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Constitutional Law—Fourteenth Amendment—The Path Leads to Nowhere: The Supreme Court Re-examines the Trek Through the Political Thicket. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—THE PATH LEADS TO NOWHERE: THE SUPREME COURT RE-EXAMINES THE TREK THROUGH THE POLITICAL THICKET. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

I. INTRODUCTION

Even a passing glance at the history of voting rights in the United States presents a picture of a voting system wracked by systematic and chronic vote denial and vote dilution. Complex and convoluted registration rules undermine the voting rights of numerous groups—in practice if not by intention. Out-of-date voting technologies and local control over the election process produce widely disparate election results—empowering some voters while effectively disenfranchising many others. Even the way we organize our elections—employing at-large or mandatory majority vote procedures—repeatedly dilutes the impact of certain groups’ ballots, in the process undermining the significance of the act of voting.¹

The United States Supreme Court has been reluctant to enter into political questions.² In 1946, the Court refused to intervene on behalf of Kenneth Colegrove, a faculty member at Northwest University in Illinois who claimed that he was being discriminated against because his vote in the Seventh District was worth one-eighth that of individuals in the Fifth District.³ Justice Frankfurter wrote in the *Colegrove v. Green*⁴ opinion that the Court would not enter into such a “political thicket.”⁵ Yet, in 1962, the Court did just that in *Baker v. Carr*⁶ when it decided that the lower courts should apply the Fourteenth Amendment’s equal protection requirement to determine whether districting plans were constitutionally sound.⁷ From this beginning, the Court continued to expand judicial intervention in political districting cases.⁸

1. CHARLES L. ZELDEN, *VOTING RIGHTS ON TRIAL*, at xi (2002).

2. *See Id.* at 124.

3. GENE GRAHAM, *ONE MAN, ONE VOTE: BAKER V. CARR AND THE AMERICAN LEVELLERS* 23–24 (1972).

4. 328 U.S. 549 (1946).

5. *Id.* at 556.

6. 369 U.S. 186 (1962).

7. ANDREW HACKER, *CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION* 27 (1963). The Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

8. *See infra* Part III.

This article will examine the Court's initial refusal to get involved in the *Colegrove* case.⁹ It will then examine *Baker v. Carr* and trace the cases that pushed the doors wide open for the Court to begin hearing cases involving states' redistricting plans up to *Davis v. Bandemer*.¹⁰ Then, the path leads to *Vieth v. Jubelirer*,¹¹ a case that attempted to stop the confusion that resulted from the *Bandemer* decision.¹² Finally, this article will discuss whether *Vieth* actually managed to clear the air, and by what standards state districting plans can now be judged.¹³ When the journey is through, this article discusses the potential for political gerrymandering claims to arise under the Fourteenth Amendment, and what alternatives exist to protect one of this nation's most fundamental institutions—the electoral process.¹⁴

II. FACTS

A. Redistricting

The original plaintiffs in *Vieth v. Jubelirer*, Richard Vieth, Norma Jean Vieth, and Susan Furey, were registered Pennsylvania Democrats.¹⁵ The defendants included the Commonwealth of Pennsylvania and those responsible for Act One, Pennsylvania's new redistricting plan.¹⁶ According to the plaintiffs, the 2000 census resulted in Pennsylvania having two less congressional representatives than previous years, for a total of nineteen representatives.¹⁷ With the new population figures in hand, Pennsylvania's General Assembly began the process of redistricting.¹⁸ Even with a Republican majority in both state houses and a Republican governor,¹⁹ the two houses could not agree on a redistricting plan in 2001.²⁰

Meanwhile, Republican Party leaders on a national level started encouraging a redistricting plan that would allegedly serve as a retaliatory measure for redistricting plans in other parts of the country that favored the

9. See *infra* Part III.A.

10. 478 U.S. 109 (1986). See *infra* Parts III.B. and III.C.

11. 541 U.S. 267 (2004).

12. See *infra* Part IV.

13. See *infra* Part V.

14. *Id.*

15. *Vieth v. Jubelirer*, 541 U.S. 267, 271–72 (2004) (“*Vieth IV*”).

16. *Id.* at 272.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002) (“*Vieth I*”). According to *Vieth I*, among the nationally recognized political personalities implicated in the redistricting plan were United States Senator Rick Santorum, Speaker of the House Dennis Hastert, and political consultant Karl Rove. *Id.*

Democratic Party.²¹ In January 2002, after a Conference Committee vote that fell down party lines, Pennsylvania's legislature passed the redistricting bill that became Act One upon the governor's signature.²²

Act One divided Pennsylvania's 12,281,054 residents among the State's allotted nineteen districts.²³ Although an even distribution of those residents would have meant districts of 646,371 or 646,372 individuals, Act One left the largest district with 646,380 and the smallest district with 646,361.²⁴ In addition, Act One used its congressional districts to slice up local governments.²⁵ The ultimate effect of all this slicing and dicing was the potential for the Republican Party to walk away from the upcoming congressional elections with thirteen of the nineteen available seats notwithstanding a general population that was approximately half Republican and half Democrat.²⁶

The plaintiffs wanted to prevent the redistricting of Pennsylvania according to Act One's design.²⁷ The complaint included a claim for infringement on the constitutional requirement to equally proportioned districts as mandated by Article I, Section Two of the United States Constitution.²⁸ Plaintiffs also claimed a Fourteenth Amendment violation because the new plan, with its oddly shaped districts and lack of regard for political boundaries, was an attempted political gerrymander.²⁹

B. Procedural History

Initially, the district court dismissed the plaintiffs' claims against the Commonwealth of Pennsylvania based on sovereign immunity according to the Eleventh Amendment.³⁰ The district court also dismissed the political gerrymandering claim because the plaintiffs failed to show that the redistricting plan actually discriminated against them.³¹ On the other hand, the court refused to dismiss the plaintiff's complaint that the plan violated the Article I, Section 2 requirement of equally populated districts.³²

21. *Id.*

22. *Id.* Every Democrat on the Conference Committee opposed the redistricting plan, while every Republican member supported the plan. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* The 1992 redistricting plan resulted in the division of twenty-seven local governments. *Id.* at 535-536. By comparison, Act One resulted in the division of eighty-four local governments. *Id.* at 535.

26. *Vieth I*, 188 F. Supp. 2d at 536.

27. *Vieth IV*, 541 U.S. at 272.

28. *Id.*

29. *Id.*

30. *Vieth I*, 188 F. Supp. 2d at 539.

31. *Id.* at 547.

32. *Id.* at 543.

At trial, the district court found that, in light of the very real possibility that districts could be created with equal populations, the defendants failed to provide a valid justification for its unequal population distribution among districts.³³ Instead of presenting a remedy, however, the court directed the state legislature to draft a new plan that would meet constitutional requirements, with the district court retaining jurisdiction until the new plan could be created.³⁴

As a result of this order, Pennsylvania's General Assembly created another plan for congressional districting.³⁵ Upon the governor's signature, the plan became Act Thirty-Four.³⁶ Under this new plan, the difference between the district with the highest population and lowest population would have been ninety-seven.³⁷ The plaintiffs wanted the district court to compel remedial districts.³⁸ Unlike their argument at trial, this time the plaintiffs failed to show a lack of good faith by the defendants in creating the districts.³⁹ The court believed that the Pennsylvania legislature attempted to create equally sized districts when it enacted Act Thirty-Four.⁴⁰ Therefore, the Act was not in violation of Article I, Section 2 of the United States Constitution.⁴¹ Not only did the district court hold that Act Thirty-Four cured any problems present in Act One, but also that the revised redistricting plan did not constitute a political gerrymander.⁴² From this decision, the plaintiffs appealed to the Supreme Court of the United States.⁴³

III. BACKGROUND

In the year 1812, a strange creature appeared on the political map of Massachusetts.⁴⁴ State Democrats conjured up this creature to aid in securing elections.⁴⁵ The creature was a political district drawn by the legislature

33. *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 678 (M.D. Pa. 2002) ("*Vieth II*").

