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## Misshapen Districts, Mistaken Jurisprudence: The Supreme Court's Decisions on Partisan Gerrymandering

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**MISSHAPEN DISTRICTS, MISTAKEN JURISPRUDENCE: THE  
SUPREME COURT'S DECISIONS ON PARTISAN  
GERRYMANDERING**

*The evils we experience flow from the excess of democracy. The people do not want virtue, but are dupes of pretended patriots. – Elbridge Gerry*<sup>1</sup>

I. INTRODUCTION

The 2006 elections produced great change in America's political landscape. For only the second time in the last half century, control of the House of Representatives switched parties between the Republican Party and the Democratic Party.<sup>2</sup> Despite broad discontent with President George W. Bush, the Iraq war and a scandal-plagued Republican party, the election was not as competitive as it first appears. Out of 435 seats up for election, 317 races had margins of victory greater than 20%.<sup>3</sup> Sixty races were decided by fewer than 10% of the vote, and in only thirty-four districts did the runner-up finish within 5% of the vote of the winner.<sup>4</sup> Fourteen states had no competitive Congressional races and thirty-five seats went completely uncontested.<sup>5</sup> In California, only two of fifty-three seats were decided by fewer than twenty points.<sup>6</sup> This lack of competitiveness is not a natural phenomenon. At the end of the Nineteenth Century, fully half of

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1. JAMES MACGREGOR BURNS & JACK WALTER PELTASON, GOVERNMENT BY THE PEOPLE, THE DYNAMICS OF AMERICAN NATIONAL, STATE, AND LOCAL GOVERNMENT 49 (Prentice-Hall, 6th ed. 1963).

2. Office of the Clerk, Party Divisions of the House of Representatives (1789 to Present), available at [http://clerk.house.gov/art\\_history/house\\_history/partyDiv.html](http://clerk.house.gov/art_history/house_history/partyDiv.html) (last visited Mar. 23, 2007).

3. Editorial, *Redistricting Reconsidered: Does Election 2006 Show That Fears About Partisan Gerrymandering Were Overblown?* WASH. POST, Nov. 15, 2006, at A20.

4. *Id.*

5. CNN.com, *America Votes 2006*, available at <http://www.cnn.com/ELECTION/2006/pages/results/house/full.list> (last visited Mar. 18, 2007).

6. *Id.*

Congressional elections were decided by fewer than ten points.<sup>7</sup> These one-sided elections are the direct result of gerrymandering.<sup>8</sup>

Gerrymandering is neither new nor single-minded in its purpose. The word itself derives from a portmanteau of the name of Massachusetts Governor Elbridge Gerry and the word salamander.<sup>9</sup> As Governor in 1812, Gerry signed a bill that created a salamander-shaped district designed to disadvantage his political opponents.<sup>10</sup> Gerrymandering is not only deep-rooted in American electoral politics; it is also quite versatile. In California, lawmakers successfully drew districts to maintain the status quo and to protect incumbents.<sup>11</sup> In Pennsylvania, Republican legislators “kidnapped” Democratic Representative Frank Mascara by placing his home in the same district as another Democrat, John Murtha.<sup>12</sup> The district lines came down the middle of his street up to his house and stopped; he lived in the eighteenth district but parked his car in the twelfth.<sup>13</sup> Gerrymandering has been used to assure proportional representation between Democrats and Republicans,<sup>14</sup> to disadvantage racial minorities,<sup>15</sup> and to provide a district that represents specific interests.<sup>16</sup>

Two developments have made gerrymandering more prevalent over the last few decades. First, the Supreme Court’s decisions leading to “one-man, one-vote” principle<sup>17</sup> have increased the frequency of both redistricting and gerrymandering. Prior to these decisions, most states only redistricted when the state gained or lost a seat in the House of Representatives due to population shifts.<sup>18</sup> Pursuant to these decisions, every state is required to redraw its

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7. Joanne Dann, *Redistricting Works Against Moderates By Creating ‘Safe’ House Districts, Lawmakers Encourage Hardliner Candidates*, ORLANDO SENTINEL, Dec. 16, 2001, at G1.

8. In Iowa, where a nonpartisan commission draws the district map, four out of five races were within fifteen points. In California, where the state legislature draws the districts, forty-eight of fifty-three elections were decided by 20% or more. CNN.com, *supra* note 5.

9. The Maven’s Word of the Day, Feb. 2, 1999, <http://www.randomhouse.com/wotd/index.pperl?date=19990202> (last visited Mar. 18, 2007).

10. *Id.*

11. Adam Clymer, *The Nation: Democracy in Middle America; Why Iowa Has So Many Hot Seats*, N.Y. TIMES, Oct. 27, 2002, at § 4.

12. Jeffrey Toobin, *The Great Election Grab: When Does Gerrymandering Become a Threat to Democracy?*, NEW YORKER, Dec. 8, 2003, at 63.

13. *Id.*

14. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

15. *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993).

16. In California, a district was created along the Pacific coast to represent the views of coastal residents. This district spans over 500 miles of coast and is in some places less than 500 yards wide. Rachel Morris, *The Race to Gerrymander: Democrats Have a Parallel Campaign to Win the House; It Starts in the States*, WASH. MONTHLY, Nov. 2006, at 15.

17. Dann, *supra* note 7.

18. *Id.*

district lines every ten years according to the census.<sup>19</sup> Frequent redistricting leads to more and more partisan battles over lines on a map.<sup>20</sup> The other development is the growth of computer technology. While Governor Gerry may have known the general area where his supporters and opponents lived, computers have greatly increased the precision of the gerrymander.<sup>21</sup> Maps are so precise that individual blocks within neighborhoods are segmented to the mapmaker's desire.<sup>22</sup> The increased use of demographic research also allows a degree of precision never before imagined. These advances have led to some of the most oddly shaped districts one could imagine.<sup>23</sup>

The ability to cause drastic change simply by redistricting has led several states to adopt objective standards for redistricting or to employ nonpartisan committees to draw the maps. Iowa is generally considered the preeminent model for nonpartisan districting. Iowa's districting is handled by the Legislative Service Bureau, which is prohibited from viewing partisan data when creating the map.<sup>24</sup> Additionally, counties may not be split, and contiguity must be maintained.<sup>25</sup> Seven states have instituted reforms in the districting process.<sup>26</sup> Sixteen additional states have sponsored bills or constitutional amendments to take the redistricting process out of the hands of the state legislature.<sup>27</sup>

Gerrymandering, in its various forms, has been around for nearly two centuries, but its modern use has become more effective and divisive. In the

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19. *Id.*

20. *Id.*

21. *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring); *id.* at 345 (Souter, J., dissenting); *id.* at 364 (Breyer, J., dissenting); Toobin, *supra* note 12; Clymer, *supra* note 11; Dann, *supra* note 7.

22. *Vieth*, 541 U.S. at 364 (Breyer, J., dissenting); Toobin, *supra* note 12.

23. For pictures of gerrymandered maps, see generally CNN.com, America Votes 2006 House Map, <http://www.cnn.com/ELECTION/2006/pages/results/house/map.html> (map of entire country); *see, e.g.*, Tennessee Congressional Districts, [http://rangevoting.org/TN\\_CDloc.pdf](http://rangevoting.org/TN_CDloc.pdf) (map of Tennessee—note Districts 3 and 7); Congressional Districts Compared, <http://rangevoting.org/TexasRedist.jpg> (map of Texas before and after the 2003 redistricting); The Pennsylvania Marketing and Planning Center, PA—Before and After the 2001 Reapportionment, <http://www.mapcenter.org/region/gerrymaps.html> (map of Pennsylvania before and after the 2001 redistricting); Gerry's Gallery, [http://www.westmiller.com/fairvote2k/in\\_gerry.htm](http://www.westmiller.com/fairvote2k/in_gerry.htm) (collection of bizarrely-shaped districts) (all websites last visited Mar. 18, 2007).

24. Dann, *supra* note 7.

25. *Id.*

26. HAW. REV. STAT. § 25-2 (1993); IDAHO CODE ANN. § 72-1506 (2006); IOWA CODE § 42.4(5) (2003); ME. REV. STAT. ANN. tit. 21-A, §§ 1206, 1206-A (2003); MONT. CODE ANN. § 5-1-115 (2003); N.J. CONST. art. II, § 2; WASH. REV. CODE § 44.05.090 (1994).

27. California, Florida, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Virginia. Redistricting Reform Watch, <http://www.fairvote.org/index.php?page=1389> (last visited Mar. 18, 2007).

past, redistricting occurred, at most, once a decade. While the partisan battles were fierce, they were limited. In 2003, the Texas legislature attempted to redistrict for the second time in the decade.<sup>28</sup> If the political gambit worked, the Texas legislature would have forever changed the future of gerrymandering.

This comment will first present the facts and procedural history of *League of United Latin American Citizens v. Perry*. Then it will trace the history of partisan gerrymandering<sup>29</sup> via the Supreme Court's chief opinions in *Davis v. Bandemer* ("Bandemer"), *Vieth v. Jubelirer* ("Vieth"), and *League of United Latin American Citizens v. Perry* ("League"). Each opinion will be critiqued regarding the guidance it gives the lower courts and the limitations it would place on the state legislatures. This comment will also discuss and explain the rationale for declaring partisan gerrymandering justiciable. Finally, this comment will set forth a standard for when mid-decade redistricting and partisan gerrymanders are unconstitutional.

