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Managing Gerrymandering

Mitchell N. Berman

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Managing Gerrymandering

Mitchell N. Berman*

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Political scientists, legal scholars, and engaged citizens have railed against partisan gerrymandering for decades, if not centuries. This is not surprising, for, as the critics often observe, the core principle of republican government is that the voters should choose their representatives, not the other way around.¹ And yet a majority of the Supreme Court was largely

* Copyright © 2005 Mitchell N. Berman. Bernard J. Ward Centennial Professor in Law, The University of Texas at Austin. Email: mberman@mail.law.utexas.edu. I am indebted to Micah Altman, Renea Hicks, Sam Hirsch, Sam Issacharoff, Douglas Laycock, and Larry Sager for extremely helpful conversations and comments on an earlier draft and to Chris Macleod for excellent research assistance. I am also grateful to the editors of the Texas Law Review, especially Nick Bunch and Arthur D’Andrea, for their flexibility and good humor.

1. See, e.g., *Session v. Perry*, 298 F. Supp. 2d 451, 516 (E.D. Tex. 2004) (Ward, J., concurring in part and dissenting in part) (remarking that “extreme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa”), *vacated and remanded by* Am. G.I. Forum of Tex. v. Perry, No. 03-1396, 2004 WL 759440 (U.S. Oct. 18, 2004), *Henderson v. Perry*, No. 03-9644, 2004 WL 729280 (U.S. Oct. 18, 2004), *Jackson v. Perry*, No. 03-

deaf to these criticisms before its 1986 holding, in *Davis v. Bandemer*,² that claims of unconstitutional partisan gerrymanders would be justiciable. In so doing, however, the *Bandemer* Court announced such a demanding test for adjudicating gerrymandering challenges that no claims have succeeded in the nearly two decades that have ensued.

Last spring, in *Vieth v. Jubelirer*,³ the Court entertained its first partisan gerrymandering claim since *Bandemer*. Unfortunately, commentators who had hoped that *Vieth* would bring greater sense and order to the field were disappointed. To be sure, *Vieth* did advance the ball in one critical respect: For the first time, all nine Justices agreed that excessive partisanship in redistricting is unconstitutional.⁴ All Justices also agreed that the *Bandemer* test was infirm.⁵ Beyond that, however, *Vieth* created uncertainty. Even while acknowledging that excessive partisanship in redistricting does offend the Constitution, a four-member plurality of the Court would have overruled *Bandemer* by holding claims of partisan gerrymandering nonjusticiable for want of a judicially manageable standard.⁶ Four other Justices steadfastly defended *Bandemer*'s holding as to justiciability, but proposed three separate tests, in three separate opinions, to replace the *Bandemer* approach that they agreed must go.⁷ Justice Kennedy stood alone in the middle.⁸ With the plurality, he expressed skepticism that a manageable standard could be devised,⁹ but, decrying the dangers of excessive partisanship, he also declared his reluctance to reach that conclusion prematurely.¹⁰ "If workable standards do emerge," he insisted, "courts should be prepared to order relief."¹¹

Although the uncertainty that *Vieth* has bequeathed is unfortunate, it is not wholly unexpected. The chief message of the decision, after all, is that crafting judicially manageable tests for administering a ban on extreme forms of partisan gerrymandering is hard work. And we've known that for generations; surely, few observers believed that *Bandemer* had solved the

1391, 2004 WL 759434 (U.S. Oct. 18, 2004), *Lee v. Perry*, No. 03-1399, 2004 WL 759443 (U.S. Oct. 18, 2004), and *Travis County v. Perry*, No. 03-1400, 2004 WL 759444 (U.S. Oct. 18, 2004); see also *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1807 n.25 (2004) (Stevens, J., dissenting) (claiming that the architect of a gerrymandered map selects the constituencies and, in effect, the representatives).

2. 478 U.S. 109 (1986).

3. 124 S. Ct. 1769 (2004).

4. See *infra* subpart I(C).

5. See *infra* subpart I(C).

6. *Vieth*, 124 S. Ct. at 1778, 1784 (plurality opinion).

7. *Id.* at 1799 (Stevens, J., dissenting); *id.* at 1815 (Souter, J., dissenting); *id.* at 1822 (Breyer, J., dissenting). But see *infra* note 125 (noting the fundamental agreement shared by all of the dissenters).

8. *Id.* at 1792 (Kennedy, J., concurring).

9. *Id.* at 1793 (Kennedy, J., concurring).

10. *Id.* at 1799 (Kennedy, J., concurring).

11. *Id.*

problem. So *Vieth* reinforces what has long been clear—that the great challenge is to craft judicially manageable standards for adjudicating claims of unconstitutionally partisan gerrymandering. Despite all the ink that legal scholars and political scientists have spilled on this very question, most extant proposals appear unsatisfactory for one of two reasons: Because the tests proposed are not manageable (such as the “predominant intent” test floated by Justice Stevens),¹² or because, even if manageable, they are not clearly relevant to the constitutional violation (such as tests put forth by political scientists that depend upon compactness measures or swing ratios).¹³

This Article tries to rectify some of these deficiencies. Taking as a given that excessive pursuit of partisan advantage violates the Constitution,¹⁴ it explores how judge-made constitutional doctrine should be crafted to administer this constitutional prohibition. Very generally, I argue that the task ought to proceed in three steps. First, courts need to elaborate on the notion of excessive partisanship as a matter of constitutional meaning. Second, courts must appreciate the logical structure of constitutional adjudication, i.e., the relationship between constitutional *meaning* and constitutional *doctrine*. Third—and not sooner—courts should turn to political scientists for help crafting manageable constitutional doctrine to administer the constitutional meaning of excessive partisanship, as that meaning has been fleshed out in step one. This recipe may appear obvious to some readers. It is not, however, how contributors to the literature have tended to proceed.

The structure of this Article roughly corresponds to those three steps. Part I sets the table by providing a thumbnail history of the Court’s grappling with partisan gerrymandering, culminating in a detailed review of the fractured opinions in *Vieth*. The remaining three Parts then confront the challenge of crafting a judicially manageable test for administering the (*Vieth*-recognized) constitutional prohibition against excessive partisanship in redistricting. Part II elaborates on this constitutional meaning by clarifying the very notion of “excessive partisanship.” Part III distinguishes

12. *Id.* at 1809–10 (Stevens, J., dissenting).

13. See, e.g., Richard G. Niemi, *The Swing Ratio as a Measure of Partisan Gerrymandering*, in POLITICAL GERRYMANDERING AND THE COURTS 171, 176 (Bernard Grofman ed., 1990) (suggesting that one crucial issue in gerrymandering cases should be “whether the swing ratio associated with a particular plan is particularly low in comparison with historical experience in the jurisdiction in question”).

14. In making this assumption, I do not mean to suggest that it is self-evidently correct. Still less do I claim that, if the proposition is true, the reasons why it is true are obvious. For one brief yet suggestive sketch of some of the evils that partisan gerrymandering causes, see Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Political Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301, 304–09 (1991). For a skeptical account, see Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563 (1989). Nonetheless, given the views expressed in *Vieth*, the assumption in the text is surely one that a constitutional lawyer may justifiably indulge.

between judicial elucidations of constitutional meaning and the “decision rules” that tell courts whether the dictates of constitutional meaning are satisfied in a given case, to explain how the Court can move from this fuller understanding of constitutional meaning to manageable constitutional doctrine. Part IV proposes possible decision rules that courts might craft that would sensibly administer the constitutional prohibition against excessive partisanship in redistricting.

Such decision rules can come in both wholesale and retail variants—that is, a rule could be designed either to cover all claims of unconstitutionally excessive partisanship in redistricting or to address only certain fact situations describable with fair particularity. Accordingly, Part IV offers the skeleton of one wholesale, or one-size-fits-all, decision rule. But, recognizing the possible attractiveness of a more minimalist approach to this thorny problem, it also offers a few retail decision rules tailored to subclasses of redistricting cases in which excessive partisanship might be present. One such subclass is represented by the notorious, mid-decade Texas gerrymander enacted in the fall of 2003. Although avowedly and egregiously partisan,¹⁵ the redistricting was upheld in *Session v. Perry* by a three-judge district court applying *Bandemer*.¹⁶ Last October, however, the Supreme Court vacated the lower court’s ruling and remanded for further proceedings in light of *Vieth*.¹⁷ With an eye toward this especially important litigation—important for the stakes immediately at issue and because of its unusually high profile and symbolic salience—Part IV recommends a decision rule that directs courts to conclude that mid-decade redistrictings undertaken by a single-party-controlled state government are motivated by excessive partisanship—hence are unconstitutional—unless narrowly tailored to achieve a compelling interest. This is a manageable test that bears an appropriate relationship to the evil of “excessive partisanship,” properly understood.