34. *Id.* at 678-79.

35. *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 480 (M.D. Pa. 2003) ("*Vieth III*").

36. *Id.*

37. *Id.* at 481.

38. *Id.* at 480.

39. *Id.* at 483.

40. *Id.*

41. *Veith III*, 241 F. Supp. 2d at 485.

42. *Id.* at 485.

43. *Vieth IV*, 541 U.S. at 273.

44. AM. BAR ASSOC. SPECIAL COMMITTEE ON ELECTION LAW AND VOTER PARTICIPATION, DIV. OF PUB. SERV. ACTIVITIES, CONGRESSIONAL REDISTRICTING: A PUBLIC INFORMATION MONOGRAPH 3 (1981).

45. *Id.*

with the encouragement of the governor, Elbridge Gerry.⁴⁶ Compared to a salamander, the creature was dubbed the “gerrymander.”⁴⁷ Gerrymandering,⁴⁸ once referred to as “the art of political cartography,” is essentially a method of drawing the political map so that one party is benefited while the other party is harmed.⁴⁹ Since then, courts continued to struggle with the influence of the gerrymander on American politics, especially as it relates to the Equal Protection Clause of the Constitution.⁵⁰

Part of the reason that there has been a struggle may lie in the fact that, to some extent, political gerrymandering (not including racial gerrymandering) is tolerable and even expected.⁵¹ In the final analysis, the United States Supreme Court allows politically motivated redistricting under several conditions.⁵² Legislatures can use their districting power to create districts that favor their own parties.⁵³ The Constitution does not require that there be any proportional relationship between the size of the political party in the general population and its representation in the legislature.⁵⁴ Legislatures are allowed to create districts that keep existing candidates in office.⁵⁵ Finally, the Supreme Court has not foreclosed on individual politicians creating districts that protect their own interests and ambitions.⁵⁶

Two very common methods used by politicians to create favorable districts are breaking up groups of minority voters into multiple districts and placing groups of minority voters into small numbers of districts.⁵⁷ The first method dilutes votes because it takes a group that might normally vote in a unified manner, divides it into smaller pieces, and places those pieces into different districts so that those voters’ voices are drowned out by the majority of voters in the new districts.⁵⁸ This type of gerrymandering is known as “cracking.”⁵⁹ The second approach dilutes votes because, by lumping together all (or as many as possible) of the minority voters into a few districts, it prevents that group from affecting elections in other districts and “wastes”

46. *Id.*

47. *Id.*

48. Gerrymandering is “[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” BLACK’S LAW DICTIONARY 708 (8th ed. 2004).

49. HACKER, *supra* note 7, at 46–47.

50. *See Vieth IV*, 541 U.S. at 276–77.

51. *See J. GERALD HEBERT ET. AL., THE REALISTS’ GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS*, 13 (2000).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. 25 AM. JUR. 2D *Elections* §§ 56, 57 (2004).

58. *Id.* at § 56.

59. *Vieth IV*, 541 U.S. at 286, n.7.

that group's voting unity in the saturated districts.⁶⁰ This type of gerrymandering is known as "packing."⁶¹

This section will start by examining the United States Supreme Court's initial hesitation to become entangled in individual states' districting disputes.⁶² It will then show how the Court finally became involved in districting disputes via the constitutional requirement of equally populated districts.⁶³ From there, the Court found itself sorting out "packing" and "cracking" on a racial level, thus forcing the courts to decide the propriety of racial gerrymandering.⁶⁴ From there, it was only a small step for the Court to become completely ensnared in questions of political gerrymandering.⁶⁵

A. Court Involvement in Political Districting

Initially, courts were reluctant to get involved in districting disputes.⁶⁶ The Supreme Court demonstrated its reluctance in the 1946 opinion of *Colegrove v. Green*.⁶⁷ The plaintiffs in that case pointed to the failure of the Illinois districts to meet the requirements of compactness and generally equal population distribution.⁶⁸ In response, Justice Frankfurter pointed out that the plaintiff had not suffered a wrong, but rather the complaint concerned a particular segment of the Illinois population.⁶⁹ Justice Frankfurter also noted that court involvement in politics on this level was "hostile" to this nation's political system.⁷⁰ The Constitution's make-or-alter provision, Article I, Section Four, charged Congress with checking political districts.⁷¹

60. 25 AM. JUR. 2D *Elections* § 57 (2004). In *Vieth IV*, Justice Scalia notes that packing can occur naturally based on the fact that sound groups (in this case, political groups) are inclined to "cluster," so district lines drawn around these groups would make them appear somewhat packed. *Vieth IV*, 541 U.S. at 289–90.

61. *Vieth IV*, 541 U.S. at 286 n.7. Samuel Issacharoff and Pamela S. Karlan identified a third form of political gerrymandering known as "shacking." Samuel Issacharoff & Pamela S. Karlan, *The Law of Democracy: The Texas and Pennsylvania Partisan Gerrymandering Cases: Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 552 (2004). In this type of gerrymandering, mapmakers examine voter demographics as well as where the representatives live (the representative's "shack"). *Id.* Districts can be redrawn so that the incumbent representative can either be cut out of the district, or two incumbents (previously from different districts) can be drawn into one district, forcing them to square-off in the upcoming election. *Id.*

62. See *infra* Part III.A.

63. See *infra* Part III.B.

64. See Part III.C.1.

65. See *infra* Part III.C.2.

66. See *Colegrove v. Green*, 328 U.S. 549 (1946).

67. *Id.*

68. *Id.* at 550–51.

69. *Id.* at 552.

70. *Id.* at 553–54.

71. *Id.* at 554.

In order to avoid stepping on Congress's toes, the Supreme Court resolved the dilemma by leaving the remedy with the very same groups that created the districts in the first place—state legislatures—then by abdicating the issue to Congress.⁷² By keeping districting disputes confined within the legislative branch, the Court avoided entering what Justice Frankfurter referred to as the “political thicket.”⁷³

B. The Court Draws the Line (Right Through the Political Thicket)

Less than twenty years later, the inequality of district sizes was becoming hard to ignore.⁷⁴ Tennessee served as an example of how unequal population growth could result in Equal Protection Clause claims.⁷⁵ Populations redistributed as people from the countryside moved into the cities.⁷⁶ The state's districting plan, however, did not reflect these changes.⁷⁷ For example, one Tennessee congressman represented three times as many constituents as certain other rural congressmen.⁷⁸ Not surprisingly, this discrepancy was readily apparent in the distribution of tax money, with farms receiving subsidies and exemptions while cities searched for a way to get more.⁷⁹ In order to address this inequality, the United States Supreme Court would have to deal head-on with *Colegrove*.⁸⁰

72. *Colegrove*, 328 U.S. at 556.

73. *Id.* In cautioning the Court about becoming involved in political disputes such as redistricting cases, Justice Frankfurter stated,

Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.

Id.

74. See GRAHAM, *supra* note 3, at 12–18.

75. *Id.* at 11–12.

76. *Id.*

77. *Id.* at 15–16. Tennessee was not the only state facing this type of predicament. See *id.* at 13. Problems with representation in Chicago prompted that city to warn Illinois of its desire to secede over the situation if it were not improved. *Id.*

78. *Id.* at 16.

79. *Id.* at 18.