## II. FACTS OF *LEAGUE*

In the summer of 2006, the Supreme Court issued its controversial decision in *League of United Latin American Citizens v. Perry*<sup>30</sup> approving the blatant partisan gerrymandering that occurred in Texas during 2003. The case's background is convoluted yet intriguing. In 1990, the decennial census resulted in Texas receiving thirty seats in the House of Representatives—an increase of three seats from the previous decade.<sup>31</sup> Accordingly, the Democratically-controlled Texas Legislature redrew the Congressional district map.<sup>32</sup> Using the current but diminishing Democratic majority and newly emerging computer software, the Democrats designed what has been called the "shrewdest gerrymander of the 1990's."<sup>33</sup> The results of this map were remarkable. In 2000, using the still applicable 1990 map, Texas Democrats lost the governorship and control of the State Senate and only carried 41% of the vote for statewide offices, yet still won seventeen of the thirty Congressional seats.<sup>34</sup>

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28. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2606 (2006).

29. "Partisan gerrymandering" and "political gerrymandering" are both used to describe the same phenomenon. Unless taken from a direct quote, this comment will use "partisan gerrymandering."

30. *League of United Latin American Citizens*, 126 S. Ct. 2594.

31. *Id.* at 2605.

32. *Id.*

33. *Id.* (quoting M. BARONE & R. COHEN, *ALMANAC OF AMERICAN POLITICS* 2004 1510 (2003)).

34. *Id.* at 2605-06.

The 2000 census led to an increase of two more Congressional seats for Texas, bringing the state's total number of seats to thirty-two.<sup>35</sup> Once again, the legislature was charged with redrawing the state's district map.<sup>36</sup> Due to the fact that the Republicans controlled the State Senate and the Democrats controlled the State House of Representatives, the legislature was unable to come to a consensus on changes to district boundaries.<sup>37</sup>

The "unwelcome obligation" of redrawing the map was left to a three-judge panel of federal judges in the Eastern District of Texas.<sup>38</sup> In *Balderas v. Texas*, the district court enacted what is known as Plan 1151C.<sup>39</sup> The court applied "only 'neutral' redistricting standards" when it drew the new map.<sup>40</sup> These standards included placing new districts in high-growth areas, applying county and voting precinct lines, and avoiding pairing incumbents in the same district.<sup>41</sup> Then, the *Balderas* court conformed the map to the one person-one vote principle.<sup>42</sup>

In the 2002 Congressional election, Republicans did not win as many seats as they had expected.<sup>43</sup> Despite winning 59% of the vote in statewide elections, Texas Republicans were elected to only a minority of Texas's seats in the U.S. House.<sup>44</sup> The Republicans, however, did gain a majority in the Texas House of Representatives, which gave them control of both houses of the state legislature and the governorship.<sup>45</sup>

The Republicans then began their quest to gain seats in Congress through a mid-decade redistricting.<sup>46</sup> "There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."<sup>47</sup> To prevent redistricting, Democratic members of the Texas House of Representatives absented themselves in order to frustrate quorum

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35. *Id.* at 2628 (Stevens, J., concurring in part and dissenting in part).

36. *League of United Latin American Citizens*, 126 S. Ct. at 2628 (Stevens, J., concurring in part and dissenting in part).

37. *Id.*

38. *Id.* (quoting *Balderas v. Texas*, No. 6:01CV158, 2001 WL 35673966 (E.D. Tex. Nov. 14, 2001) (per curium)).

39. *Id.* at 2606 (plurality opinion).

40. *Id.*

41. *Id.*

42. *League of United Latin American Citizens*, 126 S. Ct. at 2606.

43. *Id.*

44. *Id.* Texas Republicans received fifteen of thirty-two Congressional seats. The majority opinion *League* does not take into account incumbency as a reason that the court-enforced plan may not have immediately resulted in a Republican majority.

45. *Id.*

46. *Id.*; *id.* at 2629 (Stevens, J., concurring in part and dissenting in part).

47. *Id.* at 2606 (plurality opinion) (quoting *Session v. Perry*, 298 F. Supp. 2d 451, 470 (E.D. Tex. 2004)); *id.* at 2629 (Stevens, J., concurring in part and dissenting in part).

requirements.<sup>48</sup> After the legislature failed to redistrict during the regular session, Republican Governor Rick Perry called a special session to redraw the district maps—an act he refused to do in 2001.<sup>49</sup> The House soon approved a new map, but the Democratic Senators took advantage of a long-standing tradition that allowed a filibuster unless overruled by two-thirds of the Senators.<sup>50</sup>

During a second special session, Lieutenant Governor David Dewhurst suspended operation of the Senate filibuster.<sup>51</sup> Every Democratic Senator then left the state to prevent a quorum in the second special session.<sup>52</sup> After the return of a lone Democratic State Senator, Governor Perry called a third special session to approve a new map.<sup>53</sup> During this session, the Texas legislature approved Plan 1374C, which was the subject of *League*.<sup>54</sup>

Plan 1374C dramatically changed the landscape of the Texas districting map. Over one third of the state's population was shifted to different districts than under Plan 1151C.<sup>55</sup> Additionally, the newly drawn districts were on the whole less compact<sup>56</sup> than under the previous plan.<sup>57</sup>

#### A. Procedural History

Soon after Plan 1374C was enacted by the state, several lawsuits were filed claiming that the redistricting was unconstitutional.<sup>58</sup> A coalition comprised of voters, interest groups, members of Congress, and a city claimed that Plan 1374C violated the Census, Elections, and Equal Protections Clauses of the U.S. Constitution and the Voting Rights Act.<sup>59</sup> The District Court for the

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48. *League of United Latin American Citizens*, 126 S. Ct. at 2630 (Stevens, J., concurring in part and dissenting in part).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *League of United Latin American Citizens*, 126 S. Ct. at 2630 (Stevens, J., concurring in part and dissenting in part).

55. Eight million residents of Texas were redrawn into different districts. *Id.* The population of Texas as of 2000 was 20,851,820. U.S. Census Bureau, State & County Quick Facts: Texas, available at <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Mar. 23, 2007).

56. Compactness is often used as an objective standard to prove gerrymandering. “Compactness” can be determined by several methods, including the ratio of the area of a district to the area of the smallest circle that would fit around the entire district or the ratio of the area to the perimeter. *Vieth v. Jubelirer*, 541 U.S. 267, 348 n.3 (2004) (Breyer, J., dissenting).

57. *League of United Latin American Citizens*, 126 S. Ct. at 2630-31 (Stevens, J., concurring in part and dissenting in part).

58. *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (per curiam).

59. *Id.* at 457.

Eastern District of Texas entered judgment against the plaintiffs.<sup>60</sup> The plaintiffs appealed to the Supreme Court, which remanded all the cases back to the district court to decide the issue in light of *Vieth v. Jubelirer*.<sup>61</sup> On remand, the district court again rejected the plaintiffs' claims.<sup>62</sup>

### III. DISCUSSION

The Supreme Court's decision in *League* is nothing short of convoluted. In total, the case contains six different opinions and over seventy-five pages.<sup>63</sup> Every Justice dissented or separately concurred in part to at least one portion of the plurality opinion, and only two Parts of Justice Kennedy's opinion received enough support to garner a majority.<sup>64</sup> The opinion decided three different issues: (1) whether the statewide districting plan was unconstitutional; (2) whether the district map was unconstitutional as to Districts 23 and 25 under Section 2 of the Voting Rights Act; and (3) whether the district map was unconstitutional as to District 24 under Sections 2 and 5 of the Voting Rights Act.<sup>65</sup> Due to the multitude of highly specific issues in the case, this comment will focus only on the claim that partisan gerrymandering is unconstitutional. The comment will not, therefore, address any of the specific claims made by the plaintiffs as to Districts 23, 24, or 25.

#### A. *Davis v. Bandemer*

Prior to *League*, the Supreme Court first discussed statewide partisan gerrymandering in *Davis v. Bandemer*.<sup>66</sup> In *Bandemer*, the Republican-controlled Indiana legislature reapportioned its districts for both houses of the state legislature.<sup>67</sup> In the 1982 election, Democratic candidates received a majority of the total votes in the state House but failed to elect a majority of

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60. *Id.*; *League of United Latin American Citizens*, 126 S. Ct. at 2607.

61. *League of United Latin American Citizens*, 126 S. Ct. at 2607. The following cases were joined and decided together on remand in *Henderson* and in the Supreme Court in *League*: *Lee v. Perry*, 126 S.Ct. 2978 (2006); *GI Forum of Texas v. Perry*, 126 S.Ct. 829 (2005); *Jackson v. Perry*, 126 S.Ct. 827 (2005); *Travis County, Tex. v. Perry* 126 S.Ct. 827 (2005); *League of United Latin American Citizens v. Perry*, 126 S.Ct. 827 (2005). In addition, the cases of *Henderson v. Perry*, 126 S.Ct. 2976 (2006), and *Soechting v. Perry*, 126 S.Ct. 2978 (2006), were decided on the same day as *League of United Latin American Citizens* and under the same rationale.

62. *League of United Latin American Citizens*, 126 S. Ct. at 2607.

63. *See generally id.*

64. Parts II-A and III were the Opinion of the Court. *Id.* at 2594, 2604.

65. The plurality held that District 23 was illegal as it violated § 2 of the Voting Rights Act (Kennedy, Souter, Ginsburg, Breyer, and Stevens concurred at least in the judgment, with Roberts, Alito, Scalia and Thomas dissenting). The plurality held that District 24 was not unconstitutional (Kennedy, Roberts, Alito, Scalia and Thomas concurred in the judgment, with Stevens, Breyer, Souter, and Ginsburg filing three different dissents). *Id.* at 2626.

