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Vieth v. Jubelirer
541 U.S. ___ (2004)

[Scalia, J., announced the judgment of the Court and delivered an opinion, in which Rehnquist, C. J., and O'Connor and Thomas, JJ., joined. Kennedy, J., filed an opinion concurring in the judgment. Stevens, J., filed a dissenting opinion. Souter, J., filed a dissenting opinion, in which Ginsburg, J., joined. Breyer, J., filed a dissenting opinion.]

JUSTICE SCALIA delivered the opinion of the Court.

Plaintiffs-appellants Richard Vieth, Norma Jean Vieth, and Susan Furey challenge a map drawn by the Pennsylvania General Assembly establishing districts for the election of congressional Representatives, on the ground that the districting constitutes an unconstitutional political gerrymander. In *Davis v. Bandemer*, 478 U. S. 109 (1986), this Court held that political gerrymandering claims are justiciable, but could not agree upon a standard to adjudicate them. The present appeal presents the questions whether our decision in *Bandemer* was in error, and, if not, what the standard should be.

I. The facts, as alleged by the plaintiffs, are as follows. The population figures derived from the 2000 census showed that Pennsylvania was entitled to only 19 Representatives in Congress, a decrease in 2 from the Commonwealth's previous delegation. Pennsylvania's General Assembly took up the task of drawing a new districting map. At the time, the Republican party controlled a majority of both state Houses and held the Governor's office. Prominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere. The Republican members of Pennsylvania's House and Senate worked together on such a plan. On January 3, 2002, the General Assembly passed its plan, which was signed into law by Governor Schweiker as Act 1....

Defendants-appellees were the Commonwealth of Pennsylvania and various executive and legislative officers responsible for enacting or implementing Act 1. The complaint alleged, among other things, that the legislation created malapportioned districts, in violation of the one-person, one-vote requirement of Article I, §2, of the United States Constitution, and that it constituted a political gerrymander, in violation of Article I and the Equal Protection Clause of the Fourteenth Amendment. With regard to the latter contention, the complaint alleged that the districts created by Act 1 were "meandering and irregular," and "ignor[ed] all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage." Juris. Statement 136a, ¶22, 135a, ¶20.

II. Political gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives.... In 1812, of course, there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited with forming was thought to resemble....

It is significant that the Framers provided a remedy for such practices in the Constitution. Article 1, §4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to "make or alter" those districts if it wished....

The power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant. In the Apportionment Act of 1842, 5 Stat. 491, Congress provided that Representatives must be elected from single-member districts "composed of contiguous territory." See Griffith 12 (noting that the law was "an attempt to forbid the practice of the gerrymander"). Congress again imposed these requirements in the Apportionment Act of 1862, 12 Stat. 572, and in 1872 further required that districts "contai[n] as nearly as practicable an equal number of inhabitants," 17 Stat. 28, §2. In the Apportionment Act of 1901, Congress imposed a compactness requirement. 31 Stat. 733. The requirements of contiguity, compactness, and equality of population were repeated in the 1911 apportionment legislation, 37 Stat. 13, but were not thereafter continued. Today, only the single-member-district-requirement remains. See 2 U. S. C. §2c.... Eighteen years ago, we held that

the Equal Protection Clause grants judges the power and duty to control political gerrymandering, see *Davis v. Bandemer*, 478 U. S. 109 (1986). It is to consideration of this precedent that we now turn.

III. As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137 (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness because the question is entrusted to one of the political branches or involves no judicially enforceable rights. See, e.g., *Nixon v. United States*, 506 U. S. 224 (1993) (challenge to procedures used in Senate impeachment proceedings); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U. S. 118 (1912) (claims arising under the Guaranty Clause of Article IV, §4). Such questions are said to be "nonjusticiable," or "political questions."

In *Baker v. Carr*, 369 U. S. 186 (1962), we set forth six independent tests for the existence of a political question:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Id.

These tests are probably listed in descending order of both importance and certainty. The second is at issue here, and there is no doubt of its validity. "The judicial Power" created by Article III, §1, of the Constitution is not whatever judges choose to do, see *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982); or even whatever Congress chooses to assign them, see *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992). It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by standard, by rule. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions....

Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in *Bandemer's* four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time—but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: judicial intervention has been refused. As one commentary has put it, "[t]hroughout its subsequent history, *Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress." S. Issacharoff, P. Karlan, & R. Pildes, The Law of Democracy 886 (rev. 2d ed. 2002). The one case in which relief was provided (and merely preliminary relief, at that) did not involve the drawing of district lines; in all of the cases we are aware of involving that most common form of political gerrymandering, relief was denied....

Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

III-A. We begin our review of possible standards with that proposed by Justice White's plurality opinion in *Bandemer* because, as the narrowest ground for our decision in that case, it has been the standard employed by the lower courts. The plurality concluded that a political gerrymandering claim could succeed only where plaintiffs showed "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U. S., at 127. As to the intent element, the plurality acknowledged that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." Id., at 129. However, the effects prong was significantly harder to satisfy. Relief could not be based merely upon the fact that a group of persons banded together for political purposes had failed to achieve representation commensurate with its numbers, or that the apportionment scheme made its winning of elections more difficult. Rather, it would have to be shown that, taking into account a variety of historic factors and projected election results, the group had been "denied its chance to effectively influence the political process" as a whole, which could be achieved even without electing a candidate. Id., at 132–133. It would not be enough to establish, for example, that Democrats had been "placed in a district with a supermajority of other Democratic voters" or that the district "departs from pre-existing political boundaries." Id., at 140–141. Rather, in a challenge to an individual district the inquiry would focus "on the opportunity of members of the group to participate in party

deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." Id., at 133. A statewide challenge, by contrast, would involve an analysis of "the voters' direct or indirect influence on the elections of the state legislature as a whole." Ibid. With what has proved to be a gross understatement, the plurality acknowledged this was "of necessity a difficult inquiry." Id.

In her *Bandemer* concurrence, JUSTICE O'CONNOR predicted that the plurality's standard "will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality." Id., at 155 (opinion concurring in judgment, joined by Burger, C. J., and REHNQUIST, J.). A similar prediction of unmanageability was expressed in Justice Powell's opinion, making it the prognostication of a majority of the Court. See id. ("The . . . most basic flaw in the plurality's opinion is its failure to enunciate any standard that affords guidance to legislatures and courts"). That prognostication has been amply fulfilled....

Because this standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by the appellants, we decline to affirm it as a constitutional requirement.

III-B. Appellants take a run at enunciating their own workable standard based on Article I, §2, and the Equal Protection Clause.... Appellants' proposed standard retains the two-pronged framework of the *Bandemer* plurality—intent plus effect— but modifies the type of showing sufficient to satisfy each.

To satisfy appellants' intent standard, a plaintiff must "show that the mapmakers acted with a predominant intent to achieve partisan advantage," which can be shown "by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." As compared with the *Bandemer* plurality's test of mere intent to disadvantage the plaintiff's group, this proposal seemingly makes the standard more difficult to meet—but only at the expense of making the standard more indeterminate.

"Predominant intent" to disadvantage the plaintiff political group refers to the relative importance of that goal as compared with all the other goals that the map seeks to pursue—contiguity of districts, compactness of districts, observance of the lines of political subdivision, protection of incumbents of all parties, cohesion of natural racial and ethnic neighborhoods, compliance with requirements of the Voting Rights Act of 1965 regarding racial distribution, etc. Appellants contend that their intent test must be discernible and manageable because it has been borrowed from our racial gerrymandering cases. See *Miller v. Johnson*, 515 U. S. 900 (1995); *Shaw v. Reno*, 509 U. S. 630 (1993). To begin with, in a very important respect that is not so. In the racial gerrymandering context, the predominant intent test has been applied to the challenged district in which the plaintiffs voted. See *Miller*, supra. Here, however, appellants do not assert that an apportionment fails their intent test if any single district does so. Since "it would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines," ... appellants propose a test that is satisfied only when "partisan advantage was the predominant motivation behind the entire statewide plan," id. Vague as the "predominant motivation" test might be when used to evaluate single districts, it all but evaporates when applied statewide....