80. See *Baker v. Carr*, 369 U.S. 186, 202 (1962). Joseph Carr and Charlie Baker of *Baker v. Carr* did not meet until late 1965, three years after the case was decided. GRAHAM, *supra* note 3, at 11. Carr, the Secretary of State in Tennessee, showed up at Baker's Memphis office to introduce himself, saying, “I figured it was about time we met since everybody keeps using our names together.” *Id.* Carr was named as a defendant in the case because of his political position. *Id.* at 19.

1. *Baker v. Carr Gets the Court Moving*

In *Baker v. Carr*, jurisdiction arose through Article III, Section Two of the Constitution and 28 U.S.C. § 1343(3)⁸¹ and the plaintiffs had standing because the issue was personal, affecting the individual's right to vote.⁸² Although the nonjusticiability of political questions shut down the claim in *Colegrove*, the Court now held that the apportionment in this case was not a political question.⁸³ The Court then gave a list of factors to aid in determining whether an issue before the Court was a political question.⁸⁴ Those factors were:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁸⁵

The only reason that a court would need to dismiss a claim for presenting a political question would be if one of these factors presented appeared inseparable from the issue facing the court.⁸⁶ Cases would have to be examined on an individual basis to determine the presence of a political question.⁸⁷ In addition, any claim under the Guaranty Clause would still be nonjusticiable.⁸⁸ By showing the requisite discrimination, plaintiffs could jump out of the political question ring and potentially land safely under the protection of the Equal Protection Clause.⁸⁹

The Boston Globe noted that *Baker v. Carr* started courts on a course that would "change Congress."⁹⁰ Though this was a milestone in the progression of voting rights,⁹¹ the ultimate result was anti-climactic—on re-

81. *Baker*, 369 U.S. at 200.

82. *Id.* at 204, 208.

83. *Id.* at 209.

84. *Id.* at 217.

85. *Id.*

86. *Id.* at 217.

87. *Baker*, 369 U.S. at 217.

88. *Id.* at 218.

89. *Id.* at 209–10.

90. Nelson W. Polsby, *Election 2000: What Does it All Mean? No Reason to Fix a System That Works*, BOSTON GLOBE, November 9, 2000, at A19.

91. GRAHAM, *supra* note 3, at 12.

mand the lower court expressed a desire to maintain a low level of court involvement and sent the districting plan back to the legislature to correct its shortcomings.⁹² Still, after 150 years of shutting out political questions, the door had finally been cracked open.⁹³ The momentum carried the Court (and the lawsuits) forward, and in 1963 the Supreme Court examined *Gray v. Sanders*.⁹⁴

2. *Cases Continue to Ride on the Back of Baker v. Carr*

Gray addressed the districting system in Georgia where one to three representatives were given to each county based on the county's population.⁹⁵ In a statewide primary election, a candidate receiving the highest number of votes in a county was entitled to two votes for each representative to which that county was entitled.⁹⁶ Through this system, one of Georgia's counties that had 14.11% of the state's population only had 1.46% of the unit votes which determined the winner in a statewide primary.⁹⁷ Broken down by residents, one county had one unit vote for 938 residents, while another had one unit vote for 92,721 residents.⁹⁸ While the Court had jurisdiction and standing based on *Baker*, it did not use the Fourteenth Amendment as a starting point.⁹⁹ Instead, the Fifteenth and Nineteenth Amendments held the key.¹⁰⁰ Because Georgia's system weighted some votes more than others, it effectively discriminated against anyone whose vote was weighted less.¹⁰¹ Then the Court called in the Fourteenth Amendment, noting that all votes should be weighted equally.¹⁰² Based on these considerations, it appeared that the Constitution could require nothing less than "one person, one vote."¹⁰³

The next year, the Court marched ahead with the cadence, "one person, one vote," still ringing in its ears when it decided *Wesberry v. Sanders*.¹⁰⁴ This case was the final strike on *Colegrove v. Green*.¹⁰⁵ Plaintiffs in *Wesberry* complained that the district apportionment in Georgia resulted in

92. See *Baker v. Carr*, 206 F. Supp 341, 348, 350 (1962).

93. ZELDEN, *supra* note 1, at 124.

94. 372 U.S. 368 (1963).

95. *Id.* at 371.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 373, 376.

100. *Gray*, 372 U.S. at 379.

101. *Id.*

102. *Id.*

103. *Id.* at 381.

104. 376 U.S. 1 (1964).

105. GRAHAM, *supra* note 3, at 267.

some of their congressmen representing only half of the constituents that other congressmen represented.¹⁰⁶ This, in turn, violated their Fourteenth Amendment rights.¹⁰⁷ The district court relied on *Colegrove* to dismiss the claim.¹⁰⁸

The Supreme Court, on the other hand, drew a connection between *Wesberry* and *Baker* and held that the case was justiciable.¹⁰⁹ This afforded the opportunity to examine the case on its merits.¹¹⁰ Allowing some votes to carry more weight than others seemed to run counter to this country's democratic process and the ideas behind the Constitution.¹¹¹ After examining Article I, Section Two of the Constitution, the Court determined that elections for the House of Representatives had to be on a population basis.¹¹² In fact, debates at the 1787 Constitutional Convention touched on that very topic as delegates pushed for proportional representation so that each representative would answer to an equal number of citizens.¹¹³ Based on the nation's history and what the Court believed were constitutional requirements, the holding in the *Wesberry* case required that the House of Representatives maintain "equal representation for equal numbers of people."¹¹⁴ This holding acknowledged the difficulty of creating districts with exactly equal population distribution, but required that those creating the political maps make such districts with that ultimate goal in mind.¹¹⁵

In 1964 the Supreme Court handed down *Reynolds v. Sims*.¹¹⁶ According to the plaintiffs in that case, the Alabama Constitution required the legislature to reapportion every ten years, but the legislature had not been meeting that requirement.¹¹⁷ Plaintiffs claimed that the last apportionment was done as a result of a federal census from 1900.¹¹⁸ Meanwhile, Alabama's population had increased more in some areas than in others.¹¹⁹ The ultimate result of this, according to the plaintiffs, was that their voting rights were being violated, and they had received no assistance from the courts in

106. *Wesberry*, 376 U.S. at 2.

107. *Id.* at 3.

108. *Id.*

109. *Id.* at 6.

110. *Id.* at 7.

111. *Id.* at 8.

112. *Wesberry*, 376 U. S. at 8-9.

113. *Id.* at 10-11.

114. *Id.* at 18.

115. *Id.*

116. 377 U.S. 533 (1964).

117. *Id.* at 540-41.

118. *Id.* at 540.

119. *Id.*

correcting the problem.¹²⁰ Once again, *Baker* provided the grounds for jurisdiction.¹²¹

The *Reynolds* Court harkened back to *Baker* and *Wesberry*, noting the importance that those cases placed on population distribution and the weight of individual citizens' votes.¹²² No other right could be enjoyed to its fullest where the right to vote had been diminished.¹²³ In applying the "one person, one vote" standard, the *Reynolds* Court held that, to pass muster under the Equal Protection Clause, states must establish "substantially equal . . . legislative representation."¹²⁴ In addition, when a state legislature has two houses, both must be apportioned by population.¹²⁵

The requirement of "substantially equal" apportionment did not mean absolutely perfect population distribution.¹²⁶ Instead, based on *Wesberry*, the requirement would be "as nearly as practicable."¹²⁷ This standard provided some flexibility to states in creating districts for their legislatures.¹²⁸ Where the distribution deviates somewhat from the equal-apportionment requirement, the deviation must be due to some genuine state interest.¹²⁹ These interests include consideration for political boundaries, compactness, and contiguity.¹³⁰

These are not the only traditional interests that states use in creating districts.¹³¹ The American Bar Association's publication *The Realists' Guide to Redistricting* lists five customary interests (as well as mentioning interests that may vary among the states).¹³² In addition to those enumerated in *Reynolds*, the ABA also includes, "respect for communities of interest" and "protection of incumbents."¹³³ So far, there has been no exact definition for what constitutes compactness.¹³⁴ The test seems to run from scientific assessment (such as measuring "dispersion") to simply looking at the district shape and using a common sense approach.¹³⁵ Contiguity seems to be a minor factor for consideration.¹³⁶ While those creating political maps can

120. *Id.*

121. *Id.* at 542.