66. *Davis v. Bandemer*, 478 U.S. 109 (1986).

67. *Id.* at 113.



seats.<sup>68</sup> Prior to the election, several Indiana Democrats filed suit, claiming that the reapportionment constituted a partisan gerrymander which violated the Equal Protection Clause of the Fourteenth Amendment.<sup>69</sup> Based on the legislature's discriminatory intent and the discriminatory effect, as evidenced by the 1982 elections, the district court invalidated the plan.<sup>70</sup>

The Supreme Court decided two major issues in *Bandemer*. The first issue was whether partisan gerrymandering was a justiciable question.<sup>71</sup> The defendants in the case argued that the case was non-justiciable because it was a political question.<sup>72</sup> Following *Baker v. Carr*, the Court stated:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to coordinate political department; or [2] a lack of justiciably 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 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. . . . Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.<sup>73</sup>

The Court dismissed most of the political question factors as inapplicable to the facts.<sup>74</sup> The majority held that since none of the *Carr* factors were present, partisan gerrymandering was justiciable.<sup>75</sup>

Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, concurred only in the judgment because there were no judicially manageable standards.<sup>76</sup> O'Connor dismissed the plurality's standard as not judicially manageable because it would require a court to make an analysis of the proper proportionality of a reapportionment.<sup>77</sup> Since no judicially manageable standard existed, partisan gerrymandering was a political question and was thus non-justiciable.<sup>78</sup>

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68. *Id.* at 115.

69. *Id.*

70. *Id.* at 115-16.

71. *Id.* at 118.

72. *Bandemer*, 478 U.S. at 118.

73. *Id.* at 121-22 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

74. *Id.* at 122-23.

75. *Id.*

76. *Id.* at 147 (O'Connor, J., concurring).

77. *Id.* at 155-61.

78. *Bandemer*, 478 U.S. at 160.

The second question in *Bandemer* was what standard should be used to determine whether a partisan gerrymander has impermissibly violated the Equal Protection Clause. The majority on the issue of justiciability could not reach a consensus on an appropriate standard. According to the plurality,<sup>79</sup> the plaintiffs must prove there was “intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>80</sup> If the plaintiffs meet this threshold question, the court should examine the legislation for valid underpinnings.<sup>81</sup> The *Bandemer* plaintiffs did not pass the threshold question of effect, so the Court did not address any of the other issues.<sup>82</sup>

In his dissent, Justice Powell, joined by Justice Stevens, argued for a broader standard based on several “neutral” criteria.<sup>83</sup> The most important criteria were the district’s shape and the district’s adherence to established subdivisions, such as counties, cities, or school districts.<sup>84</sup> Other factors include the legislative process, legislative goals, population disparities, and vote dilution.<sup>85</sup> No one factor could be dispositive, but the cumulative effect would be to determine the “fairness of a redistricting plan.”<sup>86</sup> Based on the application of the facts to these factors, Justice Powell determined that the redistricting plan in Indiana violated the Equal Protection Clause of the Fourteenth Amendment.<sup>87</sup>

A majority in *Bandemer* recognized that the Constitution offers protection against partisan gerrymanders; however, a majority failed to craft a workable standard to determine when such an impermissible gerrymander occurs. The standard proposed by the plurality eventually proved too strict to provide any actual relief for citizens whose votes were nullified by partisan gerrymanders and relief was denied in every claim of partisan gerrymander that followed *Bandemer*.<sup>88</sup> While the Supreme Court concluded that the Constitution precludes partisan gerrymanders, there proved to be no actual check on the redistricting process. *Bandemer* failed because the Court punted its opportunity to control an unconstitutional legislative practice by advocating a standard that provides no actual relief.

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79. Justices White, Brennan, Marshall, and Blackmun. *Id.* at 113.

80. *Id.* at 127.

81. *Id.* at 141.

82. *Id.* at 141-42.

83. *Id.* at 162 (Powell, J., dissenting).

84. *Bandemer*, 478 U.S. at 173.

85. *Id.*

86. *Id.*

87. *Id.* at 184-85.

88. *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (plurality opinion).

## B. Vieth v. Jubelirer

Unsurprisingly, the Court's opinions in *Bandemer* did not end the question of the constitutionality of partisan gerrymandering. The Supreme Court next visited the issue of partisan gerrymandering in *Vieth v. Jubelirer*.<sup>89</sup> In *Vieth*, the plurality opinion,<sup>90</sup> written by Justice Scalia and joined by Chief Justice Rehnquist and Justices Thomas and O'Connor, sought to overturn *Bandemer*.<sup>91</sup> Since judicial relief was denied in every case between *Bandemer* and *Vieth*, the *Bandemer* plurality standard had proven unmanageable because it provided virtually no guidance for the lower courts.<sup>92</sup> The number and variety of proposed standards were evidence that no standard is judicially manageable.<sup>93</sup>

The plurality argued partisan gerrymanders are non-justiciable because no judicially manageable standard exists to decide the constitutionality of such causes of action.<sup>94</sup> In order to prove this argument, the plurality dismissed each proposed standard.<sup>95</sup> This comment will, therefore, describe each proposed standard, followed by the plurality's rationale for dismissing each standard.

### 1. Powell's *Bandemer* standard

The plurality rejected Justice Powell's standard from his dissent in *Bandemer*.<sup>96</sup> The plurality described Powell's standard as "a totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander . . . is not 'fair.'"<sup>97</sup> The plurality dismissed Powell's "fairness" standard without justification, stating only that "[s]ome criterion more solid . . . seems to us necessary to enable the state legislatures to discern the limits of

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89. *See generally id.*

90. The four-justice plurality held that partisan gerrymanders are non-justiciable, but the other five justices, for differing reasons, held the case to be justiciable. *See id.* Justice Kennedy concurred in the judgment of the plurality. *Id.* at 267, 269.

91. *Id.* at 281.

92. *Id.* at 279-280, 282-83.

93. *Vieth*, 541 U.S. at 292. "We preface [our consideration of the dissenter's standards] 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." *Id.*; *but see id.* at 368 (Breyer, J., dissenting) ("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.").

94. *Id.* at 281 (plurality opinion).

95. *Id.* at 281-305.

96. *Id.* at 290-91.

97. *Id.* at 291.

their districting discretion.”<sup>98</sup> The plurality’s rationale for dismissing Powell’s *Bandemer* standard is unconvincing. “Fairness” has been used by the Court in other areas of the law such as personal jurisdiction and due process.<sup>99</sup> The broad standard proposed by Powell would likely lead to effective limitations of partisan gerrymandering. “Fairness” as a standard, however, could make consistency in the district courts difficult.

## 2. Plaintiffs’ *Vieth* standard

The plurality also considered and rejected a standard proposed by the plaintiffs.<sup>100</sup> The plaintiffs’ standard maintained but modified the two prong intent/effects test from *Bandemer*.<sup>101</sup> The plaintiffs’ standard required the *predominant* intent of the legislature be to political gerrymander.<sup>102</sup> The plurality dismissed this standard because it was unable to determine the predominant intent of a legislative body.<sup>103</sup>

Under the plaintiffs’ test, “[t]he 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.”<sup>104</sup> The plurality denied this part of the standard because the Constitution “guarantees equal protection of the law [only] to persons, [and] not equal representation in government to equivalently sized groups.”<sup>105</sup> Furthermore, even neutral districting schemes could result in packing and cracking and a majority of statewide votes not translating into a majority of seats.<sup>106</sup>

The plaintiffs’ standard fails in both guidance and limitations. The *Bandemer* plurality standard demonstrated that the intent/effects test is too narrow. The modifications would not accomplish the necessary broadening of

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98. *Id.*

99. While Justice Scalia believed that “fairness” was too indeterminate to be used as a standard, previous opinions by the Supreme Court have used just such a standard. *See id.* The Court used a standard of fairness in personal jurisdiction and Due Process claims. *See, e.g.,* *Rush v. Savchuk*, 444 U.S. 320, 328 (1980) (personal jurisdiction); *Clark v. Arizona*, 126 S. Ct. 2709, 2732 (2006) (due process). Justice Scalia provided no rationale for why “fairness” was an appropriate standard in those cases but failed in partisan gerrymandering cases. *See generally* *Rush*, 444 U.S. at 328; *Clark*, 126 S. Ct. at 2732.

100. *Vieth*, 541 U.S. at 284-90.

101. *Id.* at 284.

102. *Id.*

103. *Id.* at 284-85.

104. *Id.* at 286-87 (internal quotes omitted) (emphasis in original).

105. *Id.* at 288.

106. *Vieth*, 541 U.S. at 289. The Court failed to address that where unintentional packing and cracking occurs, there would be no problem because the map would pass the intent prong of the analysis.

the test to make it effective in limiting the legislatures. Additionally, little guidance is provided to the lower courts on how to administer this test.