The effects prong of appellants' proposal replaces the *Bandemer* plurality's vague test of "denied its chance to effectively influence the political process," with criteria that are seemingly more specific. The requisite effect is established when "(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party's voters, and (2) the court's examination of the 'totality of circumstances' confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats...." We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy....

Assuming, however, that the effects of partisan gerrymandering can be determined, appellants' test would invalidate the districting only when it prevents a majority of the electorate from electing a majority of representatives. Before considering whether this particular standard is judicially manageable we question whether it is judicially discernible in the sense of being relevant to some constitutional violation. Deny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

Even if the standard were relevant, however, it is not judicially manageable. To begin with, how is a party's majority status to be established? Appellants propose using the results of statewide races as the benchmark of party support. But as their own complaint describes, in the 2000 Pennsylvania statewide elections some Republicans won

and some Democrats won. See Juris. Statement 137a–138a (describing how Democrat candidates received more votes for President and auditor general, and Republicans received more votes for United States Senator, attorney general, and treasurer). Moreover, to think that majority status in statewide races establishes majority status for district contests, one would have to believe that the only factor determining voting behavior at all levels is political affiliation. That is assuredly not true....

But if we could identify a majority party, we would find it impossible to assure that that party wins a majority of seats—unless we radically revise the States' traditional structure for elections. In any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party....

Our one-person, one-vote cases, see *Reynolds v. Sims*, 377 U. S. 533 (1964) have no bearing upon this question, neither in principle nor in practicality. Not in principle, because to say that each individual must have an equal say in the selection of representatives, and hence that a majority of individuals must have a majority say, is not at all to say that each discernable group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers. And not in practicality, because the easily administrable standard of population equality adopted by Reynolds enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.

III-C. For many of the same reasons, we also reject the standard suggested by Justice Powell in *Bandemer*. He agreed with the plurality that a plaintiff should show intent and effect, but believed that the ultimate inquiry ought to focus on whether district boundaries had been drawn solely for partisan ends to the exclusion of "all other neutral factors relevant to the fairness of redistricting...."

IV. We turn next to consideration of the standards proposed by today's dissenters. We preface it with the observation that the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard....

IV-A. JUSTICE STEVENS would, however, require courts to consider political gerrymandering challenges at the individual-district level. Much of his dissent is addressed to the incompatibility of severe partisan gerrymanders with democratic principles. We do not disagree with that judgment, any more than we disagree with the judgment that it would be unconstitutional for the Senate to employ, in impeachment proceedings, procedures that are incompatible with its obligation to "try" impeachments. See *Nixon v. United States*, 506 U. S. 224 (1993). The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy. On that point, JUSTICE STEVENS's dissent is less helpful, saying, essentially, that if we can do it in the racial gerrymandering context we can do it here....

JUSTICE STEVENS's confidence that what courts have done with racial gerrymandering can be done with political gerrymandering rests in part upon his belief that "the same standards should apply," post. But in fact the standards are quite different. A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not....

JUSTICE STEVENS relies on First Amendment cases to suggest that politically discriminatory gerrymanders are subject to strict scrutiny under the Equal Protection Clause. See post. It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable. To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny. Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs....

IV-B. JUSTICE SOUTER, like JUSTICE STEVENS, would restrict these plaintiffs, on the allegations before us, to district-specific political gerrymandering claims. Post (dissenting opinion). Unlike JUSTICE STEVENS, however, JUSTICE SOUTER recognizes that there is no existing workable standard for adjudicating such claims. He proposes a "fresh start," post: a newly constructed standard loosely based in form on our Title VII cases, see *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), and complete with a five-step prima facie test

sewn together from parts of, among other things, our Voting Rights Act jurisprudence, law review articles, and apportionment cases. Even if these self-styled "clues" to unconstitutionality could be manageably applied, which we doubt, there is no reason to think they would detect the constitutional crime which JUSTICE SOUTER is investigating—an "extremity of unfairness" in partisan competition. Post.