122. *Reynolds*, 377 U.S. at 557–59.

123. *Id.* at 560.

124. *Id.* at 568.

125. *Id.*

126. *Id.* at 577.

127. *Id.*

128. *Reynolds*, 377 U.S. at 578.

129. *Id.*

130. *Id.*

131. HEBERT, *supra* note 51, at 59.

132. *Id.* at 59–65.

133. *Id.* at 59.

134. *Id.*

135. *Id.* at 60.

136. *Id.* at 61.

use community interests in drawing borders, districts cannot be created strictly on the basis of race.¹³⁷

C. The Gerrymander Rears Its Ugly Head

Though the Supreme Court was able to dispose of unequally populated districts through the protection of the Fourteenth Amendment, that evasive creature—the political gerrymander—proved tougher to wrangle.¹³⁸ Gerrymandering itself was an old game in American politics, though it was not known as such until 1812.¹³⁹ It is possible that gerrymandering dates back to the early 1700s in the United States.¹⁴⁰ Even Patrick Henry may have used the gerrymander in an effort to prevent James Madison from participating in the First Congress.¹⁴¹ In fact, not only did the gerrymander have a long history in this country prior to *Baker* and its offspring, but it had even been scrutinized by the Supreme Court the year before *Baker* was decided.¹⁴²

1. *The Racial Gerrymander*

There is no denying that in the late 1950s through the 1960s the United States faced strong forces that acted to shape American culture.¹⁴³ It was 1955 when Rosa Parks refused to move to the back of the bus in compliance with Jim Crow laws, igniting the bus boycott in Montgomery, Alabama.¹⁴⁴ It was September of 1957 when Central High School in Little Rock, Arkansas, was to admit black students as a part of desegregation.¹⁴⁵ Those students entered the school with the sound of “two, four, six, eight, we ain’t going to integrate,” ringing in their ears.¹⁴⁶ It was 1960 when a small group of black students in North Carolina sat down at a Woolworth’s to have lunch and refused service.¹⁴⁷ Over the next several days, hundreds more had joined those students, beginning what became known as the “sit-in movement.”¹⁴⁸ The year 1961 brought the Freedom Rides.¹⁴⁹ The summer of

137. HEBERT, *supra* note 51, at 63.

138. See *Vieth IV*, 541 U.S. at 280–81.

139. *Id.* at 274.

140. *Id.*

141. *Id.*

142. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

143. See WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II* (Oxford University Press 3d ed. 1995).

144. *Id.* at 161–62.

145. *Id.* at 158.

146. *Id.*

147. *Id.* at 165.

148. *Id.*

149. CHAFE, *supra* note 143, at 208.

1963 brought a crowd of 250,000 to the Lincoln Memorial to hear the speech, "I Have a Dream," given by Dr. Martin Luther King.¹⁵⁰ Then, 1965 brought race riots to Los Angeles as well as the assassination of Malcolm X.¹⁵¹

This was the climate in which the racial gerrymander slithered its way to the steps of the Supreme Court.¹⁵² In the 1957 case, *Gomillion v. Lightfoot*, Alabama's legislature took a once-square Tuskegee city boundary and reshaped it into a twenty-eight-sided Tuskegee city boundary.¹⁵³ The new shape cut out almost all 400 black voters without cutting out any white voters from the city, meaning the ousted black voters could not participate in the municipal elections.¹⁵⁴ The black residents, believing they had a decent discrimination claim, sued for violations of the Fourteenth and Fifteenth Amendments.¹⁵⁵ The Supreme Court, while still tipping its hat to individual states' authority to create and shape political districts, noted that the Constitution does, in fact, place a limit on that districting power.¹⁵⁶ But it was the Fifteenth Amendment, not the Fourteenth, that the Court invoked to limit states' power.¹⁵⁷ States simply were not free to slap a coat of paint on racial discrimination and call it "politics" without violating the Fifteenth Amendment.¹⁵⁸

Baker had not been decided yet, but because the Court side-stepped the Fourteenth Amendment and resolved *Gomillion v. Lightfoot* using the Fifteenth Amendment, the Court's refusal to adjudicate these types of districting claims in *Colegrove* did not present an obstacle.¹⁵⁹ Where *Colegrove* presented a question of district apportionment, *Gomillion* presented a question of racial discrimination in voting rights—a Fifteenth Amendment issue.¹⁶⁰ This decision made racial gerrymandering unconstitutional, yet, be-

150. *Id.* at 312.

151. *Id.* at 318.

152. "By May of 1963, the Justice Department had become involved in voting rights issues in 145 Southern counties—nearly a 500 percent increase over the thirty counties subject to federal intervention in 1960." *See id.* at 208.

153. *Gomillion*, 364 U.S. at 340.

154. *Id.* at 341.

155. *Id.* at 340.

156. *Id.* at 342, 344.

157. *Id.* at 345.

158. *Id.*

159. *See Gomillion*, 364 U.S. at 345–46.

160. *Id.* at 346. *Shaw v. Reno* addressed the converse situation of *Gomillion*—gerrymandering in order to benefit racial minorities. *See* 509 U.S. 630, 633 (1993). This type of gerrymandering has been referred to as "affirmative racial gerrymandering." Melissa L. Saunders, *Redistricting in a New America: of Minority Representation, Multiple-Race Responses, and Melting Pots: Redistricting in the New America*, 79 N.C. L. REV. 1367, 1367 (2001). In *Shaw*, the court examined a districting plan in North Carolina that created districts that had been described as a "Rorschach ink-blot test" by the lower court and a "bug splat-

cause it was not decided under the Equal Protection Clause, it proved to be little help in resolving questions surrounding political gerrymandering.¹⁶¹

2. *The Political Gerrymander*

In 1985 *Davis v. Bandemer* presented an opportunity for the Supreme Court to deal squarely with two important questions: 1) Are political gerrymandering claims justiciable? 2) If so, what are the standards for determining whether there has been a violation of the Equal Protection Clause?¹⁶² The claim was brought by a group of Democrats from Indiana who claimed that the state's legislature "unconstitutionally diluted" their votes through a 1981 redistricting plan.¹⁶³ Because the plan created oddly shaped districts that had little relation to political boundaries and tended to favor Republicans, the district court decided that the plan was indeed unconstitutional.¹⁶⁴

In deciding justiciability of a political gerrymandering claim, the Court jumped back to *Baker* and retraced its steps through claims of unequally populated districts, to racial gerrymandering, to cases that hinted at the justiciability of political gerrymandering questions.¹⁶⁵ Though the Court had upheld district court decisions that political gerrymandering was not justiciable, it was entitled to answer the question for itself once and for all.¹⁶⁶ In order to do so, the *Baker* political question analysis had to be addressed.¹⁶⁷ The analysis for equally populated districts as a political question used in *Baker* was the same for political gerrymandering cases.¹⁶⁸ One factor in

tered on a windshield" by the *Wall Street Journal*. *Shaw*, 509 U.S. at 635. A section of one district ran along I-85, becoming so narrow in some places that a state legislator commented that "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district." *Id.* at 636. Because the North Carolina redistricting plan was "so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race" without adequate justification, the Court held that the plaintiffs did have a possible Fourteenth Amendment claim. *Id.* at 657-58. The Court remanded the case, leaving open the possibility that the state might offer a "compelling governmental interest" to justify the redistricting plan. *Id.* at 658.