### 3. Justice Kennedy's concurrence

Justice Kennedy concurred with the judgment of the plurality but refrained from finding that partisan gerrymandering is non-justiciable.<sup>107</sup> His basic argument was that even though he could not currently determine a judicially manageable standard, he would not now foreclose all future claims because of the alleged infringement to constitutional rights.<sup>108</sup> He reasoned that since the judiciary is willing to enter the districting fray for other scenarios, such as one person-one vote and racial gerrymandering, partisan gerrymandering is justiciable.<sup>109</sup> Finally, he believed that eighteen years of one unworkable standard did not prove that there was no workable standard available.<sup>110</sup>

The plurality rejected Kennedy's concurrence as illogical and illegal.<sup>111</sup> The concurrence is illogical because it followed all the rationale for non-justiciability but failed to follow it through to that logical conclusion.<sup>112</sup> The plurality opinion suggested that lower courts treat Kennedy's concurrence as a "reluctant fifth vote against justiciability."<sup>113</sup>

Justice Kennedy recognized that partisan gerrymandering is a constitutional problem, but his lack of standard provides no guidance whatsoever to the lower courts. Furthermore, his opinion does nothing to curb partisan gerrymandering now or in the future.

### 4. Justice Stevens' dissent

Justice Stevens put forth a standard for determining unconstitutional partisan gerrymanders. Stevens' standard was based on the idea that when the state legislature's sole motivation is partisanship, without any pretense of neutrality, the legislature violates its requirement to govern impartially.<sup>114</sup>

Justice Stevens followed the standards set forth by the Court in various racial gerrymandering cases.<sup>115</sup> Therefore, based on the standing requirements

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107. *Id.* at 309 (Kennedy, J., concurring in the judgment).

108. *Id.* at 309-10.

109. *Id.* at 310-11.

110. *Id.* at 311-12.

111. *Id.* at 301 (plurality opinion). The plurality believed Kennedy's opinion was illegal because it neither affirmed the district court, finding the claims justiciable but failing to meet a standard for unconstitutionality, nor did it reverse, finding the claims non-justiciable. *Id.*

112. *Vieth*, 541 U.S. at 301.

113. *Id.* at 305.

114. *Id.* at 317-18 (Stevens, J., dissenting).

115. *Id.* at 327 ("in my view, racial and political gerrymanders are species of the same constitutional concern"); *see generally* *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737, 745 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

in the racial gerrymandering cases, he believed that there was no standing for a statewide claim of partisan gerrymandering.<sup>116</sup> A plaintiff, therefore, must reside in a challenged district and allege a specific type of “representational harm”<sup>117</sup>—namely that the winner of the gerrymandered district does not represent the whole district but only those responsible for its gerrymandered win.<sup>118</sup>

[The] danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all. The problem, simply put, is that the will of the cartographers rather than the will of the people will govern.<sup>119</sup>

Assuming the plaintiff has standing to challenge the district, the plaintiff must allege and prove that the district is an unusual shape,<sup>120</sup> irregular,<sup>121</sup> peculiar,<sup>122</sup> or bizarre,<sup>123</sup> such as “an uncouth twenty-eight-sided figure.”<sup>124</sup> The irregular district alone is not a constitutional violation; the plaintiff must also show that politics and partisanship were the *predominant* factors in the legislature’s decision.<sup>125</sup> Other neutral districting principles, such as compactness, contiguity, and respect for political subdivisions are objective factors that may defeat a claim of partisan gerrymandering.<sup>126</sup> Foremost in Stevens’ opinion was the intent of the legislature—whether it “allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles. . . . [I]f no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district’s bizarre shape is

116. *Vieth*, 541 U.S. at 327 (Stevens, J., dissenting). Citizens challenging districting schemes must reside in the districts that they challenge. *Id.* Stevens based this view on *stare decisis* from *Shaw v. Reno* but would not suggest that a plaintiff would never have standing. *Id.* at 327, n.16.

117. *Id.* at 330 (citing *Hays*, 515 U.S. at 745).

118. *Id.* at 329. “When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as whole. This is altogether antithetical to our system of representative democracy.” *Reno*, 509 U.S. at 648. “Gerrymanders subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles.” *Vieth*, 541 U.S. at 330 (Stevens, J., dissenting).

119. *Vieth*, 541 U.S. at 331.

120. *Id.* at 321 n.21.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Vieth*, 541 U.S. at 321 (Stevens, J., dissenting) (citing *Gomillon v. Lightfoot*, 364 US 339, 340 (1960)).

125. *Id.* at 335 (citing *Miller v. Johnson*, 515 U.S. 900, 913 (1995)).

126. *Id.* (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

a *naked desire* to increase partisan strength, then no rational basis exists to save the district.”<sup>127</sup>

The plurality dismissed Justice Steven’s view that partisan gerrymandering cases should follow racial gerrymandering cases because racial gerrymandering is too distinct from partisan gerrymandering.<sup>128</sup> The plurality’s rationale was that districting based on political entities is contemplated and approved by the Constitution,<sup>129</sup> whereas districting by race is unlawful.<sup>130</sup> Moreover, political affiliation “is rarely as readily discernible—and *never* as permanently discernible—as a person’s race. Political affiliation is not an immutable characteristic, but may shift from one election to the next.”<sup>131</sup> In sum, the plurality rejected Stevens’ standard not because it is unmanageable, but because the accepted rationale for racial gerrymandering does not apply to partisan gerrymandering.<sup>132</sup>

Justice Stevens’ standard would definitely provide manageable standards for the lower courts because the courts already apply these standards to cases of racial gerrymandering. However, the standard would likely fail in its purpose of restricting partisan gerrymandering. Partisan gerrymandering does not occur district-by-district. The legislatures manipulate the entire map, not just individual districts. Furthermore, his requirement that districts forsake all neutral principles is unreasonable because districts could be gerrymandered, while maintaining a single neutral districting principle, such as incumbent protection,<sup>133</sup> geographical features,<sup>134</sup> or one person-one vote.

##### 5. Justice Souter’s<sup>135</sup> dissent

Justice Souter’s dissent laid out a distinct and sophisticated test based on the burden shifting standard first established in *McDonnell Douglas Corp. v. Green*.<sup>136</sup> Plaintiffs must prove a prima case with five elements.<sup>137</sup> First, plaintiffs must show that they identify with a cohesive political group.<sup>138</sup> Second, plaintiffs must show that their district “paid little or no heed to those traditional districting principles whose disregard can be shown

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127. *Id.* at 339 (emphasis added).

128. *Id.* at 285-86 (plurality opinion).

129. *Id.* at 285; *see also* U.S. CONST. art. I, § 4.

130. *Vieth*, 541 U.S. at 286.

131. *Id.* at 287 (emphasis in original).

132. *Id.* at 295. “This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms.” *Id.*

133. *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

134. *Morris*, *supra* note 16.

135. Opinion joined by Justice Ginsburg. *Vieth*, 541 U.S. at 342 (Souter, J., dissenting).

136. *Id.* at 346; *see generally* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

137. *Vieth*, 541 U.S. at 347 (Souter, J., dissenting). For simplicity’s sake, Justice Souter would only apply this test to single member districts. *Id.* at 346-47.

138. *Id.* at 347.

straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains.”<sup>139</sup> Third, plaintiffs need to show how the unusual shape of the district helped or hurt one party over the other.<sup>140</sup> Plaintiffs must show *why* specific lines were drawn, based on the lines and the demographics of the area.<sup>141</sup> The overall plan should compel an inference that the shape of the district was based on the distribution of the plaintiff’s group.<sup>142</sup> Fourth, plaintiffs must present a hypothetical district which would alleviate the problem of the gerrymander and more closely follow traditional districting standards than the actual district.<sup>143</sup> Finally, plaintiffs must show that the defendants intentionally manipulated the district to pack<sup>144</sup> or crack<sup>145</sup> the district.<sup>146</sup>

Once plaintiffs meet these five criteria, the burden shifts to the defendants who must show that the decisions were not based on “naked partisan advantage.”<sup>147</sup> The state could show that the neutral objectives could not be better served by the hypothetical district, or it could affirmatively establish legitimate objectives, such as to avoid racial dilution, one person-one vote compliance, proportional representation, or other legitimate objectives.<sup>148</sup> Justice Souter chose to postpone any definition for a statewide claim until the Court has the benefit of analyzing the district specific claims.<sup>149</sup>

The plurality rejected Justice Souter’s standard as more complicated but equally unworkable.<sup>150</sup> While the tests are broken down, they are still unanswerable because the question remains as to how much is too much.<sup>151</sup> The plurality stated that each of the last four *prima facie* “steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards.”<sup>152</sup> Justice Souter countered this argument by stating that

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139. *Id.* at 347-48.

140. *Id.* at 349.

141. *Id.* The plaintiffs “would need to point to specific protuberances . . . that reach out to include Democrats, or fissures in it that squirm away from Republicans.” *Id.*

142. *Id.*

143. *Vieth*, 541 U.S. at 349 (Souter, J., dissenting).

144. “Pack” means to intentionally place a super-majority of members of one party in a district, in order that all the votes go to only one candidate. *Id.* at 286 n.7 (plurality opinion).

145. “Cracking” involves splitting a pocket of members who may form a majority in a district in order that they form a safe minority in several districts. *Id.*

146. *Id.* at 350 (Souter, J., dissenting). Justice Souter noted that intent was easily proved as the legislature is not politically naïve, but he would only apply intent when the gerrymandering party controls both houses and the governorship or is veto-proof by an adversarial governor. *Id.*

147. *Id.* at 351.

148. *Id.* at 351-52.

149. *Vieth*, 541 U.S. at 353 (Souter, J., dissenting).

150. *Id.* at 296-97 (plurality opinion).