* * *

In the immediate aftermath of *Vieth*, federal courts’ first task will be to flesh out the meaning of “excessive partisanship.” They then must endeavor

15. Two commentators, not both known to be Democratic loyalists, deemed the Texas effort “about as partisan as they come.” Vasan Kesavan & Michael Stokes Paulsen, *Let’s Mess With Texas*, 82 TEXAS L. REV. 1587, 1616 (2004).

16. 298 F. Supp. 2d 451, 457 (E.D. Tex. 2004).

17. *Am. G.I. Forum of Tex. v. Perry*, No. 03-1396, 2004 WL 759440 (U.S. Oct. 18, 2004); *Henderson v. Perry*, No. 03-9644, 2004 WL 729280 (U.S. Oct. 18, 2004); *Jackson v. Perry*, No. 03-1391, 2004 WL 759434 (U.S. Oct. 18, 2004); *Lee v. Perry*, No. 03-1399, 2004 WL 759443 (U.S. Oct. 18, 2004); *Travis County v. Perry*, No. 03-1400, 2004 WL 759444 (U.S. Oct. 18, 2004) (all vacating and remanding *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004)).

to craft suitable decision rules—whether broad or narrow, wholesale or retail—to implement that meaning. If the courts miss this opportunity, one might reasonably fear that the promise of Justice Kennedy’s concurrence in *Vieth* will go unfulfilled. So these early cases—*Session* notably among them—are critical for the future of partisan gerrymandering. And if the most heated critiques of the practice are to be credited, they are therefore of fundamental importance to the health of American democracy.

But the post-*Vieth* round of gerrymandering challenges bear an additional significance. In searching for a judicially manageable standard to administer the constitutional prohibition on excessive partisanship in districting, the Court is also struggling with the conceptual or logical structure of constitutional adjudication. *Vieth* makes unusually clear that the constitutional meaning that the Court discerns need not be identical to the in-court constitutional doctrine that the Court crafts to administer that meaning. This is obvious and (I will argue) inescapable. It is high time for the Court to face up to this fact forthrightly.¹⁸ A more sophisticated understanding of the relationship between meaning and doctrine will help point the way toward a workable solution to the problem of unconstitutional gerrymandering. At the same time, a sincere search for such a solution can facilitate a more mature appreciation of the relationship between meaning and doctrine. This Article, accordingly, aims both to contribute to the jurisprudence of partisan gerrymandering and to strengthen our collective understanding of the logical structure of constitutional adjudication.

I. The Legal Landscape

Partisan gerrymandering is not new. The very term “gerrymander” is nearly 200 years old—having been coined in 1812 in reference to Massachusetts Governor Elbridge Gerry and the salamander-like district he helped to create—and the practice much older still.¹⁹ For generations, however, the federal courts refused, on “political question” grounds, to police either gerrymandering or its close cousin, malapportionment.²⁰ This Part reviews the Court’s pathbreaking decision, in *Davis v. Bandemer*,²¹ to hold

18. That the Court has not yet done this is perhaps best exemplified by the striking failure of a seven-member majority in *Dickerson v. United States*, 530 U.S. 428 (2000), to clarify, in response to a fiery Scalia dissent, *see id.* at 454 (Scalia, J., dissenting), how Court-crafted constitutional doctrine can be legitimate, and resistant to change by Congress, without being constitutionally required. For elaboration of this point, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 18–29 (2004) [hereinafter Berman, *Constitutional Decision Rules*].

19. *See Vieth v. Jubelirer*, 124 S. Ct. 1769, 1774–75 (2004) (providing a thumbnail history along with citations to relevant scholarship).

20. Malapportionment involves the creation or preservation of electoral districts of different population sizes, so that the ratio of representatives to voters varies across districts. Gerrymanders can involve districts of roughly equivalent, even equal, population sizes.

21. 478 U.S. 109 (1986).

gerrymandering claims justiciable. It then examines the *Vieth* decision in some detail. First, though, it offers a nutshell summary of the road to *Bandemer*. One lesson to be drawn from that narrative, simplified though it is, will be that the Court's determination in *Bandemer* to try to police partisan gerrymandering was not the sudden innovation that *Bandemer*'s critics often suggest. To the contrary, it was the predictable and hard-to-resist outgrowth of a concern with the practice that had been deepening at the Court for a generation.

A. Prehistory

The story, in outline, is familiar.²² It starts, customarily, in 1946 with *Colegrove v. Green*,²³ “the Court’s last, and possibly most strident, refusal to become involved in cases of malapportionment or gerrymandering.”²⁴ The *Colegrove* plaintiffs had sought an injunction against the holding of congressional elections under Illinois’s districting scheme, which had not been modified since 1901 and had entrenched massive population inequalities between districts.²⁵ Writing for a divided Court,²⁶ Justice Frankfurter rejected the plaintiffs’ plea for judicial intervention, reasoning that Article I, § 4 of the Constitution entrusted apportionment matters entirely to Congress.²⁷ “To sustain this action would cut very deep into the very being of Congress,” Frankfurter wrote. “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.”²⁸

22. For additional overviews, with which this summary is broadly consistent, see, for example, Gordon E. Baker, *The Unfinished Reapportionment Revolution*, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra* note 13, at 11 [hereinafter Baker, *Unfinished Reapportionment Revolution*]; Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *TEXAS L. REV.* 1643, 1647–60 (1993) [hereinafter Issacharoff, *Elusive Quest*].

23. 328 U.S. 549 (1946).

24. MARK E. RUSH, *DOES REDISTRICTING MAKE A DIFFERENCE: PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR* 16 (1993).

25. *Colegrove*, 328 U.S. at 550–51 (plurality opinion).

26. Only two other justices joined Justice Frankfurter’s opinion for the Court; a fourth, Justice Rutledge, concurred only in the result. The three remaining Justices on the case—Black, Douglas, and Murphy—dissented forcefully on Equal Protection grounds, noting the remedy suggested by Frankfurter—the ballot box—was illusory precisely because of the extreme malapportionment. *See id.* at 569 (Black, J., dissenting).

27. *Id.* at 552–54 (plurality opinion).

28. *Id.* at 556 (plurality opinion).

Colegrove was abandoned sixteen years later²⁹ when, in *Baker v. Carr*, the Court considered a challenge to another malapportionment resulting from continued reliance on a 1901 state statute and held that such cases *were* justiciable under the Equal Protection Clause.³⁰ After noting that the political question doctrine “is primarily a function of the separation of powers,”³¹ Justice Brennan harvested from prior cases six indicators of a nonjusticiable political question:

Prominent on the surface of any case held to involve a political question is found 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.³²

Although the presence of any single factor in a particular case would justify dismissal,³³ Brennan argued that none was present so as to prevent the Court from adjudicating malapportionment claims.³⁴ In so arguing, he

29. That *Colegrove* had become more fragile was perhaps suggested two years before *Baker* when, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the Court invalidated an Alabama statute that retooled the municipal boundaries of Tuskegee to exclude all but a handful of black voters. Plaintiffs challenged this gerrymander, alleging that the legislature’s creation of this “uncouth twenty-eight-sided figure” violated the Due Process Clause, Equal Protection Clause, and the Fifteenth Amendment. *Id.* at 340. Confronted by this outrage, not even Justice Frankfurter would counsel judicial restraint. Writing again for the Court, Frankfurter sidestepped the Fourteenth Amendment claims but agreed that the gerrymander abridged the Fifteenth Amendment by stripping black citizens of their right to vote. *Id.* at 345. But the difficulty with this analysis, as Robert Dixon explained,

is that it does not fit the facts. Negro voters affected by shrinking of Tuskegee’s boundaries could still vote in all elections except city elections. . . . They were the victims of a racially motivated action and were, of course, aggrieved. But their generic complaint was not that there was an impairment of “voting rights” in the conventional sense of the term. Rather, they were being *excluded from the city* by state action impermissibly grounded on race.

ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 117 (1968); *see also* *Gomillion*, 364 U.S. at 348 (Douglas, J., concurring) (asserting that Justice Black’s *Colegrove* equal protection dissent ought to control); *id.* at 349 (Whittaker, J., concurring) (also rejecting the Fifteenth Amendment claim in favor of the equal protection one). *Gomillion*, in short, provided some further evidence that the political thicket might prove irresistible.

30. 369 U.S. 186, 201 (1962).

31. *Id.* at 210.

32. *Id.* at 217.

33. *Id.*

34. *Id.* at 226.

specifically asserted that such intervention would not mire the courts in controversies which they were incompetent to resolve. “Judicial standards under the Equal Protection Clause are well developed and familiar,” Brennan insisted, “and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”³⁵ But the Court stopped short of providing lower courts with any greater direction in applying this vague standard.