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

162. See *id.*

163. *Id.* at 113.

164. *Id.* at 115-16.

165. *Id.* at 118-20.

166. *Id.* at 120-21.

167. *Bandemer*, 478 U.S. at 121.

168. *Id.* at 122. Gerrymandering is not the only method that political parties use to work around the "one person, one vote" requirement of equally populated districts. See Peter S. Canellos, *Political Gamesmanship is a Losing Proposition*, BOSTON GLOBE, January 4, 2005, at A3. Canellos points Republican and Democrat tactics during the 2000 presidential election including aiding military personnel in voting and less strict registration requirements for individuals that relocate frequently, respectively. *Id.* Even the location of early voting booths and the number of voting booths available (intended to increase or decrease the wait in line

particular would ultimately prove to be key in the *Vieth* decision.¹⁶⁹ In deciding whether political gerrymandering was a political question, the Court stated that it was not “persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided.”¹⁷⁰

The “one person, one vote” requirement of equally-populated districts made mandatory by *Reynolds* was re-cast in light of “fair representation.”¹⁷¹ Because districts with different populations and different numbers of representatives resulted in different weights of individual votes, the issue boiled down to representation.¹⁷² Likewise, racial gerrymandering cases concerned representation because specific racial groups were being denied the opportunity to elect the officials of their choice.¹⁷³ In fact, one racial gerrymandering case acknowledged the existence of a “political fairness principle” in relation to districting cases.¹⁷⁴ Connecting the dots from case to case, the Court reasoned that the issue in *Bandemer* also concerned representation, and the fact that it concerned a political group did not foreclose its justiciability.¹⁷⁵

Though political gerrymandering claims were now officially declared justiciable, whether such districting violated the Equal Protection Clause was another matter.¹⁷⁶ The district court had applied a two-part test that received approval from the Supreme Court.¹⁷⁷ The test required an intent to discriminate against and a definite discriminatory effect on a specific political subdivision.¹⁷⁸ Disposing of the first part of the test—intent—was a fairly simple matter.¹⁷⁹ The Court noted that not only is districting meant to be a method of creating elections that are somewhat “politically fair,” but random districting without regard to political concerns could result in the most unfair elections of all.¹⁸⁰ Because legislatures create districts with the political effects of each line in mind, the result of that districting plan is likely intentional, fulfilling the first part of the test.¹⁸¹

to vote) can be used to influence citizens’ voting habits. *Id.*

169. See *Vieth IV*, 541 U.S. 267.

170. *Bandemer*, 478 U.S. at 123.

171. *Id.* at 123–24.

172. *Id.* at 124.

173. *Id.*

174. *Id.* at 125.

175. *Id.*

176. *Bandemer*, 478 U.S. at 127.

177. *Id.* at 127.

178. *Id.*

179. *Id.* at 129.

180. *Id.* at 128–29.

181. *Id.*

In presenting the second part of the test—effects—the *Bandemer* plaintiffs did not show sufficient discrimination to support an Equal Protection Clause violation.¹⁸² Initially, the Court made it clear that the Constitution does not command results in the legislature that are proportionate to the members of a political group in the general population.¹⁸³ In fact, the same also applies to racial groups.¹⁸⁴ To raise a districting plan's resulting discrimination to the level of Equal Protection Clause violation, the plan must mean "excluded groups have less opportunity to participate in the political processes and to elect candidates of their choice."¹⁸⁵ Just because a party fails to get its candidate elected does not mean that the party has been denied the chance to impact politics.¹⁸⁶ Instead, plaintiffs would need to show a more general discriminatory effect over multiple elections.¹⁸⁷ The results of one election alone would not be enough to prove a violation of the Equal Protection Clause in a political gerrymandering claim.¹⁸⁸

Because there was insufficient evidence of adequate discriminatory effect under the Equal Protection Clause, the district court's decision that the districting plan was unconstitutional was reversed.¹⁸⁹ This decision, however, was not unanimous as only four justices formed the plurality.¹⁹⁰ Not only was the Court divided, but both Republicans and Democrats believed that the decision was a "victory."¹⁹¹ In fact, the case had created interesting alliances between Republicans and Democrats prior to the final decision.¹⁹²

Still, *Bandemer* settled the issue of whether political gerrymandering claims were justiciable and presented a two-part test of intent and effect for use in deciding whether districting plans are unconstitutional.¹⁹³ Lower courts would wrestle with this test for the next eighteen years.¹⁹⁴ The tally at the end of nearly two decades would show that no relief was granted under typical political gerrymandering claims.¹⁹⁵ One case was found to violate the Equal Protection Clause, but it did not concern "the drawing of district

182. *Bandemer*, 478 U.S. at 129.

183. *Id.* at 130.

184. *Id.*

185. *Id.* at 131 (quoting *Rogers v. Lodge*, 458 U.S. 613, 624 (1982)).

186. *Id.* at 132–33 (noting that denial of chance to participate would include providing fewer chances to register and vote and to participate in candidate nomination).

187. *Id.* at 132–35.

188. *Bandemer*, 478 U.S. at 135.

189. *Id.* at 143.

190. *Id.* at 113 (White, J., Brennan, J., Marshall, J., and Blackmun J., joining).

191. Ruth Marcus, *Gerrymandering May Be Illegal, Justices Rule*, WASH. POST, July 1, 1986, at A1.

192. *Id.* In *Bandemer*, the Republican National Committee supported state Democrats in an effort to break redistricting schemes in other states. *Id.*

193. See *Bandemer*, 478 U.S. 109 (1986).

194. *Vieth IV*, 541 U.S. at 279.

195. *Id.* at 279–80.

lines.”¹⁹⁶ In *Vieth v. Jubelirer*, the United States Supreme Court acknowledged and addressed the struggle courts have faced in deciding political gerrymandering claims since *Bandemer*.¹⁹⁷

IV. REASONING

A. The Plurality

Writing for the plurality, Justice Scalia first noted that the underlying issue in *Vieth v. Jubelirer* was whether the Supreme Court’s decision regarding the justiciability of political gerrymandering claims in *Davis v. Bandemer* was made in error, and if that question was answered in the negative, by what standard should political gerrymandering claims be judged.¹⁹⁸ Initially, Justice Scalia traced the history of political gerrymandering in the United States.¹⁹⁹ This discussion led to the standard set forth in *Davis v. Bandemer*, including the key cases that prompted that decision and the fallout from that decision.²⁰⁰ After deciding that the standard proposed in *Bandemer* was, in fact, no standard at all, the discussion turned to suggested alternate standards including: the standard proposed by the plaintiffs-appellants, the standard suggested by Justice Powell’s opinion in *Bandemer* (concurring in part and dissenting in part), and the concurring and dissenting opinions in *Vieth*.²⁰¹ In concluding that political gerrymandering claims would no longer be justiciable, Justice Scalia affirmed the district court.²⁰²

1. *The History of the Political Gerrymander*

In a recap of political gerrymandering history, Justice Scalia pointed to its presence in the American colonies in the early Eighteenth Century.²⁰³ The gerrymander was alive and well, and working its political magic even before it earned its name as a result of Governor Elbridge Gerry’s districting scheme.²⁰⁴ Justice Scalia emphasized Congress’s authority to restrain the political gerrymander through Article I, Section Four, the Constitution’s “make or alter” clause.²⁰⁵ In addition, where “contiguity, compactness, and equality of population” had once been required, Congress now only man-

196. *Id.*

197. *See id.*

198. *Id.* at 272.