151. *Id.*

152. *Id.* at 296.



while the test may allow some partisan gerrymandering, it “does not make it impossible for courts to identify at least the worst cases of gerrymandering, and to provide a remedy. The most the plurality can show is that my approach would not catch them all.”<sup>153</sup>

The standard proposed by Justice Souter would work on both judicial guidance and legislative limitations. The lower courts would have five distinct elements to determine rather than the two-pronged intent/effects test. The standard succeeds because it uses a presumption to shift the burden once the plaintiff has met the prima facie case. It removes the difficult burden on the plaintiff to prove the intent of the legislature. Importantly, if the state has a legitimate state interest that cannot be met with another map, then the district will be approved. The standard fails on one level because it provides relief only for individual districts and not for a statewide map. As stated above, partisan gerrymandering usually occurs on the statewide level, rather than district by district.

#### 6. Justice Breyer’s dissent

Justice Breyer first focused on what the plurality described as the impossible problem, determining what the court is testing for.<sup>154</sup> He stated that the Constitution, through its guarantee of democratic government, must provide “a method for transforming the will of the majority into effective government.”<sup>155</sup> Moreover, given the use of single-member districts in the United States, political ramifications in districting are not only necessary but beneficial.<sup>156</sup> Therefore, the use of political considerations, by itself, does not violate the Constitution because it is justified by desirable goals, such as minority party representation and stable legislatures.<sup>157</sup>

While the use of political considerations is beneficial in some circumstances, it can lead to serious abuse when it results in unjustified entrenchment of a minority party in power.<sup>158</sup> “Unjustified entrenchment” is defined as when a party that “enjoys only minority support among the populace has nonetheless contrived to take, and hold legislative power [which] . . . is purely the result of partisan manipulation and not other

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153. *Id.* at 354-55 (Souter, J., dissenting).

154. *Id.* at 356 (Breyer, J., dissenting).

155. *Vieth*, 541 U.S. at 356 (Breyer, J., dissenting).

156. *Id.* at 357-59. With non-random boundaries, under single member districts, a very small shift in the political climate – 49% Republican to 51% Republican – could change the government from 100% Democratic to 100% Republican. *Id.* at 357.

157. *Id.* at 360.

158. *Id.*

factors.”<sup>159</sup> Such unjustified entrenchment leads to Constitutional violations of the Equal Protection Clause.<sup>160</sup>

Justice Breyer’s plan for determining when unjustified entrenchment occurs was complex. He proposed that the factors fall along a continuum, where the more entrenched the minority party is, the fewer indicia of abuse are required.<sup>161</sup> For example, where few abuses are alleged but a majority party<sup>162</sup> twice fails to obtain a majority of seats and this failure cannot be explained by neutral factors, then there would be an unconstitutional entrenchment.<sup>163</sup> Further down the continuum, if the disadvantaged party can show more indicia of abuse and the majority party has once failed to obtain a majority of seats, then “[t]hese circumstances could also add up to unconstitutional gerrymandering.”<sup>164</sup> Finally, Justice Breyer also saw an unconstitutional entrenchment when the indicia of abuse were extremely high (more than one redistricting in a decade, radical departure from traditional districting standards, or strong evidence that a minority will receive a majority of votes) but the actual entrenchment had yet to occur.<sup>165</sup> This was based on his view that “the presence of a mid-cycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process.”<sup>166</sup>

The plurality dismissed Justice Breyer’s standard as too vague and unspecified.<sup>167</sup> On his continuum, the plurality had trouble understanding where the line is drawn between an unconstitutional entrenchment and a constitutional entrenchment because Breyer stated the second scenario “could” be unconstitutional and the third scenario “may” be unconstitutional.<sup>168</sup> The plurality appropriately felt this ambiguity left Justice Breyer’s test as too undefined to be judicially manageable.<sup>169</sup>

Justice Breyer’s standard fails in providing guidance to lower courts. His continuum is poorly defined and would make it difficult for a district court

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159. *Id.* Other justified factors include sheer happenstance, more than two major parties, Senate election scheme, or reliance on traditional districting criteria. *Id.* at 360-61.

160. *Id.* at 362.

161. *Vieth*, 541 U.S. at 365 (Breyer, J., dissenting).

162. Justice Breyer defines a majority party as the party that receives the most votes actually cast in a race for its candidates in a particular race. So the if the Republicans got the most votes cast for the U.S. House of Representatives in that state, they would be the majority party for that race in that state. *Id.* at 366.

163. *Id.*

164. *Id.*

165. *Id.* at 366-67.

166. *Id.* at 367.

167. *Vieth*, 541 U.S. at 300 (plurality opinion). “In sum, we neither know precisely what Justice Breyer is testing for, nor precisely what fails the test.” *Id.*

168. *Id.* at 299-300.

169. *Id.* at 300.

judge to determine when a violation has occurred. Also, his requirement of an “unjustified entrenchment” makes the test too narrow. There is as much danger in a majority creating a supermajority as there is in a minority holding on to power.<sup>170</sup>

*Vieth* fails for many of the same reasons that *Bandemer* failed. First, no opinion could garner a majority of the Court. This leaves the lower courts unable to determine the appropriate approach to a partisan gerrymandering case. The cases remain justiciable, as *Bandemer* is still good law on that point. No standard, however, is available for lower courts to use to make a determination on the merits of the case. District court judges presented with a partisan gerrymandering claim must either dismiss the case because the facts do not meet the unknown standard, or choose or create a standard and apply it to the facts. If a judge finds the district map invalid, the finding will likely be reversed for having chosen the ‘wrong’ standard. *Vieth* fails because it provides no guidance for lower courts.

*Vieth* also fails because it provides neither guidance nor limitations on the state legislatures. The longer the Supreme Court fails to strike down a map for partisan gerrymandering, the bolder the legislatures will get in drawing the partisan maps. Every election that is predetermined by a gerrymandered map violates a citizen’s right to vote and right to equal protection.<sup>171</sup> Furthermore, the more partisan the map, the more partisan the individuals elected. On both sides of the aisle, more extreme individuals will be elected, resulting in a major gap in the political middle, where most Americans actually reside.<sup>172</sup>

### C. League of United Latin American Citizens v. Perry

In *League*, the Court again failed to reach a majority on any significant issue with regards to partisan gerrymandering. Majority consensus only existed as to the scope of the issue—that the opinion does not address the question of justiciability.<sup>173</sup> Partisan gerrymanders are justiciable,<sup>174</sup> but disagreement remains over any substantive standard to apply.<sup>175</sup> *League* addressed two issues of partisan gerrymandering: 1) whether redistricting mid-

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170. See generally THE FEDERALIST NO. 10 (James Madison).

171. See *infra* pp. 33-34.

172. Dann, *supra* note 7.

173. League of United Latin American Citizens v. Perry, 126 S. Ct. 2595, 2607 (2006).

174. *Bandemer* is still the applicable case law because no majority has overturned it. *Id.* Chief Justice Roberts and Justice Alito give no opinion on the issue of justiciability, as it was not argued in this case. *Id.* at 2652 (Roberts, C.J., concurring in part and dissenting in part). Since both of the recently departed justices (Rehnquist and O’Connor) supported non-justiciability in *Vieth*, it is doubtful that a majority would have formed declaring partisan gerrymandering as non-justiciable.

175. *Id.* at 2607 (majority opinion).

decade violates the Constitution, and 2) what standard should be applied to determine an unconstitutional partisan gerrymandering.<sup>176</sup>

1. The *League* plurality opinion<sup>177</sup>

The plurality stated that the Constitution allocates the primary responsibility of drawing district maps to the states and their legislatures.<sup>178</sup> Only in necessary circumstances, such as a failure to comply with the one person-one vote requirement or because of an imminent election, should federal district courts be saddled with the “unwelcome obligation” of drawing a district map.<sup>179</sup> The act is unwelcome because it is one of the most significant acts of a state in ensuring the rights of citizens in the voting process.<sup>180</sup> Importantly, there is no constitutional or Congressional ban on a state legislature redrawing a district map to replace a map previously drawn by either the legislature or a federal court.<sup>181</sup> Furthermore, there is no presumption of impropriety placed upon a legislature that chooses to redraw a judicially drawn map in the middle of the decade.<sup>182</sup>

The plaintiffs presented a standard similar to the standard presented by Justice Stevens in his dissent in *Vieth*.<sup>183</sup> The plaintiffs modified Justice Stevens’ predominant intent standard by placing a presumption of invalidity on a mid-decade redistricting plan.<sup>184</sup> The focus of the plaintiffs’ query was not necessarily the district lines but the choice to redistrict in itself.<sup>185</sup>

The Court rejected the circumstance of mid-decade redistricting as tipping the balance toward unconstitutionality.<sup>186</sup> There is no presumption that a mid-decade redistricting is unconstitutional.<sup>187</sup> Furthermore, it is an anathema to rule that a highly partisan redistricting that coincides with the census would be constitutional, while a less effective mid-decade partisan gerrymander would be unconstitutional.<sup>188</sup> This rule would likely lead to partisan excess at the beginning of each decade, accompanied by minority toe-dragging because

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176. *Id.*

177. Opinion by Kennedy which is joined by Souter and Ginsburg, and in which Roberts and Alito concurred in the judgment. *Id.* at 2604.

178. *Id.* at 2607-08.

179. *League of United Latin American Citizens*, 126 S. Ct. at 2608 (citing *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)).