Justice Clark’s concurrence scolded the Court precisely for refusing to articulate detailed standards for malapportionment claims.³⁶ But the most withering criticism came in thundering dissents by Justices Frankfurter and Harlan. Frankfurter berated the majority for “asserting destructively novel judicial power” in a “massive repudiation of the experience of our whole past” and also warned that the Court’s entry into the political thicket was doomed to failure.³⁷ The Court’s lofty pronouncements on the sanctity of voting rights would eventually be exposed, he predicted, as “merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.”³⁸ Justice Harlan was equally skeptical, arguing pointedly that because the claim concerned the apportionment of a state legislature, the Equal Protection Clause had no room to operate unless the state’s apportionment method was wholly irrational. Here, Harlan insisted, Tennessee could reasonably determine that legislative apportionment by geographic region best balanced the diverse interests of the state’s citizens.³⁹

Notwithstanding these vigorous dissents, the Court immediately set itself to making good on *Baker*’s promise by announcing a test to govern malapportionment claims. The now familiar one-person, one-vote rule arose from a trio of cases decided in 1963 and 1964—*Gray v. Sanders*,⁴⁰ *Wesberry v. Sanders*,⁴¹ and *Reynolds v. Sims*.⁴²

Gray invalidated Georgia’s county-unit primary system for electing statewide officers, rejecting a vote-weighting mechanism similar to the federal electoral college.⁴³ The system significantly diluted the votes of those living in more populated counties and, despite some last-minute tinkering by the legislature,⁴⁴ the Court held that once a state had set voter

35. *Id.*

36. *Id.* at 251 (Clark, J., concurring).

37. *Id.* at 267 (Frankfurter, J., dissenting).

38. *Id.* at 270 (Frankfurter, J., dissenting).

39. *Id.* at 334 (Harlan, J., dissenting).

40. 372 U.S. 368 (1963).

41. 376 U.S. 1 (1964).

42. 377 U.S. 533 (1964).

43. 372 U.S. at 376–78.

44. *Id.* at 372.

eligibility requirements, it could not then weight some votes more heavily than others without violating equal protection.⁴⁵ “The conception of political equality,” Justice Douglas wrote for the Court, “can mean only one thing—one person, one vote.”⁴⁶ *Wesberry v. Sanders* condemned similar population disparities between Georgia’s congressional districts.⁴⁷ Because the suit challenged congressional districting rather than state legislative apportionment, the Court grounded the one-person, one-vote rule in Article I, § 2 rather than the Equal Protection Clause.⁴⁸ The basic rule, however, was the same: “[A]s nearly as is practicable,” the Court insisted, “one man’s vote in a congressional election is to be worth as much as another’s.”⁴⁹

Reynolds v. Sims,⁵⁰ decided four months later, involved a challenge to state legislative districts and therefore, like *Gray*, involved the Equal Protection Clause, not Article I, § 2. But a majority held that the *Wesberry* rule applied here too—a state must “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.”⁵¹ However, Chief Justice Warren explained, “some distinctions may well be made between congressional and state legislative representation.”⁵² Most particularly, the Court discerned reasons why it might be more important in the latter context for legislatures to try to maintain the integrity of political subdivisions. “Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting,” it concluded.⁵³ A contrary rule, it recognized, might produce more harm than good, for “[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.”⁵⁴ This was small consolation to Justice Harlan, who in dissent charged that, by forceclosing state reliance on traditional districting factors, the Court had left states with few other options.⁵⁵

45. *Id.* at 379–81.

46. *Id.* at 381.

47. 376 U.S. 1, 7–8 (1964).

48. *Id.*

49. *Id.*

50. 377 U.S. 533 (1964).

51. *Id.* at 577.

52. *Id.* at 578.

53. *Id.*

54. *Id.* at 578–79. Some commentators read this passage as expressing the majority’s belief that one-person, one-vote could forestall partisan gerrymandering. See, e.g., Issacharoff, *Elusive Quest*, *supra* note 22, at 1648 & n.29. I read it, in contrast, to reflect the majority’s recognition that too stringent reliance on one-person, one-vote could indeed provoke legislatures to gerrymander by withdrawing from them the option of drawing lines in a way that would respect the interests of political subdivisions—an option that Chief Justice Warren, perhaps naively, seemed to suppose that legislatures would prefer were it open to them.

55. *Reynolds*, 377 U.S. at 622–23 (Harlan, J., dissenting).

The *Reynolds* Justices were, therefore, clearly conscious of the problem of partisan gerrymandering, even as they directly engaged with the analytically distinct problem of malapportionment. Because the practice of judicial review consistently favors rules over standards, however, a majority of the Court proceeded over the course of the decade to tighten the one-person, one-vote rule from a guideline into something closer to a straightjacket—especially in congressional districting.⁵⁶ Predictably, this development spawned a concomitantly growing worry among a minority of Justices that the Court was thereby opening the door wide for precisely the gerrymandering that even the *Reynolds* majority had warned against.

The rulings in *Kirkpatrick v. Preisler*⁵⁷ and *Wells v. Rockefeller*,⁵⁸ handed down on the same day in 1969, highlighted the dispute. In *Kirkpatrick*, the Court clarified *Wesberry*'s “as nearly as practicable” standard for congressional apportionment, holding that “the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.”⁵⁹ According to Justice Brennan, Missouri had not made a good-faith effort to achieve equality, and its justifications—maintaining communities of interest and the difficulty of achieving legislative consensus—could not save the plan.⁶⁰

In *Wells*, the Court invalidated New York's congressional apportionment plan for the same reason, while pointedly refusing to address related partisan gerrymandering claims.⁶¹ Four Justices—Fortas, Harlan, Stewart, and White—disagreed sharply with the majority's insistence on precise mathematical equality.⁶² Justice Fortas concurred in both cases and

56. As Samuel Issacharoff observed:

While the Supreme Court's opinion in *Reynolds* left open the possibility that alternatives to the one-person, one-vote rule might satisfy constitutional norms, the logic of judicial review inexorably pushed the equipopulation principle to the fore. The very qualities of objectivity and manageability that made the equipopulation strategy appealing in *Reynolds* soon made it the sole arbiter of political fairness.

Issacharoff, *Elusive Quest*, *supra* note 22, at 1651.

57. 394 U.S. 526 (1969).

58. 394 U.S. 542 (1969).

59. *Kirkpatrick*, 394 U.S. at 531.

60. *Id.* at 531–33; *see also* *White v. Weiser*, 412 U.S. 783 (1973) (upholding invalidation of congressional apportionment plan for lack of good-faith effort to achieve absolute population equality, but reversing district court rejection of plan that followed legislative districting choices as much as possible while achieving population equality).

61. *Wells*, 394 U.S. at 544, 546–47.

62. *See Kirkpatrick*, 394 U.S. at 538 (Fortas, J., concurring) (arguing that state legislatures should not have to “ignore the boundaries of common sense” to achieve precise mathematical equality of population in congressional districts); *Wells*, 394 U.S. at 549–50 (Harlan, J., dissenting joined by Stewart, J.) (ridiculing the “magic formula” of “one man-one vote” as practically unworkable and ineffective at preventing partisan gerrymandering); *id.* at 553–54 (White, J.,

accused the Court of firming up the equal population requirement while simultaneously disallowing any conceivably legitimate excuse for deviation.⁶³ Small population disparities should be tolerated, he argued, “in the absence of evidence of gerrymandering—the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.”⁶⁴

Objecting that “the Court’s exclusive concentration upon arithmetic blinds it to the realities of the political process,” Harlan took it upon himself to state what those realities are: “The fact of the matter is that the rule of absolute equality is perfectly compatible with ‘gerrymandering’ of the worst sort.”⁶⁵ “If the Court believes it has struck a blow today for fully responsive representative democracy, it is sorely mistaken,” he elaborated, echoing Frankfurter’s *Baker* critique.⁶⁶ “Even more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.”⁶⁷

Yet even as a majority of the Court resisted appeals to address partisan gerrymandering, they also refused to tighten population requirements in the state apportionment context.⁶⁸ In *Gaffney v. Cummings*, the Court upheld Connecticut’s legislative apportionment plan, adopted by a bipartisan districting board that deliberately sought rough proportionality between voters’ partisan preferences and party representation in the legislature, despite population deviations of almost eight percent among House districts and almost two percent among Senate districts.⁶⁹ Justice White, who had dissented from *Kirkpatrick*’s strict equipopulation rule, wrote for the

dissenting) (arguing that the possibility of precise mathematical equality in population among congressional districts is “illusory” and that the Court’s insistence on precise equality will require greater judicial involvement in congressional redistricting).

63. *Kirkpatrick*, 394 U.S. at 536–37 (Fortas, J., concurring).

64. *Id.* at 537–38.

65. *Wells*, 394 U.S. at 551 (Harlan, J., dissenting from both *Kirkpatrick* and *Wells*).

66. *Id.* at 552 (Harlan, J., dissenting).