199. *See id.* at 274–77.

200. *Veith IV*, 541 U.S. at 277–84.

201. *See id.* at 284–305.

202. *See id.* at 305–06.

203. *Id.* at 274.

204. *Id.* at 274.

205. *Id.* at 275–76.

dates the “single-member-district-requirement.”²⁰⁶ Despite Congress’s constitutional authority over districting, in 1986 the Supreme Court decided *Davis v. Bandemer*, holding that the Equal Protection Clause gave the judicial branch the same authority.²⁰⁷

2. *Political Questions and Davis v. Bandemer*

Though *Marbury v. Madison* explicitly held that the courts are to interpret the law, some questions were not meant for the courts because they were either expressly given to another branch of government or because there were no rights involved over which the courts have authority.²⁰⁸ These “political questions” were not within the judicial branch’s reach, and in 1962, *Baker v. Carr* set out the test for those questions.²⁰⁹ Of the six criteria set out in that case, the second presented the problem for political gerrymander claims, the need for a standard courts could use in deciding gerrymander cases.²¹⁰ Because there was no majority agreement on the *Bandemer* standard, and because the eighteen years since *Bandemer* was decided brought many political gerrymandering cases with all but one refusing relief, a close inspection of the so-called “standard” of *Bandemer* was in order.²¹¹

3. *The Test According to Bandemer*

Bandemer proposed a two-part test that required “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”²¹² The first step of the test posed little problem because of the ease in showing a legislature’s intent when it created a redistricting plan.²¹³ The second part of the test proved to be the conundrum.²¹⁴

206. *Veith IV*, 541 U.S. at 276.

207. *Id.* at 277.

208. *Id.* Justice Scalia emphasized that “Justice Marshall proclaimed two centuries ago, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

209. *Id.* at 277.

210. *Id.* at 278–79.

211. *Id.* at 280–281. Justice Scalia related the ironic story of the one case (that went unreported) in which judicial interference was granted: *Republican Party of North Carolina v. Hunt*, No. 94-2410, 1996 WL 60439 (4th Cir. Feb. 12, 1996). *Id.* at 287 n.8. In *Hunt*, the district court intervened because it believed that the districting plans managed to successfully block Republicans from effectively participating in the political process, and those plans would continue to block Republican participation. *Id.* Less than one week after that decision, in an election for superior court judges, all the Republican candidates won their desired seats. *Id.* This resulted in the case being remanded. *Id.*

212. *Veith IV*, 541 U.S. at 281 (quoting *Bandemer*, 478 U.S. 109, 127).

213. *Id.*

The requirement that there be a discriminatory effect necessitated more than just disproportionate results in elections.²¹⁵ A discriminatory effect meant that a particular subset of the population “had been ‘denied its chance to effectively influence the political process’ as a whole.”²¹⁶ On a statewide level, a political gerrymandering claim would only succeed if the plaintiffs showed a lack of opportunity to directly or indirectly have an impact on elections.²¹⁷

While concurring with the plurality in *Bandemer*, Justice O’Connor expressed concern over the two-part test.²¹⁸ Almost prophetically, Justice O’Connor and Justice Powell, in separate opinions, conveyed apprehensions that the judicial branch would not be able to utilize the test because the standard was not clear enough.²¹⁹ Duly noting those opinions, Justice Scalia then pointed to a long line of cases and commentary that struggled with the standard outlined by *Bandemer*.²²⁰ Justice Scalia closed that section of the opinion by stating that the *Bandemer* “standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by the appellants.”²²¹

4. *Alternate Tests*

a. The *Vieth* plaintiffs-appellants’ test

Justice Scalia addressed the standard proposed by the plaintiffs-appellants in the *Vieth* case, due in part to the fact that it was so nearly representative of other typical suggested standards.²²² The plaintiffs-appellants’ test was based on the *Bandemer* requirements of intent and effect but with requirements for demonstrating intent and effect.²²³

The intent part of the test was partially derived from cases that addressed racial gerrymandering and would require plaintiffs to demonstrate that those creating the new districts had the “predominate intent” of gaining the political upper-hand.²²⁴ According to Justice Scalia, this test would be even more ambiguous than *Bandemer*.²²⁵ Justice Scalia disapproved of the

214. *Id.* at 281.

215. *Id.* at 281.

216. *Id.* at 282 (quoting *Bandemer*, 478 U.S. 109, 132–33).

217. *Id.*

218. *Veith IV*, 541 U.S. at 282.

219. *Id.*

220. *See id.* at 282–83.

221. *Id.* at 283–84.

222. *Id.* at 284.

223. *Id.*

224. *Veith IV*, 541 U.S. at 284.

225. *Id.*

comparison drawn between racial gerrymandering and political gerrymandering.²²⁶ Not only were racial gerrymandering cases determined on an individual district basis, while here the plaintiffs proposed a statewide test, but also the Constitution prohibits race-based gerrymandering, while allowing the possibility of political gerrymandering.²²⁷

Plaintiffs-appellants patched in pieces from the Voting Rights Act's race discrimination tests to address the effects part of their test.²²⁸ This test would require a showing of a redistricting plan based on "packing" and "cracking," then an examination of the entirety of the circumstances to demonstrate that the redistricting plan prevented plaintiffs from electing a majority of the representatives even though they had the majority of the votes.²²⁹ Justice Scalia pointed out that while race is a permanent characteristic, an individual's politics may vary, not to mention the fact that the Constitution does not require proportionate representation.²³⁰ In addition, the one person, one vote requirement cannot be used in obtaining proportionate representation.²³¹ As it stands now, that requirement is based on an objective examination of the total numbers of voters and the numbers as divided among districts.²³² Translating the one person, one vote requirement, into a proportionate-representation requirement would toss the judicial branch into "a sea of imponderables."²³³

b. Justice Powell

Justice Scalia then addressed Justice Powell's concurring in part, dissenting in part opinion in *Bandemer*.²³⁴ Though Justice Powell approved of the intent and effect test of the plurality, he believed the main question was whether the districts were created without any consideration for factors other than politics.²³⁵ The shape of the districts was the key factor, but essentially all factors would converge on the general concepts of fairness and vote dilution.²³⁶ Justice Scalia criticized this approach because it meant that courts would have to examine and weigh multiple factors and then determine at what point a politically ambitious redistricting plan crossed the

226. *See id.* at 285–86.

227. *Id.*

228. *Id.* at 287.

229. *Id.* at 287–90.

230. *Veith IV*, 541 U.S. at 287–88.

231. *Id.* at 290.

232. *Id.* at 290.

233. *Id.* at 290.

234. *Id.* at 290–91.

235. *Id.*

236. *Veith IV*, 541 U.S. at 291.

Constitutional line.²³⁷ In addition, the concept of fairness was not workable for the courts.²³⁸ Potentially, a “fair” districting plan might not follow the traditional considerations of compactness, contiguity, and respect for political boundaries.²³⁹ Something more concrete than weighing a myriad of factors should be required in order for courts to get involved in partisan districting disputes.²⁴⁰

B. Justice Kennedy’s Concurring Opinion

Justice Kennedy agreed that the complaint in the *Vieth* case needed to be dismissed, however, he did not agree that the types of claims presented in *Veith* should be considered nonjusticiable if some solid test could be created for those claims.²⁴¹ A “categorical negative” (that no standard could possibly exist) is difficult to prove, and Justice Kennedy believed that the Court gave in too quickly.²⁴² The fact that there had been no standard defined in the eighteen years since *Bandemer* did not mean a firm test for political gerrymandering cases could not be found.²⁴³

Justice Kennedy’s standard would be the Fourteenth Amendment.²⁴⁴ As racial gerrymandering cases are grounded in the prohibition on classification based on race, political gerrymandering claims must be grounded in some method of classifying and districting voters that, though permissible, violates voter rights.²⁴⁵ The First Amendment would also aid in deciding political gerrymandering cases because such districting potentially infringes on voter rights based on “ideology, beliefs, or political association.”²⁴⁶

Although it appeared to Justice Kennedy that the *Vieth* case did present a situation in which the legislature had gone too far in basing its redistricting plan on political ambitions, the case still required dismissal due to the lack of a workable standard by which the plan could be judged.²⁴⁷ In response to this, Justice Scalia pointed out that there were only two options

237. *Id.*

238. *Id.* at 291.