Under JUSTICE SOUTER's proposed standard, in order to challenge a particular district, a plaintiff must show (1) that he is a member of a "cohesive political group"; (2) "that the district of his residence . . . paid little or no heed" to traditional districting principles; (3) that there were "specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group"; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that "the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group." Post. When those showings have been made, the burden would shift to the defendants to justify the district "by reference to objectives other than naked partisan advantage." Post.

While this five-part test seems eminently scientific, upon analysis one finds that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards: How much disregard of traditional districting principles? How many correlations between deviations and distribution? How much remedying of packing or cracking by the hypothetical district?...

IV-C. We agree with much of JUSTICE BREYER's dissenting opinion, which convincingly demonstrates that "political considerations will likely play an important, and proper, role in the drawing of district boundaries." Post. This places JUSTICE BREYER, like the other dissenters, in the difficult position of drawing the line between good politics and bad politics. Unlike them, he would tackle this problem at the statewide level.

The criterion JUSTICE BREYER proposes is nothing more precise than "the unjustified use of political factors to entrench a minority in power." ...While he invokes in passing the Equal Protection Clause, it should be clear to any reader that what constitutes unjustified entrenchment depends on his own theory of "effective government." ...While one must agree with JUSTICE BREYER's incredibly abstract starting point that our Constitution sought to create a "basically democratic" form of government, ...that is a long and impassable distance away from the conclusion that the judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent unjustified political machinations (whatever that means).

JUSTICE BREYER provides no real guidance for the journey. Despite his promise to do so,... he never tells us what he is testing for, beyond the unhelpful "unjustified entrenchment."...

V. JUSTICE KENNEDY recognizes that we have "demonstrat[ed] the shortcomings of the other standards that have been considered to date," ...(opinion concurring in judgment). He acknowledges, moreover, that we "lack . . . comprehensive and neutral principles for drawing electoral boundaries," post; and that there is an "absence of rules to limit and confine judicial intervention," .... From these premises, one might think that JUSTICE KENNEDY would reach the conclusion that political gerrymandering claims are nonjusticiable. Instead, however, he concludes that courts should continue to adjudicate such claims because a standard may one day be discovered....

JUSTICE KENNEDY, concurring in the judgment.

A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation's political life. While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases....

JUSTICE BREYER, dissenting.

The use of purely political considerations in drawing district boundaries is not a "necessary evil" that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political "gerrymandering" will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when that is so, courts can identify an equal protection violation and provide a remedy. Because the plaintiffs could claim (but have not yet proved) that such circumstances exist here, I would reverse the District Court's dismissal of their complaint.

The plurality focuses directly on the most difficult issue before us. It says, "[n]o test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing for." Ante. That is true. Thus, I shall

describe a set of circumstances in which the use of purely political districting criteria could conflict with constitutionally mandated democratic requirements—circumstances that the courts should "test for." I shall then explain why I believe it possible to find applicable judicially manageable standards. And I shall illustrate those standards.

I. I start with a fundamental principle. "We the People," who "ordain[ed] and establish[ed]" the American Constitution, sought to create and to protect a workable form of government that is in its "'principles, structure, and whole mass,'" basically democratic. G. Wood, The Creation of the American Republic, 1776–1787, p. 595 (1969) (quoting W. Murray, Political Sketches, Inscribed to His Excellency John Adams 5 (1787)). See also, e.g., A. Meiklejohn, Free Speech and Its Relation to Self-Government 14–15 (1948). In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators representing equally populous electoral districts. *Reynolds v. Sims*, 377 U. S. 533 (1964). There must also be a method for transforming the will of the majority into effective government.

This Court has explained that political parties play a necessary role in that transformation. At a minimum, they help voters assign responsibility for current circumstances, thereby enabling those voters, through their votes for individual candidates, to express satisfaction or dissatisfaction with the political status quo. Those voters can either vote to support that status quo or vote to "throw the rascals out." See generally *McConnell v. Federal Election Comm'n*, 540 U. S. ___ (2003). A party-based political system that satisfies this minimal condition encourages democratic responsibility. It facilitates the transformation of the voters' will into a government that reflects that will.