67. *Id.* Justice White sounded the same theme, contending that the marginal benefits achieved through enforcement of the rigid population equality standard of *Kirkpatrick* and *Wells* would be more than offset by the corresponding decrease in legislatures’ ability to minimize gerrymandering. He noted:

Today’s decisions, on the one hand require precise adherence to admittedly inexact census figures, and on the other downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts

Id. at 555 (White, J., dissenting from both *Kirkpatrick* and *Wells*).

68. See, e.g., *Mahan v. Howell*, 410 U.S. 315, 324 (1973) (concluding that “Virginia’s legislative redistricting plan was not to be judged by the more stringent standards” applied in *Kirkpatrick* and *Wells*).

69. 412 U.S. 735, 737 (1973).

majority. Noting that *Reynolds* gave states more flexibility in apportioning their own legislatures than in drawing congressional district lines, Justice White emphasized that courts should tolerate minor deviations from absolute equality if the state had legitimate reasons for carving out districts as it did.⁷⁰ Observing that “[p]olitics and political considerations are inseparable from districting and apportionment,” the majority squarely rejected the contention “that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.”⁷¹ The majority held that the state’s pursuit of “political fairness” between Democrats and Republicans easily justified the departures from equipopulousness.⁷²

A decade later, the Court decided *Karcher v. Daggett*, which concerned a challenge to a New Jersey congressional apportionment plan that allegedly diluted Republican voting strength in Newark.⁷³ Justice Brennan’s opinion for the Court analyzed the claims under Article I, § 2, *Wesberry* and *Kirkpatrick*, and invalidated the scheme solely because population deviations between districts did not reflect a good-faith effort to achieve population equality.⁷⁴ Four dissenters opposed the majority’s insistence on near precision, invoking the by-now familiar objection that fastidious insistence on population equality would serve to facilitate, rather than impede, partisan gerrymandering.⁷⁵

Justice Stevens concurred. Although agreeing that an insistence on equipopulousness alone would facilitate gerrymandering, he thought that, in this case, the small malapportionment was itself further evidence of partisan gerrymandering:

The Equal Protection Clause requires every State to govern impartially. 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, economic, or

70. *Id.* at 741–43.

71. *Id.* at 752–53.

72. *Id.* at 753.

73. 462 U.S. 725 (1983).

74. *Id.* at 727. In applying the *Kirkpatrick* standard in *Karcher*, the Court nonetheless discarded some of its more rigid characteristics. Justice Brennan’s *Kirkpatrick* opinion had rejected a laundry list of justifications for population deviations among Missouri’s congressional districts. *See Kirkpatrick*, 394 U.S. 533–36. But in *Karcher*, Brennan explicitly acknowledged that

[a]ny number of consistently applied legislative policies might justify some variance, including . . . making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations.

Karcher, 462 U.S. at 740 (citations omitted).

75. *Karcher*, 462 U.S. at 775–76 (White, J., dissenting).

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.⁷⁶

Stevens urged that equal protection's straightforward mandate of neutrality could be enforced relatively easily by “consider[ing] whether the plan has a significant adverse impact on an identifiable political group, whether the plan has objective indicia of irregularity, and then, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole.”⁷⁷ And such objective indicia of irregularity, he explained, would not be hard to come by. They include “dramatically irregular shapes,”⁷⁸ “[s]ubstantial divergences from a mathematical standard of compactness,”⁷⁹ and “[e]xtensive deviation from established political boundaries.”⁸⁰ Where a plaintiff can establish a significant adverse impact and objective indicia of irregularity and the state cannot show “that its plan is supported by adequate neutral criteria,” Stevens would have allowed courts to “conclude that the challenged scheme is either totally irrational or entirely motivated by a desire to curtail the political strength of the affected political group.”⁸¹

For the four dissenters, *Karcher* furnished an opportunity to criticize *Kirkpatrick*'s strict equipopulation standard, its application to a plan with population deviation of less than one percent, and its detrimental effect on political fairness. Justice White, whose opinion was joined by three other justices, reprised the warnings from his *Kirkpatrick* dissent.⁸² In hindsight, he observed, one of *Kirkpatrick*'s most significant effects may have been to “provid[e] a patina of respectability for the equipopulous gerrymander.”⁸³ He argued that the Court would do better to set a maximum permissible deviation; he suggested five percent.⁸⁴ This would allow the states to give effect to considerations like compactness and preservation of political subdivisions in drawing congressional districts, without having to worry that their plans would later be invalidated for failing to achieve strict equality.⁸⁵

76. *Id.* at 748 (Stevens, J., concurring) (citations omitted).

77. *Id.* at 751 (Stevens, J., concurring).

78. *Id.* at 755 (Stevens, J., concurring).

79. *Id.*

80. *Id.* at 758 (Stevens, J., concurring).

81. *Id.* at 760–61 (Stevens, J., concurring).

82. *See Wells v. Rockefeller*, 394 U.S. 542, 553–56 (White, J., dissenting) (arguing that the *Kirkpatrick* and *Wells* holdings are “unduly rigid and unwarranted applications of the Equal Protection Clause which will unnecessarily involve the courts in the abrasive task of drawing district lines”).

83. *Karcher*, 462 U.S. at 777 (White, J., dissenting).

84. *Id.* at 781–82 (White, J., dissenting).

85. *Id.* at 780 (White, J., dissenting).

It would have the additional virtue of substantially harmonizing the standards applicable to state and congressional apportionment.⁸⁶

Justice Powell was the only dissenter to engage Justice Stevens on the gerrymandering standards question in any detail. He agreed with Stevens that gerrymandering could cause injuries of constitutional magnitude,⁸⁷ and blamed *Kirkpatrick*'s "uncompromising emphasis on numerical equality" for "encourag[ing] and legitimat[ing] even the most outrageously partisan gerrymandering."⁸⁸ According to Powell, equal protection condemned apportionment schemes with "the purpose and effect of substantially disenfranchising identifiable groups of voters."⁸⁹ For him, as for Stevens, the clearest indicator of such disenfranchisement was the drawing of lines that could not be rationally defended on the basis of any coherent state policy.⁹⁰ Where state-drawn districts lack compactness, or disregard traditional political boundaries, the state should be required to articulate a legitimate, nondiscriminatory reason for the plan.⁹¹

Powell agreed that, on the facts of the case, "one cannot rationally believe that the New Jersey Legislature considered factors other than the most partisan political goals and population equality."⁹² Absent some compelling and legitimate state justifications—which Powell doubted the state could supply—the plan almost certainly violated equal protection. However, because the district court below had considered only the constitutionality of the population deviations, and the gerrymandering issue therefore was not at issue, Powell dissented only as to the majority's unyielding application of *Kirkpatrick*.⁹³

B. Bandemer

Although the *Gaffney* Court had upheld the Connecticut scheme against claims of unconstitutional partisan gerrymandering, the mere fact that it resolved the case on the merits might have suggested that such claims were justiciable.⁹⁴ And Justices Stevens and Powell made clear in their separate *Karcher* opinions that they shared that view.⁹⁵ However, the full Court did not squarely address the question until three years later (thirteen after

86. *Id.* at 782 n.14 (White, J., dissenting).

87. *Id.* at 787 (Powell, J., dissenting).

88. *Id.* at 785 (Powell, J., dissenting).

89. *Id.* at 788 (Powell, J., dissenting).

90. *Id.*

91. *Id.*

92. *Id.* at 788–89 (Powell, J., dissenting).

93. *Id.* at 790 (Powell, J., dissenting).

94. The *Bandemer* Court would later make just this point. See *Davis v. Bandemer*, 478 U.S. 109, 119–20 (1986). But see *id.* at 120–21 (discussing dicta from other cases, as well as summary dispositions, that seem to "look in different directions" on the question of justiciability).

95. *Karcher*, 462 U.S. at 760–61 (Stevens, J., concurring); *id.* at 787 (Powell, J., dissenting).

Gaffney) when, in *Davis v. Bandemer*, it confronted a challenge by Indiana Democrats to a redistricting scheme for the state House and Senate adopted by the Republican-controlled legislature.

Justice O'Connor, Chief Justice Burger and then-Justice Rehnquist would have held claims of partisan gerrymandering nonjusticiable.⁹⁶ Emphasizing the quintessentially political nature of redistricting, Justice O'Connor predicted that courts would be unable to craft a stable test that would not evolve into "a requirement of roughly proportional representation for every cohesive political group."⁹⁷ And such a requirement would constitute just the sort of fundamental policy determination inappropriate for the judiciary.⁹⁸ Because claims of partisan gerrymandering would therefore be plagued either by "a lack of judicially discoverable and manageable standards" or by "the impossibility of deciding [the dispute] without an initial policy determination of a kind clearly for nonjudicial discretion,"⁹⁹ they presented a nonjusticiable political question under *Baker*'s disjunctive six-part test.¹⁰⁰

The remaining six Justices disagreed,¹⁰¹ arguing instead that *Baker*'s own conclusion that malapportionment claims are justiciable "applies equally to the question" of partisan gerrymandering.¹⁰² As Justice White explained, the easily managed "one person, one vote" rule of *Wesberry* and *Reynolds* had not yet been developed when *Baker* was decided, and the *Baker* Court "did not rely on the potential for such a rule in finding justiciability."¹⁰³ Accordingly, there was little reason to fear that the Court could not also find a manageable way to adjudicate claims of partisan gerrymandering.¹⁰⁴

96. More precisely, and marginally more narrowly, they would have held nonjusticiable those partisan gerrymandering claims pressed by "major political parties." *Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring).