239. *Id.*

240. *Id.*

241. *Id.* at 306 (Kennedy, J., concurring).

242. *Veith IV*, 541 U.S. at 311–13 (Kennedy, J., concurring).

243. *Id.* at 312 (Kennedy, J., concurring).

244. *Id.* at 313–14 (Kennedy, J., concurring).

245. *Id.* at 307 (Kennedy, J., concurring).

246. *Id.* at 315 (Kennedy, J., concurring).

247. *Id.* at 316–17 (Kennedy, J., concurring). Daniel Ortiz described the link between the Court’s theory that extreme gerrymandering is unconstitutional and its inability to articulate a standard as being similar to “firmly believing there is a God, but [] knowing anything about this God lies beyond human understanding.” Daniel R. Ortiz, *The Law of Democracy: Redistricting: Case Law and Consequences: Got Theory?*, 153 U. PA. L. REV. 459, 496 (2004).

for the Court in this case.²⁴⁸ Those options were either to apply an actual standard to decide the case, or admit that there is no standard and declare the issue nonjusticiable.²⁴⁹ Scalia felt that affirming the district court's decision and hoping for a standard to present itself at some point in time was not an option.²⁵⁰

C. Dissent

1. *Justice Stevens*

According to Justice Stevens, the Court wrongly dismissed plaintiff-appellant Furey's complaint because she lived in a district that was redistricted in such a manner that it violated the Equal Protection Clause.²⁵¹ The standards set forth by Justice Powell in *Bandemer* to examine gerrymandering on a district-level gave the Court its necessary "manageable standards."²⁵² Justice Stevens also agreed with the *Bandemer* Court's statement that a political gerrymander is just as justiciable as a racial gerrymander.²⁵³ Justice Stevens viewed the issue in light of First Amendment infringement.²⁵⁴ Just as employment decisions could not be made on the basis of political beliefs, neither could districting decisions.²⁵⁵

Justice Scalia noted that both the plurality and Justice Stevens agree that the court cannot manage statewide political gerrymandering claims.²⁵⁶ Disagreement arises because of the analogy using racial gerrymandering cases and because of the use of the First Amendment as a basis for deciding political gerrymandering claims.²⁵⁷ First, the Equal Protection Clause makes race-based discrimination unacceptable, while there is no equivalent prohibition for political discrimination.²⁵⁸ Second, the right to free political speech under the First Amendment does not translate to proportionate political representation.²⁵⁹

248. *Vieth IV*, 541 U.S. at 305.

249. *Id.*

250. *Id.*

251. *Id.* at 318–19 (Stevens, J., dissenting).

252. *Id.* at 322–24 (Stevens, J., dissenting).

253. *Id.* at 321 (Stevens, J., dissenting).

254. *Vieth IV*, 541 U.S. at 324 (Stevens, J., dissenting).

255. *Id.* (Stevens, J., dissenting).

256. *Id.* at 292.

257. *Id.* at 292–94.

258. *Id.* at 293.

259. *Id.* at 294.

2. Justice Souter

Justice Souter also examined redistricting plans on an individual district level.²⁶⁰ He also agreed with the plurality opinion that no manageable standard existed at the time of the *Vieth* opinion.²⁶¹ But instead of foreclosing on the justiciability of political gerrymandering questions, Justice Souter disposed of the standard as set forth in *Bandemer* and started all over with a plan that combined concepts from multiple sources including the Voting Rights Act, case law, and law journals.²⁶² Justice Scalia believed that this test would produce results similar to the *Bandemer* standard.²⁶³ The five-step test would still present a fair amount of judicial line drawing, plenty of gray area, and too many unanswered questions.²⁶⁴ Ultimately, because this test would still require a decision on whether the legislature had gone too far, Justice Scalia found the test just as unhelpful as *Bandemer*.²⁶⁵

3. Justice Breyer

Justice Scalia found Justice Breyer's dissent unworkable because not only did Justice Breyer address political gerrymandering at a statewide level, but he would base his decision on what constitutes "unjustified use of political factors" and "effective government."²⁶⁶ As with other suggested standards, this standard would require judicial line-drawing on a scale between justified and unjustified political motivations.²⁶⁷ This is complicated by the fact that the test is on a statewide level.²⁶⁸ Ultimately, Justice Scalia could discern neither "what Justice Breyer [was] testing for, nor precisely what fail[ed] the test."²⁶⁹

D. Conclusion

In closing, Justice Scalia explained that the Court's decision to reverse its direction from *Bandemer* and hold political gerrymandering claims unjusticiable was not affected by *stare decisis*.²⁷⁰ The compelling force of

260. *Vieth IV*, 541 U.S. at 295.

261. *Id.*

262. *Id.* at 295.

263. *See id.* at 297.

264. *Id.* at 296–97.

265. *Id.* at 298.

266. *Vieth IV*, 541 U.S. at 298.

267. *Id.* at 299.

268. *Id.* at 300.

269. *Id.*

270. *Id.* at 305. "Stare decisis" means "to stand by things decided." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004). This *stare decisis* rule requires courts to rule based on the

stare decisis was lessened for three main reasons.²⁷¹ First, Congress could not easily alter Court decisions concerning the Constitution.²⁷² Second, no firm test was ever laid out in *Bandemer*.²⁷³ Third, with no firm test, it would be odd to suggest that anyone actually acted in reliance on *Bandemer*.²⁷⁴ In almost two decades after the Supreme Court decided *Bandemer*, a practical standard had remained an enigma.²⁷⁵

V. SIGNIFICANCE

Although *Vieth* initiated a change from eighteen years of the *Bandemer* standard of judging political gerrymandering cases, it is difficult to say whether *Vieth* brought clarity to an obscure area of American law, or whether it simply created a whole new set of questions to confound courts and would-be plaintiffs.²⁷⁶ Either way, there are certain limitations on redistricting that remain intact, allowing courts to judge at least some aspects of the redistricting process including the one-person, one-vote standard, individual states' statutory limitations, and a prohibition on racial gerrymandering.²⁷⁷ Certainly, questions remain concerning the level of involvement allowed for political motivations in the redistricting process.

A. The Aftermath of *Vieth v. Jubelirer*

Justice Scalia's statement in *Vieth* that the Fourteenth Amendment did not "provide[] a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting" may not be as clear or decisive as it initially sounds.²⁷⁸ As one commentator noted, the ultimate effect of *Vieth* is to commit "us to another generation of

principles set forth in prior decisions. 21 C.J.S. *Courts* § 140 (1990). Courts do have the freedom to reject such principles, however, whenever they contradict other important values or there has been a minimal amount of judicial reliance on those principles. *Id.*

271. *Vieth IV*, 541 U.S. at 305–06.

272. *Id.*

273. *Id.* at 305–06.

274. *Id.* at 306.