Why do I refer to these elementary constitutional principles? Because I believe they can help courts identify at least one abuse at issue in this case. To understand how that is so, one should begin by asking why single-member electoral districts are the norm, why the Constitution does not insist that the membership of legislatures better reflect different political views held by different groups of voters. History, of course, is part of the answer, but it does not tell the entire story. The answer also lies in the fact that a single-member-district system helps to assure certain democratic objectives better than many "more representative" (i.e., proportional) electoral systems. Of course, single-member districts mean that only parties with candidates who finish "first past the post" will elect legislators. That fact means in turn that a party with a bare majority of votes or even a plurality of votes will often obtain a large legislative majority, perhaps freezing out smaller parties. But single-member districts thereby diminish the need for coalition governments. And that fact makes it easier for voters to identify which party is responsible for government decisionmaking (and which rascals to throw out), while simultaneously providing greater legislative stability. Cf. C. Mershon, The Costs of Coalition: Coalition Theories and Italian Governments, 90 Am. Pol. Sci. Rev. 534 (1996) (noting that from 1946 to 1992, under proportional systems "almost no [Italian] government stayed in office more than a few years, and many governments collapsed after only a few months"); Hermens, Representation and Proportional Representation, in Choosing an Electoral System: Issues and Alternatives 15, 24 (A. Lijphart & B. Grofman eds. 1984) (describing the "political paralysis which had become the hallmark of the Fourth Republic" under proportional representation). See also Duverger, Which is the Best Electoral System? in Choosing an Electoral System, supra, at 31, 32 (arguing that proportional systems "preven[t] the citizens from expressing a clear choice for a governmental team," and that nonproportional systems allow voters to "choose governments with the capacity to make decisions"). This is not to say that single-member districts are preferable; it is simply to say that single-member-district systems and more-directly-representational systems reflect different conclusions about the proper balance of different elements of a workable democratic government.

If single-member districts are the norm, however, then political considerations will likely play an important, and proper, role in the drawing of district boundaries. In part, that is because politicians, unlike nonpartisan observers, normally understand how "the location and shape of districts" determine "the political complexion of the area." *Gaffney v. Cummings*, 412 U. S. 735 (1973). It is precisely because politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense. See, e.g., Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 678, and nn. 94–95 (2002) (recounting the author's experience as a neutral court-appointed boundary drawer, in which the plan he helped draw moved an uninhabited swamp from one district to another, thereby inadvertently disrupting environmental projects that were important to the politician representing the swamp's former district).

More important for present purposes, the role of political considerations reflects a surprising mathematical fact. Given a fairly large state population with a fairly large congressional delegation, districts assigned so as to be perfectly random in respect to politics would translate a small shift in political sentiment, say a shift from 51% Republican to 49% Republican, into a seismic shift in the makeup of the legislative delegation, say from 100% Republican to 100% Democrat. See M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan

Gerrymanders, 17 Pol. Geography 989, 1002 (1998) (suggesting that, where the state population is large enough, even randomly selected compact districts will generally elect no politicians from the party that wins fewer votes statewide). Any such exaggeration of tiny electoral changes—virtually wiping out legislative representation of the minority party—would itself seem highly undemocratic.

Given the resulting need for single-member districts with nonrandom boundaries, it is not surprising that "traditional" districting principles have rarely, if ever, been politically neutral. Rather, because, in recent political memory, Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs and sometimes rural areas, geographically drawn boundaries have tended to "pac[k]" the former....

This is to say that traditional or historically-based boundaries are not, and should not be, "politics free." Rather, those boundaries represent a series of compromises of principle—among the virtues of, for example, close representation of voter views, ease of identifying "government" and "opposition" parties, and stability in government. They also represent an uneasy truce, sanctioned by tradition, among different parties seeking political advantage.

As I have said, reference back to these underlying considerations helps to explain why the legislature's use of political boundary drawing considerations ordinarily does not violate the Constitution's Equal Protection Clause. The reason lies not simply in the difficulty of identifying abuse or finding an appropriate judicial remedy. The reason is more fundamental: Ordinarily, there simply is no abuse. The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation.