97. *Id.* at 147 (O'Connor, J., concurring). As we will see, this is a recurring claim, pressed by scholars as well as Justices. See *infra* section II(B)(1).

98. *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring).

99. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

100. See *supra* text accompanying note 32.

101. Justice White's opinion concerning justiciability was joined not only by the three other members of the plurality but also by Justices Powell and Stevens. See *Bandemer*, 478 U.S. at 165 n.4 (Powell, J., concurring in part and dissenting in part).

102. *Id.* at 123.

103. *Id.*

104. The majority took issue not only with Justice O'Connor's conclusion that partisan gerrymandering claims should be nonjusticiable, but also with the particular considerations upon which she relied in support of that conclusion. Among other things, O'Connor had supposed that "political gerrymandering may be a 'self-limiting enterprise,'" *id.* at 126 (quoting *id.* at 152 (O'Connor, J., concurring)), and had worried that a holding of justiciability "will lead to 'political instability and judicial malaise' because nothing will prevent members of other identifiable groups from bringing similar claims." *Id.* at 126 (quoting *id.* at 147 (O'Connor, J., concurring)) (citation omitted). This "analysis is flawed," the majority concluded

because it focuses on the perceived need for judicial review and on the potential practical problems with allowing such review. Validation of the consideration of such amorphous and wide-ranging factors in assessing justiciability would alter substantially

But the majority split on the appropriate test. All six Justices who agreed on justiciability agreed too that a successful claim of unconstitutional partisan gerrymandering required proof of “both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”¹⁰⁵ They divided on how to measure the requisite discriminatory effect.

Writing now for a four-member plurality, Justice White announced that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”¹⁰⁶ And then, either further elucidating this standard of consistent degradation or amending it, the plurality explained that “a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”¹⁰⁷

Justice Powell, joined by Justice Stevens, rejected the plurality’s approach. Although Powell criticized several aspects of the plurality’s opinion, at its core his opinion reprised the view that Justice Stevens had developed in his *Karcher* concurrence and with which Powell himself had then expressed sympathy in dissent. To begin, Powell interpreted the Constitution to impose far more stringent limitations on partisan gerrymandering.¹⁰⁸ Whereas the plurality, like Justice O’Connor, viewed the pursuit of partisan advantage as an inevitable and seemingly acceptable part of redistricting,¹⁰⁹ Powell insisted, as Stevens had earlier, that “district lines

the analysis the Court enunciated in *Baker v. Carr*, and we decline Justice O’Connor’s implicit invitation to rethink that approach.

Id. at 126–27.

105. *Id.* at 127; *id.* at 161 (Powell, J., concurring in part and dissenting in part).

106. *Id.* at 132.

107. *Id.* at 133. In language that would later be picked up by lower courts, *see, e.g., Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (three-judge court), *summarily aff’d*, 488 U.S. 1024 (1989), the plurality proceeded to intimate that plaintiffs might be required to show that they “had essentially been shut out of the political process.” *Bandemer*, 478 U.S. at 139.

108. *Id.* at 166 (Powell, J., concurring in part and dissenting in part).

109. *See, e.g., id.* at 128. John Hart Ely contended that Justice O’Connor’s concurrence did not express any opinion about partisan gerrymandering but merely designated the issue nonjusticiable. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 621 n.75 (1998). It is true, of course, that holding a claim nonjusticiable need not entail any judgment regarding the constitutionality or propriety of the practice challenged. Nonetheless, the overall tenor of O’Connor’s opinion strongly suggests a belief that at least moderate forms of partisan gerrymandering are constitutionally inoffensive, and perhaps desirable. *See, e.g., Bandemer*, 478 U.S. at 145 (O’Connor, J., concurring) (“The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level.”). Relying on this passage, Pamela Karlan seems justified in reading O’Connor’s concurrence as an “endorsement of partisan gerrymandering.” *See Pamela S. Karlan, All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 284 & n.176.

should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.”¹¹⁰

More pointedly, Powell charged that, with its emphasis on consistent degradation and frustration of voters’ will, the plurality “fail[ed] to enunciate any standard that affords guidance to legislatures and courts.”¹¹¹ Instead, again echoing Stevens, Powell urged that courts should be able to identify when legislatures have resorted (unconstitutionally) to partisan considerations by looking to three factors: “the shapes of voting districts and adherence to established political subdivision boundaries”; legislative procedures and legislative history that bear upon partisan motivation; and evidence concerning distribution of voters by party affiliation and statistics tending to show dilution of minority party influence relative to political support.¹¹²

In light of the disagreements between Justices White and Powell, the opacity of the plurality opinion itself, and the fact, surprising to many, that the Court could hold gerrymandering claims justiciable yet uphold the instance actually before it, contemporary observers found it hard to say just what *Bandemer* required.¹¹³ But whatever its precise requirements, many anticipated that the test was unmeetable.¹¹⁴

C. Vieth

The assumption that *Bandemer* was toothless was confirmed in the years that followed. Of the twenty suits challenging the drawing of district lines under *Bandemer*, courts denied relief in every one.¹¹⁵ A dozen years

110. *Bandemer*, 478 U.S. at 166 (Powell, J., concurring in part and dissenting in part).

111. *Id.* at 171 (Powell, J., concurring in part and dissenting in part).

112. *Id.* at 173 (Powell, J., concurring in part and dissenting in part).

113. See, e.g., Bernard Grofman, *Unresolved Issues in Partisan Gerrymandering Litigation*, in POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 13, at 3, 3 (claiming that *Bandemer* “has given rise to considerable scholarly dispute over what the test of unconstitutional political gerrymandering will ultimately prove to be”); see also *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1774 (2004) (plurality opinion) (citing various commentators and courts).

114. See, e.g., Charles Backstrom et al., *Establishing a Statewide Electoral Effects Baseline*, in POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 13, at 145, 150 (contending that the plurality’s standards, “if literally applied, would be impossible to meet”).

115. Cases are collected in *Vieth*, 124 S. Ct. at 1778 n.6 (plurality opinion). One much-noted case in which *Bandemer* appeared to have teeth involved a challenge to North Carolina’s system of electing superior court judges statewide instead of by districts. See *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992) (finding that the Republican Party had stated a cause of action under *Bandemer*); *Republican Party of N.C. v. N.C. State Bd. of Elections*, 27 F.3d 563 (4th Cir. 1994) (upholding preliminary injunction ordering computation of votes on single-district as well as state-wide bases). But even this lone success for plaintiffs was short-lived: after all eight Republicans running for superior court judgeships were elected under the statewide scheme, the court of appeals vacated the injunction and remanded for reconsideration. *Republican Party of N.C. v. Hunt*, 77 F.3d 470 (4th Cir. 1996).

after *Bandemer*, John Hart Ely expressed the judgment of many when observing that, “by its impossibly high proof requirements the Court in *Bandemer* essentially eliminated political gerrymandering as a meaningful cause of action.”¹¹⁶

The *Vieth* litigation exemplifies the point. As a result of the 2000 census, Pennsylvania lost two congressional seats to reapportionment, forcing the state to redistrict. This the Republican-controlled General Assembly did with gusto, enacting a new districting scheme designed to hand the Republicans between 12 and 14 of the state’s 19 congressional seats, even though the Republican and Democratic Parties enjoy nearly equal support among the Pennsylvania electorate.¹¹⁷ The legislature accomplished this end by “sacrific[ing] every traditional districting principle—slashing through municipalities and neighborhoods, splitting counties, . . . producing oddly misshapen districts,” and pairing “six incumbents, five of whom are Democrats.”¹¹⁸ Nonetheless, a three-judge district court largely dismissed a challenge subsequently brought by Democratic voters.¹¹⁹ The General Assembly’s intent to discriminate against Democratic voters was patent. But because the redistricting scheme gave the Democrats five safe seats, and because plaintiffs could engage in such activities as organizing, campaigning, and voting, the court reasoned, plaintiffs could not possibly establish that they “will be completely shut out of the political process.”¹²⁰ This was, it seems, a fair application of *Bandemer*. So when the Supreme Court noted jurisdiction, several election law experts understandably predicted that the Court was poised to put teeth into *Bandemer*.¹²¹

Sure enough, all nine Justices agreed that the *Bandemer* test was unsatisfactory.¹²² But they fractured over what to do about it. Writing in

116. Ely, *supra* note 109, at 621; *see also* Issacharoff, *Elusive Quest*, *supra* note 22, at 1646 (noting that *Bandemer*’s “standards are fundamentally unworkable and incorporate such ambiguous and unclear commands as to be unfit for any manageable form of judicial application”).