275. *Id.*

276. *Vieth IV* was a fractured decision with Justice Scalia writing the opinion for the court joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas. *Id.* at 271. Justice Kennedy wrote the concurring opinion. *Id.* at 306. Justice Stevens, Justice Souter (joined by Justice Ginsburg), and Justice Breyer each filed a dissenting opinion. *Id.* at 317, 343, 355. Because no five Justices agreed on one view, "the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest possible grounds." *Vieth I*, 188 F. Supp. 2d at 543.

277. See *Vieth IV*, 541 U.S. at 276, 290, 293 n.4.

278. See *id.* at 305.

hacking our way through the political thicket.”²⁷⁹ When examining the varied reactions to the case from commentators and courts, this statement may ultimately prove to be true. There are those who believe that Justice Frankfurter was “half right” when he warned courts not to enter into the political thicket because those cases did not involve the rights of individual citizens.²⁸⁰ There are also those that believe Justice Frankfurter’s warning was absolutely correct, and *Vieth* is, in the end, “Frankfurter’s revenge.”²⁸¹

Some read into *Vieth* that the Supreme Court believed unanimously that political motivations can go too far when creating new districts and violate the Constitution.²⁸² Other commentators view *Vieth* as a blank check, allowing all political gerrymandering to pass constitutional muster.²⁸³ Despite all the controversy and differing opinions, the underlying theme is the same as it has been since *Bandemer*: without a standard by which to measure political gerrymander claims, no relief can be granted by the courts.²⁸⁴

These differing opinions are also seen in court reactions to *Vieth*. In *Johnson-Lee v. Minneapolis*, the district court reasoned that while the *Bandemer* standard was no longer valid, cases involving political gerrymandering remained justiciable.²⁸⁵ Therefore, the court used Justice Kennedy’s concurring opinion from *Vieth* to resolve the case.²⁸⁶ In *Shapiro v. Berger*, on the other hand, the district court found that political gerrymandering cases were not justiciable because there was no standard by which they could be judged.²⁸⁷ Still, even *Shapiro* acknowledges that Justice Kennedy’s concurring opinion in *Vieth* meant that political gerrymandering claims might be justiciable if only someone would enunciate a workable standard.²⁸⁸

B. Standards that Remain After *Vieth*

Although political gerrymandering claims cannot come before the court without a workable standard, politicians are not free to slice and dice

279. See Issacharoff & Karlan, *supra* note 61, at 578.

280. *Id.*

281. See, Heather K. Gerken, *The Law of Democracy: The Texas and Pennsylvania Partisan Gerrymandering Cases: Last in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 512, 529 (2004).

282. Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 782 (2005).

283. Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1001 (2005).

284. See *id.* at 783.

285. 2004 U.S. Dist LEXIS 19708, * 37 (D.C. Minn. Sept. 30, 2004).

286. *Id.* at * 39.

287. 328 F. Supp. 2d 496, 504 (2004).

288. *Id.*

state districts as they please since certain limitations on the districting process remain.²⁸⁹ Congress requires districts to be single-member only.²⁹⁰ Besides this Congressional requirement, individual states are allowed to place their own additional limitations on the districting process.²⁹¹

Another limitation on the districting process is a constitutional prohibition on racial gerrymandering.²⁹² While there is room for a certain level of racial considerations in creating districts, it must stop short of voter segregation based solely on race in order to avoid violating the Constitution.²⁹³ Racial discrimination requires strict scrutiny because it is prohibited by the Constitution.²⁹⁴ Discriminating against voters on the basis of politics does not receive the same level of constitutional protection, which is why racial gerrymandering standards do not translate well to political gerrymandering claims.²⁹⁵ Finally, there is the one-person, one-vote requirement.²⁹⁶ Politicians are required to carve out districts that are as equally populated as possible.²⁹⁷ In judging districts based on this standard, courts require a higher level of conformity in congressional districts than in districts created for state elections.²⁹⁸

C. Where Does the Path Lead Now?

Even if *Vieth* did not completely clear the air on political gerrymandering claims and the Fourteenth Amendment, it did send the very clear message that the test according to *Bandemer* is not going to hold water in the courts any longer.²⁹⁹ Until a manageable standard is introduced, there will be no judicial intervention in political gerrymandering claims.³⁰⁰ Plaintiffs wishing for court-ordered changes in a political-redistricting process will have basically two alternatives. The first is to use other, more traditional and definite standards such as the one-person, one-vote standard in seeking relief or other statutory standards.³⁰¹ The second, and vastly more difficult option, would be to create a standard that the courts can use in deciding

289. See *Vieth IV*, 541 U.S. at 276.

290. *Id.*

291. See *id.* at n.4.

292. HEBERT, *supra* note 51, at 50.

293. *Vieth IV*, 541 U.S. 267, 293 (2004).

294. *Id.*

295. *Id.*

296. HEBERT, *supra* note 51, at 1.

297. *Id.*

298. *Id.*

299. See Berman, *supra* note 282, at 782.

300. *Id.* at 783.

301. See *Vieth IV*, 541 U.S. at 276.

political gerrymandering cases.³⁰² Overall, it seems that this is the most important aspect of the *Vieth* decision: courts no longer have to struggle with the Bandemer standard which has produced no real judicial intervention, wasting time and resources for plaintiffs, defendants, and courts alike.³⁰³

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302. Berman, *supra* note 282, at 783.

303. See *Vieth IV*, 541 U.S. at 305–06. The results of the *Vieth* decision can be seen in the Supreme Court’s remand of the Texas redistricting cases such as *Jackson v. Perry*, 125 S. Ct. 351 (2004). *Vieth* rendered Texas Democrats’ claim against the Republican redistricting plan “moot.” R.G. Ratcliffe, *Redistricting Appeal is Before Federal Panel Again*, HOUS. CHRON., January 21, 2005. In explaining the driving force behind the plan, House Majority Leader Tom Delay, proclaimed, “I’m the majority leader, and I want more seats.” Adam Cohen, *GOP Power Grab is Part of a Trend*, THE SEATTLE POST-INTELLIGENCER, May 29, 2003, at B7. On May 11, 2003, fifty-one Texas Democrats fled to a Holiday Inn in Ardmore, Oklahoma, to prevent a quorum in the Texas House, thus frustrating Republican efforts to get their redistricting plan passed. Mary Alice Robbins, *Vacancy at the Texas House: Dems Bust Quorum by Taking Field Trip to Oklahoma Holiday Inn*, TEXAS LAWYER, May 19, 2003, Vol. 19, No. 11, at 1. This prompted Texas Republicans to call them “Chicken D’s.” *Id.* The Republicans also made “Wanted” posters, missing persons milk-cartons, and a card deck, which was apparently a spoof on the Iraqi card deck. Joel Stein, Reported by Hilary Hylton, *Sure Beats Working*, TIME MAG., at 42. The Democrats found some support for their actions, even receiving a care package from Willie Nelson complete with bandanas, shirts, and whiskey, encouraging them to “Stand your ground.” *Id.* Even the Oklahoma house got in on the action with “a resolution commending the courage of the Texas Democrats.” Robbins, *supra* note 297, at 1. Texas Democrats also fired back with name-calling of their own, dubbing DeLay “J. Edgar DeLay” because of his possible actions in involving the Department of Homeland Security in the search for the absent Democrats. Marianne Means, *Democrats Did What They Had to Do*, THE SEATTLE POST-INTELLIGENCER, May 29, 2003, at B7. They also dubbed the plan “Tommymandering” in honor of the Majority Leader. Dave McNeely, *Redistricting Only Widens House Divide*, AUSTIN AMERICAN-STATESMAN, May 22, 2003, at B1. Despite all the media attention, the United States Supreme Court refused to intervene and remanded the case based on its decision in *Vieth v. Jubelirer*. See *Jackson*, 125 S. Ct. 351.

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