II. At the same time, these considerations can help identify at least one circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, namely the unjustified use of political factors to entrench a minority in power. By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By unjustified entrenchment I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors. These "other" factors that could lead to "justified" (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria.

The democratic harm of unjustified entrenchment is obvious. As this Court has written in respect to popularly-based electoral districts:

> "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will." *Reynolds*.

Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and these democratic values are dishonored....

III. Courts need not intervene often to prevent the kind of abuse I have described, because those harmed constitute a political majority, and a majority normally can work its political will. Where a State has improperly gerrymandered legislative or congressional districts to the majority's disadvantage, the majority should be able to elect officials in statewide races—particularly the Governor— who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner. And where a State has improperly gerrymandered congressional districts, Congress retains the power to revise the State's districting determinations. See U. S. Const., Art. I, §4; ante (plurality opinion) (discussing the history of Congress' "power to check partisan manipulation of the election process by the States").

Moreover, voters in some States, perhaps tiring of the political boundary-drawing rivalry, have found a procedural solution, confiding the task to a commission that is limited in the extent to which it may base districts on partisan concerns. According to the National Conference of State Legislatures, 12 States currently give "first and final authority for [state] legislative redistricting to a group other than the legislature." National Conference of State Legislatures, Redistricting Commissions and Alternatives to the Legislature Conducting Redistricting (2004), available at http://www.ncsl.org/programs/legman/redistrict/com&alter.htm (all Internet materials as visited Mar. 29, 2004, and available in Clerk of Court's case file). A number of States use a commission for congressional redistricting: Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington, with Indiana using a commission if

the legislature cannot pass a plan and Iowa requiring the district-drawing body not to consider political data. Ibid.; Iowa General Assembly, Legislative Service Bureau, Legislative Guide to Redistricting (2000), available at http://www.legis.state.ia.us/Central/LSB/Guides/ redist.htm. Indeed, where state governments have been unwilling or unable to act, "an informed, civically militant electorate," *Baker v. Carr*, 369 U. S. 186, 270 (1962) (Frankfurter, J., dissenting), has occasionally taken matters into its own hands, through ballot initiatives or referendums. Arizona voters, for example, passed Proposition 106, which amended the State's Constitution and created an independent redistricting commission to draw legislative and congressional districts. Ariz. Const., Art. 4, pt. 2, §1 (West 2001). Such reforms borrow from the systems used by other countries utilizing single-member districts. See, e.g., Administration and Cost of Elections Project, Boundary Delimitation (hereinafter ACE Project), Representation in the Canadian Parliament (describing Canada's independent boundary commissions, which draft maps based on equality of population, communities of interest, and geographic factors), available at www.aceproject.org/main/ english/bd/bdy_ca.htm; ACE Project, The United Kingdom Redistribution Process (describing the United Kingdom's independent boundary commissions, which make recommendations to Parliament after consultation with the public), available at www.aceproject.org/main/english/bd/ bdy_gb.htm; G. Gudgin & P. Taylor, Seats, Votes, and the Spatial Organisation of Elections 8 (1979) (noting that the United Kingdom's boundary commissions are "explicitly neutral in a party political sense").

But we cannot always count on a severely gerrymandered legislature itself to find and implement a remedy. See *Bandemer*, 478 U. S., at 126. The party that controls the process has no incentive to change it. And the political advantages of a gerrymander may become ever greater in the future. The availability of enhanced computer technology allows the parties to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins in the maximum number of districts, with little risk of cutting their margins too thin. See generally Handley, A Guide to 2000 Redistricting Tools and Technology, in The Real Y2K Problem: Census 2000 Data and Redistricting Technology (N. Persily ed. 2000); Karlan, The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L. Rev. 731, 736 (1998); ante (SOUTER, J., dissenting). By redrawing districts every 2 years, rather than every 10 years, a party might preserve its political advantages notwithstanding population shifts in the State. The combination of increasingly precise map-drawing technology and increasingly frequent map drawing means that a party may be able to bring about a gerrymander that is not only precise, but virtually impossible to dislodge. Thus, court action may prove necessary.

When it is necessary, a court should prove capable of finding an appropriate remedy. Courts have developed districting remedies in other cases....