117. *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002).

118. In any event, these are the plaintiffs’ allegations. Brief for Appellants at 12–13, *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02-1580). They are broadly consistent with findings made by the state trial judge, who nonetheless upheld the map. *See Erfer v. Commonwealth*, 794 A.2d 325, 350–52 (Pa. 2002) (App. A) (finding that the 2000 map split more communities and produced less compact and more irregular districts than previous maps); *see also id.* at 343 (Zappala, C.J., dissenting) (“If the record of this case does not establish unconstitutional political gerrymandering, no such claim exists.”). The federal courts made no findings of fact, dismissing the challenge on a motion to dismiss. *Vieth*, 188 F. Supp. 2d at 538 (accepting all facts alleged by plaintiff as true for the purposes of the motion to dismiss).

119. *See Vieth*, 188 F. Supp. 2d at 549 (dismissing equal protection, § 1983, free association, and privileges and immunities claims while allowing a one-person, one-vote challenge to proceed). The Pennsylvania Supreme Court likewise rejected a challenge brought by another group of voters alleging violations of the Pennsylvania Constitution. *Erfer*, 794 A.2d at 334–35.

120. *Vieth*, 188 F. Supp. 2d at 544.

121. *See, e.g.*, Jeffrey Toobin, *The Great Election Grab*, NEW YORKER (Dec. 8, 2003) (quoting Heather Gerken describing *Vieth* as a likely “effort to pull in the reins of partisan gerrymandering”).

122. *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004).

three separate dissents, four Justices—Stevens, Souter, Ginsburg, and Breyer—proposed new standards to replace the test put forth by the *Bandemer* plurality.¹²³ Another four—Chief Justice Rehnquist and Justices Scalia, O’Connor, and Thomas—would have overruled *Bandemer* in toto, holding that claims of partisan gerrymandering raise nonjusticiable political questions. Justice Kennedy was in the middle. Agreeing with the plurality that none of the tests on the table was adequate, he voted to affirm the three-judge court’s dismissal of the challenge. But he would not join the plurality in holding all such claims nonjusticiable. At least not yet.

1. *The Dissents.*—Presenting themselves as united on what they took to be the central question raised by *Vieth*—“whether political gerrymandering claims are justiciable”¹²⁴—the four dissenters nonetheless proposed three different tests to replace the ineffectual *Bandemer* test.¹²⁵

Not surprisingly, Justice Stevens pressed essentially the same argument that he had first put forth in *Karcher* and that Justice Powell (and he) later adopted in *Bandemer*. That argument contained essentially two components: that political affiliation is simply not an appropriate basis on which to configure district lines;¹²⁶ and that, by attending to the appearance of the districts themselves (considering such criteria as bizarreness, lack of compactness, and disregard of political subdivisions) and to the procedures under which the district lines were adopted, courts can adequately recognize a prima facie case of an unconstitutional gerrymander.¹²⁷ Furthermore, according to Stevens, these twin premises had already been endorsed in the *Shaw* line of cases for racial gerrymandering.¹²⁸ Because he had long viewed racial gerrymandering as just a special case of partisan gerrymandering,¹²⁹ it followed that courts should

apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the

123. *See id.* at 1799–1829. Each of the four would have remanded for retrial in accordance with their preferred standards. *Id.* at 1813 (Stevens, J., dissenting); *id.* at 1822 (Souter, J., dissenting joined by Ginsburg, J.); *id.* at 1829 (Breyer, J., dissenting).

124. *Id.* at 1799 (Stevens, J., dissenting).

125. In so doing, the dissenters took pains to downplay their differences. *See id.* at 1813 (Stevens, J., dissenting) (deeming it “obviou[s]” that “several standards for identifying impermissible partisan influence are available to judges who have the will to enforce them” and observing that the Court “could endorse either of the approaches advocated today by Justice Souter and Justice Breyer”); *id.* at 1829 (Breyer, J., dissenting) (intimating that the dissenters would reach agreement on a test if they were able to secure Kennedy’s vote and thus become a majority); *id.* at 1816 n.1 (Souter, J., dissenting joined by Ginsburg, J.) (agreeing with Breyer on this point).

126. *Id.* at 1801 (Stevens, J., dissenting).

127. *Id.* at 1801–02 (Stevens, J., dissenting).

128. *Id.* at 1802 (Stevens, J., dissenting) (citing *Shaw v. Reno*, 509 U.S. 630, 646–47 (1993) (*Shaw I*); *Miller v. Johnson*, 515 U.S. 900, 913 (1995); *Easley v. Cromartie*, 532 U.S. 234, 241 (2001); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*)).

129. *Id.* at 1801 (Stevens, J., dissenting).

lines drawn, forsaking all neutral principles. Under my analysis, if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge.¹³⁰

Justice Souter, joined by Justice Ginsburg, started by eschewing any search for an exact “verbal test for too much partisanship”¹³¹ and by embracing instead a more common-law approach that would be avowedly experimental and revisable.¹³² As he saw it, “[T]he Court’s job must be to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness.”¹³³ Preferring to “start anew” and analogizing to the Court’s Title VII jurisprudence, Souter proposed a test for partisan gerrymandering that required a “plaintiff to satisfy elements of a prima facie cause of action, at which point the State would have the opportunity not only to rebut the evidence supporting the plaintiff’s case, but to offer an affirmative justification for the districting choices, even assuming the proof of the plaintiff’s allegations.”¹³⁴

The prima facie case Souter advocated would have five required elements:¹³⁵ (1) that the plaintiff belonged to a “cohesive political group” such as a major party; (2) that the district in which the plaintiff lived “paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains;” (3) “specific correlations between the district’s deviations from traditional districting principles and the distribution of the population of [the plaintiff’s] group” sufficient to support “an inference that the district took the shape it did because of the distribution of the plaintiff’s group;” (4) a hypothetical district that included the plaintiff’s residence “in which the proportion of the plaintiff’s group was lower (in a packing claim) or higher (in a cracking one) and which at the same time deviated less from traditional districting principles than the actual district;”¹³⁶ and (5) evidence “that the

130. *Id.* at 1812 (Stevens, J., dissenting) (footnote omitted). Notice that his proposed test would underenforce what he had earlier identified as the constitutional violation. It appears that, for Stevens, the Constitution is violated when partisan motivation supplied a but-for cause for the placement of any district lines, regardless of whether some alternative explanation is “possible.” Indeed, Stevens acknowledged that his proposed rule would leave the Constitution underenforced: “Such a narrow test would cover only a few meritorious claims, but it would preclude extreme abuses” *Id.* See *infra* text accompanying note 263.

131. *Id.* at 1815 (Souter, J., dissenting).

132. *Id.*

133. *Id.* at 1816 (Souter, J., dissenting).

134. *Id.* at 1817 (Souter, J., dissenting).

135. *Id.* at 1818–19 (Souter, J., dissenting).

136. “Packing” and “cracking” are the two primary tools of the gerrymanderer. Opposition-party voters are “packed” insofar as district lines are drawn so as to concentrate them in a relatively small number of districts in which they constitute supermajorities. They are “cracked” when

defendants acted intentionally to manipulate the shape of the district in order to pack or crack” the plaintiff’s group.¹³⁷

Justice Breyer began by addressing an issue that had divided even the *Bandemer* majority that first held partisan gerrymandering claims justiciable. Allying himself with Justice White’s plurality against Justices Powell and Stevens, Breyer declared flatly that “[t]he use of purely political considerations in drawing district boundaries is not a ‘necessary evil’ that, for lack of judicially manageable standards, the Constitution inevitably must tolerate.”¹³⁸ The value of partisanship in districting, according to Breyer, largely derives from the value of single-member districts themselves.¹³⁹ Compared to proportional representation regimes, single-member district systems “diminish the need for coalition governments” thereby “mak[ing] it easier for voters to identify which party is responsible for government decisionmaking.”¹⁴⁰ But single-member districts can be volatile. If the districts are drawn randomly, without attention to partisan composition, then “a small shift in political sentiment” could translate “into a seismic shift in the makeup of the legislative delegation.”¹⁴¹ Therefore, he concluded “that traditional or historically-based boundaries are not, and should not be, ‘politics free.’ Rather, those boundaries represent a series of compromises of principle—among the virtues of, for example, close representation of voter views, ease of identifying ‘government’ and ‘opposition’ parties, and stability in government.”¹⁴²

But, Breyer cautioned, even though “[t]he use of purely political boundary-drawing factors”¹⁴³ will often be justified by constitutional values, sometimes they won’t be. And one circumstance in which partisan redistricting is unconstitutional, Breyer argued, involves what he termed “*unjustified* entrenchment”—the effort by “a party that enjoys only minority support among the populace . . . to take, and hold, legislative power . . . [as] the result of partisan manipulation and not other factors.”¹⁴⁴ Expressly leaving open “whether political gerrymandering does, or does not, violate the

splintered into a relatively large number of districts in which they constitute minorities. Each method prevents opposition parties from achieving the efficiency that comes with holding a relatively small majority in a district.