180. *Id.*

181. *Id.*

182. *Id.*; but see *infra* pp. 33-35.

183. See *Vieth v. Jubelirer*, 541 U.S. 267, 336 (2004) (Stevens, J., dissenting); *supra* Part III.B.4.

184. *League of United Latin American Citizens* 126 S. Ct. at 2609.

185. *Id.* at 2609.

186. *Id.* at 2610.

187. *Id.*; but see *infra* text accompanying notes 252-257.

188. *League of United Latin American Citizens*, 126 S. Ct. at 2610.

opposition leaders may feel they have a better chance with the judiciary than by negotiating with the majority.<sup>189</sup>

Finally, the Court stated that a partisan gerrymander by the majority is more appropriate than one conducted by a minority.<sup>190</sup> While there is no requirement of proportional representation, the Court felt that there is less of a problem when a statewide majority takes a more substantial share of Congressional seats than when a statewide minority holds the majority of seats.<sup>191</sup>

The Court also dismissed a standard for symmetry proposed by one of the amici briefs. Under this symmetry standard, the court would look at how well the minority party would fare if the votes were equal.<sup>192</sup> For example, under Plan 1374C, Republicans would have an eight seat advantage if the votes for statewide office were 50%-50% between Democrats and Republicans.<sup>193</sup> This advantage would violate the symmetry standard because there was a significant deviation from proportionality even when one party did not dominate the vote statewide.<sup>194</sup> The Court correctly pointed out that the degree of asymmetry depends “on conjecture about where possible vote-switchers will reside.”<sup>195</sup> Even if this problem could be solved, the Court did not feel comfortable determining constitutionality based on hypothetical situations.<sup>196</sup> Furthermore, the symmetry standard proposed by the amici brief did not specify how much deviance is too much.<sup>197</sup> Because of these problems, the Court elected not to use the symmetry standard.<sup>198</sup>

The plaintiffs also argued that mid-decade redistricting for purely partisan purposes violates the one person-one vote requirement established by *Baker v. Carr*.<sup>199</sup> The standard is based on the fact that since people move within the state, districts that are equal in population in 2000 will not remain equal.

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189. *Id.* at 2611.

190. *Id.* at 2610.

191. *Id.*

192. *Id.* at 2610-11.

193. Twenty seats out of thirty-two total seats. *Id.* at 2637 (Stevens, J., concurring in part and dissenting in part).

194. *League of United Latin American Citizens*, 126 S. Ct. at 2637 (Stevens, J., concurring in part and dissenting in part).

195. *Id.* at 2611 (plurality opinion).

196. *Id.*

197. *Id.*; *but see id.* at 2638 n.9 (Stevens, J., concurring in part and dissenting in part). It is up to the Court and not social scientists to determine the amount of deviance, but 10% does not seem like an unreasonable number. *Id.*

198. *Id.* at 2611 (plurality opinion).

199. *Id.* It should also be noted that Judge Ward of the district court would have granted relief under this one person-one vote theory on remand, when it was first argued, if he was not constrained by the Supreme Court’s direction to consider the case only in light of *Vieth*. *Id.* at 2607; *Henderson v. Perry*, 399 F. Supp. 2d 756, 784-85 (E.D. Tex. 2005).

“[P]opulation variances in legislative districts are tolerated only if they ‘are unavoidable despite a good-faith effort to achieve absolute equality, or *for which justification is shown.*’”<sup>200</sup>

Plaintiffs argued that the legal fiction that population data remains accurate throughout the decade applies only when such a fiction promotes important state interests.<sup>201</sup> Such important interests include avoidance of constant redistricting and the ensuing instability (when applied to a decennial plan years after it has been enacted) and compliance with the Constitution and voting rights legislation (when applied to a belated court-drawn plan drawn a few years after the census).<sup>202</sup> This standard would require a legislature to justify its mid-decade redistricting “when there was no legal compulsion” to redistrict.<sup>203</sup> Under this standard, the Texas legislature would be unable to justify their mid-decade redistricting because the motivation behind the voluntary redistricting was to achieve partisan goals.<sup>204</sup>

The Court characterized this argument as the same argument that mid-decade redistricting, is *per se* unconstitutional.<sup>205</sup> The Court dismissed the argument for the same reasons it concluded that there is no inference that mid-decade redistricting is unconstitutional.<sup>206</sup>

Without the use of an inference, the plurality is left in its self-created purgatory of stating that partisan gerrymandering *may* be unconstitutional but without any standard to determine when and how such a decision will be made. Without an appropriate standard submitted, the Court merely affirmed that the facts do not meet some standard, whatever that standard may be. The plurality’s opinion once again failed to provide any guidance to lower courts or any limitations on state legislatures.

## 2. Justice Stevens’ dissent<sup>207</sup>

Justice Stevens dissented, as he believed that the state violated its duty to govern impartially.<sup>208</sup>

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200. *League of United Latin American Citizens*, 126 S. Ct. at 2611 (quoting *Karcher v. Daggett*, 462 U.S. 725, 730 (1983)) (emphasis added).

201. *Id.*

202. *Id.*

203. *Id.* at 2611-12.

204. *Id.* at 2606.

205. *Id.* at 2612.

206. *League of United Latin American Citizens*, 126 S. Ct. at 2612; *see supra* pp. 24-25.

207. Stevens is joined by Justice Breyer as to Parts I and II. Both Justices concur with the Court in their invalidation of District 23 in Part III of the Court’s opinion. *League of United Latin American Citizens*, 126 S. Ct. at 2626 (Stevens, J., concurring in part and dissenting in part).

208. *Id.* at 2626.

When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, or political—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.<sup>209</sup>

Stevens first established his belief that the “maintenance of existing district boundaries is advantageous to both voters and candidates.”<sup>210</sup> More than eight million Texans were put into different districts, and on the whole, the districts were less compact under Plan 1374C than they were under Plan 1151C.<sup>211</sup>

Justice Stevens framed the issue narrowly as a question of first impression for the Court: “[W]hether it was unconstitutional for Texas to replace a lawful districting plan in the middle of a decade, for the sole purpose of maximizing partisan advantage.”<sup>212</sup> The issue was not on the contours of lines on the map but on the decision to redraw the map in the first place.<sup>213</sup> Since the issue was not about the map but about the decision to redraw the map, Stevens argued that it is undeniably within the judiciary’s ability to determine the motive behind the map.<sup>214</sup> “[T]he presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map drawing process.”<sup>215</sup> The case at hand clearly supported that such a determination is feasible because the district court, in fact, had made such a determination.<sup>216</sup>

Upon concluding that it was within the purview of the district courts to determine when mid-decade redistricting is motivated solely by partisanship, Justice Stevens turned to whether such a motivation is sufficient to establish a constitutional violation.<sup>217</sup> Distinguishing *League* from *Upham v. Seamon*,<sup>218</sup> Justice Stevens concluded then that the decision to redistrict solely to

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209. *Id.* at 2641 (quoting *Karcher v. Daggett*, 462 U.S. 725, 748 (1983) (Stevens, J., concurring)).

210. *Id.* at 2626.

211. *Id.* at 2630.

212. *Id.* at 2631 (internal quotes omitted).

213. *League of United Latin American Citizens*, 126 S. Ct. at 2631-32.

214. *Id.* at 2632.

215. *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004) (Breyer, J., dissenting)).

216. *Id.* “There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage.” *Session v. Perry*, 298 F. Supp. 2d 451, 470 (E.D. Tex. 2004).

217. *League of United Latin American Citizens*, 126 S. Ct. at 2633 (Stevens, J., concurring in part and dissenting in part).

218. *Id.* at 2633-34; *but see Upham v. Seamon*, 456 U.S. 37 (1982) (*Upham* stands for the proposition that a legislature is authorized to redraw a court-drawn map only when the district court has exceeded its remedial authority).

maximize partisan advantage and without any justifiable state interest violates the state's duty to govern impartially, established by the First and Fourteenth Amendments.<sup>219</sup>

### 3. Part III of Justice Stevens' Dissent<sup>220</sup>

According to Justice Stevens, not only was drawing the map mid-decade unconstitutional, but this map would be unconstitutional if drawn at the start of a decade.<sup>221</sup> In an attempt to again put forth judicially manageable standards for the lower courts to follow, Justice Stevens supported use of the symmetry standard.<sup>222</sup>

As stated above, the symmetry standard compares the number of votes statewide for each party as compared to the number of seats elected.<sup>223</sup> "The symmetry standard requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of the legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage."<sup>224</sup> After starting with base numbers from an election, the numbers of statewide votes are then varied to determine how many seats each party would receive with a higher or lower percentage of statewide votes.<sup>225</sup> According to the amici brief and experts for both the plaintiff and the state, Republicans in Texas would likely be able to carry twenty-two of thirty-two seats with only 52% of the vote, and they could carry twenty seats with as little as 49% of the statewide vote.<sup>226</sup> Justice Stevens proposed that a symmetry deviation<sup>227</sup> over 10% should be enough to shift the burden to the State to defend the plan.<sup>228</sup>

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219. *League of United Latin American Citizens*, 126 S. Ct. at 2634. The Fourteenth Amendment prohibits invidious discrimination and requires state action to be supported by a legitimate state interest, while the First Amendment protects citizens from official retaliation based on political affiliation and also prevents the State from penalizing citizens because of their political participation or beliefs. See *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

220. Not joined by Breyer. *League of United Latin American Citizens*, 126 S. Ct. at 2626.

221. *League of United Latin American Citizens*, 126 S. Ct. at 2635 (Stevens, J., concurring in part and dissenting in part).