The bottom line is that courts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected. They should be able to separate the unjustified abuse of partisan boundary-drawing considerations to achieve that end from their more ordinary and justified use. And they should be able to design a remedy for extreme cases.

IV. I do not claim that the problem of identification and separation is easily solved, even in extreme instances. But courts can identify a number of strong indicia of abuse. The presence of actual entrenchment, while not always unjustified (being perhaps a chance occurrence), is such a sign, particularly when accompanied by the use of partisan boundary drawing criteria in the way that JUSTICE STEVENS describes, i.e., a use that both departs from traditional criteria and cannot be explained other than by efforts to achieve partisan advantage. Below, I set forth several sets of circumstances that lay out the indicia of abuse I have in mind. The scenarios fall along a continuum: The more permanently entrenched the minority's hold on power becomes, the less evidence courts will need that the minority engaged in gerrymandering to achieve the desired result.

Consider, for example, the following sets of circumstances. First, suppose that the legislature has proceeded to redraw boundaries in what seem to be ordinary ways, but the entrenchment harm has become obvious. E.g., (a) the legislature has not redrawn district boundaries more than once within the traditional 10-year period; and (b) no radical departure from traditional districting criteria is alleged; but (c) a majority party (as measured by the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections; i.e., in congressional elections if a congressional map is being challenged) has twice failed to obtain a majority of the relevant legislative seats in elections; and (d) the failure cannot be explained by the existence of multiple parties or in other neutral ways. In my view, these circumstances would be sufficient to support a claim of unconstitutional entrenchment.

Second, suppose that plaintiffs could point to more serious departures from redistricting norms. E.g., (a) the legislature has not redrawn district boundaries more than once within the traditional 10-year period; but (b) the boundary-drawing criteria depart radically from previous or traditional criteria; (c) the departure cannot be justified or explained other than by reference to an effort to obtain partisan political advantage; and (d) a majority party (as

defined above) has once failed to obtain a majority of the relevant seats in election using the challenged map (which fact cannot be explained by the existence of multiple parties or in other neutral ways). These circumstances could also add up to unconstitutional gerrymandering....

V. The plurality sets forth several criticisms of my approach. Some of those criticisms are overstated. Compare ante ("[O]f course there always is a neutral explanation [of gerrymandering]—if only the time-honored criterion of incumbent protection"), with Brief for Appellants 13 (pointing to examples of efforts to gerrymander an incumbent of the opposition party out of office and elect a new member of the controlling party); compare ante (complaining of "the difficulties of assessing partisan strength statewide"), with supra, at 12 (identifying the "majority party" simply by adding up "the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections").

Other criticisms involve differing judgments. Compare ante (complaining about the vagueness of unjustified political machination "whatever that means," and of unjustified entrenchment), with supra (detailed discussion of "justified" and *Reynolds v. Sims*); compare ante (finding costs of judicial intervention too high), with supra (finding costs warranted to assure majority rule).

But the plurality makes one criticism that warrants a more elaborate response. It observes "that the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard." Ante.

Does it? The dissenting opinions recommend sets of standards that differ in certain respects. Members of a majority might well seek to reconcile such differences. But dissenters might instead believe that the more thorough, specific reasoning that accompanies separate statements will stimulate further discussion. And that discussion could lead to change in the law, where, as here, one member of the majority, disagreeing with the plurality as to justiciability, remains in search of appropriate standards. See ante (KENNEDY, J., concurring in judgment).

VI. In the case before us, there is a strong likelihood that the plaintiffs' complaint could be amended readily to assert circumstances consistent with those I have set forth as appropriate for judicial intervention. For that reason, I would authorize the plaintiffs to proceed; and I dissent from the majority's contrary determination.

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The fact that this area of the law remains confused was shown when the Court (after *Vieth*) affirmed a finding by the Northern District of Georgia that a challenged re-districting violated the the one-person, one-vote principle of the Equal Protection Clause. The heart of the challenge involved accusations by Republicans of political gerrymandering by Democrats. See, *Cox v. Larios*, 542 U.S. __ (2004).