137. In a claim charging gerrymandering against a major party, Souter seemed to suggest that proof that the other major party controlled the state government, either by controlling the entire state legislature and the governorship or by having a veto-proof majority in the legislature, would be both necessary and sufficient on this fifth prong. *Id.* at 1819 (Souter, J., dissenting). In a claim charging discrimination against any group other than a major party, Souter noted only that “proof of intent could, admittedly, be difficult.” *Id.*

138. *Id.* at 1822 (Breyer, J., dissenting).

139. *Id.* at 1823 (Breyer, J., dissenting).

140. *Id.*

141. *Id.* at 1824 (Breyer, J., dissenting).

142. *Id.*

143. *Id.* at 1825 (Breyer, J., dissenting).

144. *Id.*

Constitution in other instances”—as, presumably, when a party with bare majority support gerrymanders to give itself a substantial supermajority of legislators—Breyer would hold unjustified entrenchment unconstitutional.¹⁴⁵

Recognizing that the problem of identifying unjustified entrenchment is not “easily solved, even in extreme instances,” Breyer nonetheless expressed confidence that “courts can identify a number of strong indicia of abuse.”¹⁴⁶ Very generally, these indicia fall into two categories: evidence that a party with majority support across the state has consistently failed to achieve a majority of the seats in the relevant elections, and evidence that the legislature has substantially departed from redistricting norms. Without proposing any specific judicial test that might dictate a conclusion of unconstitutional gerrymandering in a given case, Breyer observed that the stronger the evidence of one type, the less the courts need demand of the other.¹⁴⁷

2. *The Plurality.*—A plurality consisting of Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas had no difficulty concluding that the test advanced by the *Bandemer* plurality did not satisfy *Baker*’s call for a judicially manageable standard—just as O’Connor, joined by Rehnquist, had predicted in her *Bandemer* concurrence. Describing that standard as “misguided when proposed” and unimproved “in subsequent application”¹⁴⁸ and observing that it had produced “one long record of puzzlement and consternation”¹⁴⁹ in the lower courts, the plurality, through Justice Scalia, rejected it “as a constitutional requirement.”¹⁵⁰

And in the plurality’s view, the “totality-of-the-circumstances analysis” offered in Justice Powell’s *Bandemer* dissent fared no better. Under this approach, the plurality said, “all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander has gone too far—or, in Justice Powell’s terminology, whether it is not ‘fair.’”¹⁵¹ But “fairness,” Scalia concluded,

does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us

145. *Id.*

146. *Id.* at 1827 (Breyer, J., dissenting).

147. *Id.* at 1828–29 (Breyer, J., dissenting).

148. *Id.* at 1777 (plurality opinion).

149. *Id.* at 1779 (plurality opinion).

150. *Id.* at 1770 (plurality opinion). In light of criticisms I have elsewhere leveled against the Court’s conditional spending doctrine, see Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 30–42 (2001); Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003), I cannot help observing that “one long record of puzzlement and consternation” fairly describes the lower federal courts’ experience with *South Dakota v. Dole*, 483 U.S. 203 (1987), as well. See *id.* at 464–69.

151. *Vieth*, 124 S. Ct. at 1784 (plurality opinion).

necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.¹⁵²

Having made short work of *Bandemer*, the plurality marched through, and rejected, all the other standards for adjudicating claims of partisan gerrymandering that remained on the table—one proposed by the *Vieth* plaintiffs and the three developed in the *Vieth* dissents.¹⁵³

Plaintiff-appellants had proposed a test that retained the intent-plus-effect approach of the *Bandemer* plurality but endeavored to cure the particular defects of that earlier effort. The proposed intent prong would be more demanding than the intent prong from *Bandemer* by requiring plaintiffs to “show that the mapmakers acted with a *predominant* intent to achieve partisan advantage” in the sense that “other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage.”¹⁵⁴ The effects prong of the proposed test would rectify the vagueness of the *Bandemer* test by requiring plaintiffs to show both that the challenged scheme “systematically ‘pack[s]’ and ‘crack[s]’ the rival party’s voters” and that “the map can thwart the plaintiffs’ ability to translate a majority of votes into a majority of seats.”¹⁵⁵ By the plurality’s lights, this proposal was triply infirm: the intent prong was not judicially manageable, and the effects prong was neither manageable nor discernible.

In criticizing the plaintiffs’ intent standard, the plurality took aim at a central assumption underlying it: that because the Court’s racial gerrymandering jurisprudence prohibited a predominant intent to discriminate on the basis of race, that same predominant intent test must also be manageable in the partisan gerrymandering context. That, the plurality concluded, was just wrong. For one thing, “in the racial gerrymandering

152. *Id.*

153. The plurality prefaced its assessment of the standards proposed in the three dissents “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.* I will argue that a proper understanding of the conceptual structure of constitutional doctrine suggests that this is very much mistaken. The four dissenters, the lone concurrence, six Justices in *Bandemer*, and the appellants—indeed, even the plurality itself—actually discerned much the same “constitutional standard.” The constitutionally discernible standard on which they all centered was a prohibition against the pursuit of excessive partisan advantage in redistricting. The *Vieth* dissenters differed among themselves, and with the *Bandemer* plurality and dissent, principally concerning what test courts should create in order to administer that constitutionally discernible standard. And even here the *Vieth* dissenters were disagreeing over what judicial test would be optimal, not over what would be adequate. *See supra* note 125.

154. *Vieth*, 124 S. Ct. at 1780 (quoting Brief for Appellants, *supra* note 118, at 19 (emphasis in *Vieth*)) (plurality opinion).

155. *Id.* at 1784 (quoting Brief for Appellants, *supra* note 118, at 20) (plurality opinion).

context, the predominant intent test has been applied to the challenged district in which the plaintiffs voted.”¹⁵⁶ But the *Vieth* plaintiffs proposed their test as a way to challenge a statewide redistricting plan, not the placement of lines within a particular district.¹⁵⁷ According to the plurality, this was a defect, not a virtue.

Vague as the “predominant motivation” test might be when used to evaluate single districts, it all but evaporates when applied statewide. Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc.—*statewide*? And how is the statewide “outweighing” to be determined?¹⁵⁸

Moreover, “Even within the narrower compass of challenges to a single district, applying a ‘predominant intent’ test to *racial* gerrymandering is easier and less disruptive.”¹⁵⁹ This is because “the purpose of segregating voters on the basis of race” is rare and unlawful, whereas the purpose of segregating them for partisan advantage is common and—when not pursued in “excess”—lawful.¹⁶⁰ Given this difference, “to the extent that our racial gerrymandering cases represent a model of discernible and manageable standards, they provide no comfort here.”¹⁶¹

156. *Id.* at 1780 (plurality opinion).

157. *Id.* at 1773 (plurality opinion).

158. *Id.* at 1781 (plurality opinion).

159. *Id.*

160. *Id.*

161. *Id.* Although I have tried to present the plurality’s argument concerning the infirmities of plaintiffs’ intent prong, it must be said that this part of the plurality’s analysis is unusually muddled—extraordinarily so for a Scalia opinion. What is clear is that, according to the plurality, the intentions to segregate voters on the bases of race and of partisan affiliation differ in the two ways I have described—that the former is rare and unlawful, whereas the latter (if not taken to an extreme) is common and lawful. Now, this claim is at least doubly contestable—on the empirical claim that an intention to segregate voters on the basis of race is rare and on the interpretive claim that the intent to pursue only moderate partisan advantage is constitutionally permissible. Those quibbles aside, what is really unclear is how this observation is supposed to bear upon whether the proposed intent prong is judicially manageable. Here is the plurality’s reasoning on this score in its entirety:

[1] Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it. [2] Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering. [3] Finally, courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear; whereas they are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply *too much* partisanship in districting) which is both dubious and severely unmanageable. [4] For these reasons,

In the plurality's eyes, the plaintiffs' effects prong fares no better. It is not "judicially discernible in the sense of being relevant to some constitutional violation" because it "rests upon the principle that groups (or at least political-action groups) have a right to proportional representation."¹⁶² And it's not judicially manageable because it is "impossible to assess the effects of partisan gerrymandering,"¹⁶³ difficult to establish whether a party has "majority status,"¹⁶⁴ and "impossible to assure" that a party that does enjoy majority status "wins a majority of seats."¹⁶⁵

to the extent that our racial gerrymandering cases represent a model of discernible and manageable standards, they provide no comfort here.