222. *Id.* at 2636.

223. *Id.* at 2636-37.

224. *Id.* at 2637 (internal quotes omitted).

225. *Id.*

226. *Id.* at 2636-37. The data relied on is from Professor Gadie, the state's expert in the case. *Id.* In the 2006 election, Republicans received 47% of the statewide vote for U.S. House of Representatives, yet still won nineteen of the thirty-two seats. CNN.com, America Votes 2006 – Texas, <http://www.cnn.com/ELECTION/2006/pages/results/states/TX/> (last visited Feb. 10, 2007).

227. A symmetry deviation is created by comparing the percentage of seats each party would receive if each party had 50% of the statewide vote. For example, under 1374C, the Republicans would win 62.5% (20 of 32) compared to the Democrats getting 37.5% (12 of 32). This would



Justice Stevens also emphasized that an effective partisan gerrymander affects more than the minority party's ability to elect its candidates; it also limits the losing party's role in influencing the elected candidate.<sup>229</sup> In general, our electoral system expects the winning candidate to take the minority interest into account because the minority may later become the majority.<sup>230</sup> On the other hand, when the district is obviously created to effectuate solely the interests of one group, "elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole."<sup>231</sup> Furthermore, in this case, the Representatives may feel that they owe their success and access to the cartographers of the map and not to their constituents.<sup>232</sup>

Justice Stevens concluded that it was clear that Plan 1374C placed a severe burden on Texas Democrats because the plan created nineteen to twenty-two safe seats for Republicans.<sup>233</sup> The harm was more than hypothetical because the safe seats reduced the likelihood that Republicans occupying those seats would be responsive to the interests of Texas Democrats. Therefore, Plan 1374C, in both intent and effect, violated the state's duty to govern impartially.

Justice Stevens' dissent provides both guidance and limitations. In terms of the mid-decade redistricting, the inference of impropriety helps the judiciary determine when a violation has occurred, and it makes it more likely that partisan gerrymanders will be eliminated in between censuses. The symmetry standard also provides a concrete formula to determine when gerrymandering becomes unconstitutional. Again, this will help the judiciary in determining how much is too much and it will curb many legislative abuses.

#### 4. Other Dissents in *League*

As stated previously, this case contained six different opinions. The opinions of Justices Kennedy and Stevens spent the most time on the issue of partisan gerrymanders. Justice Souter, joined by Justice Ginsburg, preserved the principle that partisan gerrymandering may be considered a violation of the

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result in a symmetry deviation of 25% (62.5% - 37.5%). *League of United Latin American Citizens*, 126 S. Ct. at 2638-39 (Stevens, J., concurring in part and dissenting in part).

228. *Id.* at 2639 n.9. While a 10% deviation would work for larger states like Texas or California, a different standard may be needed for less populous states. *See infra* note 268.

229. *Id.* at 2638-39.

230. *Id.* at 2639; *see also* *Davis v. Bandemer*, 478 U.S. 109, 132 ("The power to influence the political process is not limited to winning elections.").

231. *League of United Latin American Citizens*, 126 S. Ct. at 2639 (Stevens, J., concurring in part and dissenting in part) (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

232. *Id.*

233. *Id.* at 2640. This statement remains true even though the Republicans only won eighteen seats in 2006, because one of the seats that the Republicans lost was District 23. District 23 had to be redrawn after *League* due to violations of the Voting Rights Act.

Equal Protection Clause.<sup>234</sup> Justice Souter did not work through his standard set forth in *Vieth* because there was no majority on either an acceptable standard or the overall unconstitutionality of Plan 1374C.<sup>235</sup> He did, however, reject Justice Kennedy's view that the process used in redistricting cannot play a role in the determination of constitutionality.<sup>236</sup> Nor did he rule out the possibility that the proposed symmetry test may be used to establish an unconstitutional partisan gerrymander.<sup>237</sup>

Justice Breyer also dissented in part on his own.<sup>238</sup> He too would have rejected Plan 1374C on its face because of its risk of entrenchment of the Republican Party.<sup>239</sup> Because the district map would give the Republicans a majority of seats even when they received a minority of statewide votes,<sup>240</sup> Plan 1374C violated Breyer's standard as declared in *Vieth*.<sup>241</sup> The State had not even attempted to justify the plan on any other ground other than partisan advantage.<sup>242</sup> Therefore, the plan violated the Equal Protection Clause.<sup>243</sup>

Chief Justice Roberts, joined by Justice Alito, concurred separately in the judgment in regards to partisan gerrymandering.<sup>244</sup> As neither Justice had ruled on the justiciability of partisan gerrymanders, they took no position on the issue, as it was not argued in this case.<sup>245</sup> They did concur in the Court's disposition, that even if the case is justiciable, these plaintiffs had failed to state a claim on which relief could be granted.<sup>246</sup>

Justice Scalia, joined by Justice Thomas, reiterated his view from *Vieth* that partisan gerrymanders are non-justiciable.<sup>247</sup> No party had yet put forth a judicially manageable standard by which to measure the constitutionality of partisan gerrymanders.<sup>248</sup> He again chided the Court for disposing of the case

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234. *Id.* at 2647 (Souter, J., concurring in part and dissenting in part); *see supra* Part III.B.5.

235. *League of United Latin American Citizens*, 126 S. Ct. at 2647.

236. *Id.*

237. *Id.*

238. Justice Breyer joined Justice Stevens as to Parts I and II of his opinion. *Id.* at 2651 (Breyer, J., concurring in part and dissenting in part).

239. *Id.* at 2652.

240. *See supra* text accompanying notes 195-196, 212-221.

241. *League of United Latin American Citizens*, 126 S. Ct. at 2652 (Breyer, J., concurring in part and dissenting in part). *See supra* Part III.B.6; *Vieth v. Jubelirer*, 541 U.S. 267, 359 (2004) (Breyer, J., dissenting).

242. *League of United Latin American Citizens*, 126 S. Ct. at 2652 (Breyer, J., concurring in part and dissenting in part).

243. *Id.*

244. *Id.* (Roberts, C.J., concurring in part and dissenting in part).

245. *Id.*

246. *Id.*

247. *Id.* at 2663 (Scalia, J., concurring in the judgment in part and dissenting in part)

248. *League of United Latin American Citizens*, 126 S. Ct. at 2663 (Scalia, J., concurring in the judgment in part and dissenting in part).

without either setting a standard by which to measure the claim or declaring these claims to be non-justiciable.<sup>249</sup>

#### IV. AUTHOR'S ANALYSIS

In its decision in *League*, the Supreme Court failed once again in its responsibility to determine the constitutionality of partisan gerrymandering. The most disturbing aspect is the lack of guidance offered to lower courts. Partisan gerrymandering is in a perpetual state of purgatory. District courts are left with no viable options. The district courts cannot dismiss the cases as non-justiciable because, as of today, the majority decision on justiciability in *Bandemer* is still applicable. Yet the lower courts have no standard by which to judge the facts. Any decision to invalidate a map will likely be reversed by a court of appeals or the Supreme Court because no defined standard currently exists.

The current status of partisan gerrymandering cases is indefensible. The Supreme Court must reach a majority on the issue the next time it comes up. A failure to settle the law leaves all participants in the predicament of not knowing what the law is. To quote former President Bill Clinton, "Strong and wrong [is better than] weak and right."<sup>250</sup> The most important aspect of these cases is for a firm majority decision to be made.

A majority determination that partisan gerrymanders are non-justiciable is inappropriate. It would settle the law in terms of the judiciary, but it would still leave legislatures with no boundaries or limitations. The state legislatures, left to their own accord, cannot be trusted to adequately address the problem. Given the opportunity, a majority party (by number of seats) will do whatever it can to maintain and extend its majority.

After *League*, there are no limits on the legislature. In the extreme, a state legislature could redraw district lines before every election in order to assure greater success in that particular election. District maps could be drawn to benefit or disadvantage specific candidates. Opponents of judicial intervention will argue that if the electorate is dissatisfied with elected officials, then the people can vote them out of office.<sup>251</sup> This argument fails because state legislatures not only draw district maps for the U.S. House of Representatives but also for the state legislatures. In other words, state legislators control their

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249. *Id.*

250. Peter Brown, 'Strong and Wrong vs. Weak and Right,' Jan. 15, 2007, [http://www.realclearpolitics.com/articles/2007/01/strong\\_and\\_wrong\\_vs\\_weak\\_and\\_r.html](http://www.realclearpolitics.com/articles/2007/01/strong_and_wrong_vs_weak_and_r.html) (last visited Feb. 10, 2007) (quoting President Bill Clinton).

251. "There used to be a theory that gerrymandering was self-regulating. . . . The idea was that the more greedy you are in maximizing the number of districts your party can control, the more likely it is that a small shift of votes will lead you to lose a lot of districts. But it's not self-regulating anymore. The software is too good, and the partisanship is too strong." Toobin, *supra* note 12.

own districts. A majority party that begins to lose popular support can maintain power by simply redrawing the lines.<sup>252</sup>

Partisan gerrymandering is not merely a matter of politics; it directly implicates the peoples' constitutional rights. The right to vote and to have one's vote counted is constitutionally protected.<sup>253</sup>

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.<sup>254</sup>

By intentionally cracking and packing citizens into districts so as to make their individual votes meaningless, the state violates its citizens' right to vote equally as much as violations of one person-one vote or racial gerrymandering violates those rights. That one form of vote dilution (disproportionate representation) is unconstitutional while another form of vote dilution (packing and cracking) is valid strikes at the heart of absurdity.

The current situation is clearly unsatisfactory. *League* leaves the judiciary with no guidance and the legislature with no limits. While ruling that partisan gerrymanders are non-justiciable would ease the burden on the judiciary, it would still leave the legislatures unrestrained. Therefore, two issues must be decided: (1) When is it permissible for a legislature to redistrict; and (2) what standard should be used to determine when a partisan gerrymander is unconstitutional.

*League* provided the Court with the new issue of whether a mid-decade redistricting is constitutional. Article I, Section 2 of the Constitution provides:

The House of Representatives shall be composed of members chosen every second year by the people of the several states, and . . . shall be apportioned among the several states which may be included within this union, according to their respective numbers . . . . The actual Enumeration shall be made . . . every subsequent term of ten years, in such manner as they shall by law direct.<sup>255</sup>

This section provides the constitutional basis for finding that districting should occur after every census and only after the census. Mid-decade redistricting will not be unconstitutional in absolutely every case, but there should be a rebuttable inference that mid-decade redistricting is impermissible. Therefore,

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252. Regardless of whether the gerrymandering party is Republican or Democrat, a significant segment of the population will applaud the continual gerrymandering. This strong sector of support may be enough to maintain a majority of seats, even if most other popular support is lost.

253. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

254. *Id.*

255. U.S. CONST. art. I, §2.

if there are legitimate reasons for redistricting in the middle of the decade, such as a dramatic population shift or violation of one person-one vote, then redistricting could be allowed. However, the burden will be on the legislature to prove that legitimate state interests are the basis for redistricting. As the plurality pointed out in *League*, a presumption of invalidity for mid-decade redistricting could simply encourage partisan excess at the beginning of the decade.<sup>256</sup> While this may be true, this presumption eliminates the worst-case scenarios. The fact that this inference does not end all abuses does not mean that it should not be implemented to end some abuse.

In addition to eliminating mid-decade partisan gerrymanders, the Court should implement a standard to determine when census-based redistricting constitutes a partisan gerrymander. In Justice Scalia's opinion in *Vieth*, he argued that eighteen years of *Bandemer* had proven that there was no judicially manageable standard.<sup>257</sup> He stated that no majority was able to agree upon a standard and "the lower courts have [not], over [eighteen] years, succeeded in shaping the standard."<sup>258</sup> Since *Bandemer*, the lower courts, however, did not try to craft standards, but instead they applied the plurality standard from *Bandemer*. It is not as Justice Scalia stated, that time has proven that no standard exists. Time has only proven that the standard advocated by the plurality in *Bandemer* fails. That standard proved to be too strict in its application, preventing any relief from being granted.

The Court erred in *Vieth* and *League* by not providing a standard for the lower courts to implement. While any proposed standard is unlikely to correct all partisan gerrymanders, an attempt must be made. The status quo, as explained above, is untenable.

In *Bandemer*, *Vieth*, and *League*, the dissenting Justices suggested a variety of approaches for an appropriate standard. The use of any of the proposed standards, with the exception of the *Bandemer* plurality standard, would be better than no standard at all. The best course of action, however, would combine aspects of several different standards.

This proposed standard would follow Justice Souter's burden shifting formula from *Vieth*.<sup>259</sup> This standard, however, would not be limited to claims on individual districts. Rather, the standard would apply to both single district claims and statewide claims. The initial burden would be on the plaintiffs. They would be required to show, by a preponderance of the evidence, that: (1) they are a member of a cohesive political party; (2) their individual district (or

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256. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2610-11 (2006).

257. *Vieth v. Jubelirer*, 541 U.S. 267, 277-281 (2004).

258. *Id.* at 279.

259. *Id.* at 347-352 (Souter, J., dissenting).

the entire statewide plan<sup>260</sup>) ignored traditional districting criteria, such as “contiguity, compactness, respect for political subdivisions, and conformity with geographic features such as rivers and mountains;”<sup>261</sup> (3) the district (or statewide plan) was drawn so as to disadvantage their particular political party; (4) they would need to present the court with a hypothetical district (or statewide map) which deviates less from traditional districting standards than the actual district; and (5) the defendants acted intentionally to disadvantage their group.

In regards to the statewide plan, the third and fourth requirements would use a modified symmetry standard as suggested by Justice Stevens in *League*.<sup>262</sup> Justice Stevens suggested a 10% rule in regards to the symmetry standard.<sup>263</sup> While 10% is an appropriate figure in states with a large population and a correspondingly large number of representatives, it fails in smaller states. For example, in a state with five representatives, if both parties get exactly 50% of the statewide vote, it is not an unconstitutional gerrymander because the Democrats got 20% more of the seats (three seats to two seats). Therefore, in smaller states with ten or fewer representatives, the standard of deviation from equality must be a minimum of 10% and more than two representatives.<sup>264</sup> Additionally, the map proposed by the plaintiffs must not unfairly discriminate against the opposing party.

Once the plaintiff has met the prima facie requirements, the burden will shift to the defendants to defend the map based on legitimate state interests. The presumption of invalidity on the map is the same as the presumption of invalidity if mid-decade redistricting occurs.<sup>265</sup> The presumption is rebuttable and may be defeated by evidence of legitimate state interests such as compliance with the Voting Rights Act,<sup>266</sup> compliance with one person-one vote, proportional representation,<sup>267</sup> or incumbent protection.<sup>268</sup> This list is not

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260. It would probably be impossible to show that every district in a statewide plan ignored traditional districting criteria. Therefore, for the statewide plan, the plaintiffs would have to show that in general, the plan ignores traditional districting criteria.

261. *Vieth*, 541 U.S. at 348 (Souter, J., dissenting).

262. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2635-41 (Stevens, J., concurring in part and dissenting in part).

263. *Id.* at 2638, n.9.

264. In a state with ten Representatives, where each party receives 50% of the statewide vote, but the Republicans receive six seats compared to the Democrats' four seats, there would be no violation of the modified symmetry standard because there was not more than a two seat difference. On the other hand, a state with nine Representatives that splits six-three with equal votes would violate the modified symmetry standard.

265. See *supra* text accompanying notes 256-258.

266. *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring).

267. *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (In *Gaffney*, the Supreme Court approved a Connecticut plan which advocated gerrymandering, but in proportion to each party's percentage of statewide vote).

exhaustive. The burden is on the defendants to show that the predominant rationale behind the map was not to disadvantage their political rivals. While in every redistricting process there will be mixed motives, the defendants must show that their predominant intent was something other than political advantage. The defendants' rationale for the map must not be a mere pretext for political advantage. Evidence to consider would include the legislative process (partisan or bipartisan), other maps proposed that also met state interests, neutral districting criteria, the shapes of districts, and the relative change from a previous map.

If the defendants can show that the map is based on legitimate state interests, then the burden shifts one final time to the plaintiffs. The plaintiffs must then show that the purported state interest is merely a pretext for partisan gerrymander—that the true purpose behind the map is partisan gerrymander, and that the purported state interest is met equally under the plaintiffs' proposed map. If the plaintiffs are able to meet this very difficult burden, then the state's map should be thrown out.

If a legislatively drawn map is deemed unconstitutional, the court may implement any of the following remedies. The court may send the map back to the legislature one time to be redrawn, subject to the approval of the court before it is implemented. If time does not permit the first option or if the legislature fails to draw an appropriate map, the court may implement the plaintiffs' suggested map, if the map is appropriate. Lastly, the court may create its own map, keeping in mind constitutional requirements, legitimate state interests, and neutral districting criteria. Once a map has been approved by the court, that map should remain in place until the next census period. The legislature may petition the court to change the map prior to the next census but only if constitutional requirements or legitimate state interests require it.

Like any theoretical plan, this proposed standard would prove imperfect. Appropriate changes may be required in the future. The lack of perfection, however, should not prevent the implementation of the standard. The status quo of partisan gerrymandering is intolerable and must be changed. The Supreme Court must no longer abdicate its responsibility. It must end these current practices and implement an appropriate standard.

## V. CONCLUSION

Gerrymandering for purely partisan purposes is a violation of the Constitution. The Constitution provides for all citizens to get an equal vote. By partisan gerrymandering, the politicians have taken away the right to vote for the U.S. House of Representatives for many Americans. Three separate

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268. For a discussion on the legitimacy of incumbent protection as a legitimate constitutional goal see Walter M. Frank, *Help Wanted: The Constitutional Case Against Gerrymandering to Protect Congressional Incumbents*, 32 OHIO N.U. L. REV. 227 (2006).

bodies—the judiciary, Congress, and the state legislatures—have the capacity to restore the power to the people. It is foolhardy to expect the legislative branches to advocate reform, as they are the primary perpetrators. As is often the case, responsibility to remedy this injustice falls on the judiciary. Over the past twenty-five years, the Supreme Court has failed in its responsibility. The Court's inability to reach a consensus on an appropriate standard to determine when a partisan gerrymander becomes unconstitutional is inexcusable. As computer software and demographic information becomes more sophisticated and specific, no amount of informed voter discontent will be able to dislodge the unconstitutional gerrymanders. Without action by Congress, the state legislature, or the Supreme Court, elections will no longer be decided by Americans; rather cartographers will elect the people's House.

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