Id. (bracketed numbers added). Sentence [4] claims that the plurality has provided several reasons in support of its claim that differences between race and partisanship argue against adopting a predominant intent test in the latter context. But has it? And, if so, are those reasons persuasive?

Clearly, the plurality does supply a reason in sentence [2]: Because a purpose to secure partisan advantage is more common than is a purpose to segregate voters on account of race, a judicial test that looks to the former is likely to produce more litigation and to prove more disruptive. Yet this reason is doubly questionable. First, the history of post-*Shaw* litigation suggests that plaintiffs can very often muster a racial gerrymandering claim. Second, even to the extent that the factual predicate holds true, it's very far from clear that this is the sort of consideration that properly bears upon the manageability question. *See infra* note 198 and accompanying text. So I think that the reason contained in sentence [2] is not very persuasive. But, to reiterate, a reason it is. Are there others?

Surely the introductory word of sentence [2] implies that a reason has appeared in sentence [1] too. But it has not. Sentence [1] is actually devoid of reason; it is just a restatement of the claimed distinctions conjoined to the assertion that they make the inquiries "quite different." Sentence [3] also contains a reason. But it is the wrong sort of reason. That the obligation to refrain from racial discrimination is clearer than is the obligation not to apply too much partisanship in districting might be a reason to tolerate more unmanageability when adjudicating the former than the latter. But the unmanageability of the proposed "predominant intent to achieve partisan advantage" standard is precisely what sentence [3] is advertised as helping to demonstrate. Justice Stevens is therefore right to label this reasoning "tautological." *Vieth*, 124 S. Ct. at 1804 n.13 (Stevens, J., dissenting). Beyond its circularity, it is puzzling. The claim that "the obligation not to apply too much partisanship in districting" is "dubious" sits uncomfortably with the plurality's repeated recognition that the Constitution does indeed impose just such an obligation. *See infra* note 192.

162. *Vieth*, 124 S. Ct. at 1782 (plurality opinion).

163. *Id.*

164. *Id.*

165. *Id.* at 1783 (plurality opinion). Unfortunately, here too the plurality's analysis leaves much to be desired. To start, pieces of the plurality's critique fail to persuade even on their own terms. Recall that the effects prong of the plaintiffs' test would require a showing that the challenged scheme systematically packs and cracks a plaintiff's party and that, as a result, the scheme prevents that party from winning a majority of seats even if it wins a majority of the votes statewide. *Id.* at 1780–81 (plurality opinion). In response, the plurality suggests that courts are unable to determine whether there is systematic packing and cracking because "a person's politics is rarely . . . readily discernible" and "not an immutable characteristic." *Id.* at 1782 (plurality opinion). Of course a person's politics is not immutable. But the argument as a whole—that packing and cracking cannot be discerned—can hardly be taken seriously. As Justice Souter objected, the noncontroversial fact that partisan gerrymandering is widespread indicates that legislators have significant faith in *their* ability to discern a person's politics. *See id.* at 1817 n.2 (Souter, J., dissenting). Furthermore, as Rick Pildes has smartly observed, the posture of naivete that Scalia assumes here contrasts markedly with his more realistic recognition, in *McConnell v. FEC*, 124 S. Ct. 619 (2003), that "the effects of political practices should be gauged against the assumption that political behavior is rationally self-interested." Richard H. Pildes, *The Supreme*

Scalia applies similar criticisms to the three different approaches that were floated by the dissenters. Justice Stevens's test failed essentially because he, like the plaintiffs, erroneously assumed that because a judicial inquiry into predominant intent is manageable in racial gerrymandering cases, a similar inquiry is therefore manageable in partisan gerrymandering cases.¹⁶⁶ Justice Souter's five-part test is criticized on the ground "that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards."¹⁶⁷ More fundamentally, Souter's proposal "is doomed to failure" because "[n]o test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing."¹⁶⁸ And yet Souter does not make clear "the precise constitutional deprivation his test is designed to identify and prevent,"¹⁶⁹ offering only the "flabby goal" of preventing "an extremity of unfairness."¹⁷⁰ Thus, even if

Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics, 118 HARV. L. REV. 29, 65 (2004) [hereinafter Pildes, *Democratic Politics*].

More fundamentally, though, the plurality's objections rest on a misapprehension of the plaintiffs' proposal. The plaintiffs' core claim, as I read it, is that "[a]ny party that earns a majority of the vote should have *at least a fighting chance* to become the governing party, with a majority of seats." Reply Brief for Appellants at 5, *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02-1580) (emphasis added); see also Brief for Appellants, *supra* note 118, at 25. To operationalize this idea, plaintiffs then proposed a complex and sophisticated methodology consisting of several discrete steps: (1) identifying all the statewide races contested by the major parties over the past decade (e.g., races for president, senators, governor, secretary of state, comptroller general, and the like); (2) determining for each race the percentage of votes won by each party's candidate, and thus the percentage increase (decrease) in votes that each losing (winning) candidate of the out party would have needed in order to have won a bare majority of votes; (3) normalizing each election to simulate an outcome in which the out-party candidate would have won a bare majority of votes, by applying that percentage increase (or decrease) to his vote total in each district that comprises the challenged scheme; and (4) counting the number of districts in which the candidate for the out party would have won a majority of votes in that simulated election. The *Vieth* plaintiffs then claimed that if performing this methodology for every statewide election would yield only a trivially small number of elections for which it would be true that the out-party candidate with a bare (50.1%) majority of the vote would have won a majority of the votes in at least half of the districts, then it is fair to conclude that the in party would have "lock[ed] up a majority of seats *even if* the other party overtakes it in popular support . . ." *Id.* at 35 (emphasis added).

Certainly, parts of the plaintiffs' test can be reasonably challenged. For example, one might deny the initial majoritarian premise. Or, one might question the normalizing assumption by which the same percentage increase in votes is allocated to each district. But my goal here is not to assess the overall wisdom or feasibility of the plaintiffs' proposal. Worth noting for present purposes is only that the particular objections leveled by the plurality are misconceived. The plaintiffs' approach never requires a court to determine whether any given party does in fact have "majority status" in the state; does not argue that if a party were to possess majority status, it must be guaranteed a majority of seats; and, by endorsing the so-called "seats bonus" (often called the winner's bonus), expressly disavows the principle that any groups have a right to proportional representation. See Reply Brief for Appellants, *supra*, at 7–8; Brief for Appellants, *supra* note 118, at 34.

166. See *Vieth*, 124 S. Ct. at 1785 (plurality opinion).

167. *Id.* at 1787 (plurality opinion).

168. *Id.*

169. *Id.*

170. *Id.* at 1788 (plurality opinion).

Souter's five steps "could be manageably applied," the plurality saw "no reason to think they would detect the constitutional crime."¹⁷¹ Justice Breyer's dissent receives some approval from the plurality, which is not surprising given that Breyer, alone among the dissenters, takes pains to insist that *some* pursuit of partisan advantage is constitutional. Also not surprising, though, is the plurality's conclusion that Breyer's analysis provides little guidance for courts in determining when "*unjustified* entrenchment" has occurred.¹⁷²

On the basis of this extended analysis, the plurality concluded that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."¹⁷³ As a result, "we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided."¹⁷⁴

3. *The Concurrence.*—In effect, Justice Kennedy agreed with this first statement—that no judicially manageable standards have yet emerged—but disagreed with the second—that the failure of an acceptable standard to appear thus far justified a conclusion that none could emerge within an acceptable timeframe.

According to Kennedy, courts confront "two obstacles" when seeking to adjudicate claims of partisan gerrymandering.¹⁷⁵ "First is the lack of comprehensive and neutral principles for drawing electoral boundaries."¹⁷⁶ Not only is there no present agreement on a "substantive definition of fairness in districting,"¹⁷⁷ there is also a lack of "helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies."¹⁷⁸ The second obstacle, related to the first, "is the absence of rules to limit and confine judicial intervention."¹⁷⁹ Given the absence, thus far, of "agreed upon substantive principles of fairness in districting," the courts are left with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."¹⁸⁰

Agreeing with the plurality that no tests yet proposed have overcome these obstacles, Kennedy would have dismissed the challenge for failure to

171. *Id.* at 1786 (plurality opinion).

172. *Id.* at 1788 (plurality opinion).

173. *Id.* at 1778 (plurality opinion).

174. *Id.*

175. *Id.* at 1793 (Kennedy, J., concurring).

176. *Id.*

177. *Id.*

178. *Id.* at 1794 (Kennedy, J., concurring).

179. *Id.* at 1793 (Kennedy, J., concurring).

180. *Id.*

state a claim.¹⁸¹ And he acknowledged that the more extreme conclusion—that claims of partisan gerrymandering should be held nonjusticiable—“may prevail in the long run.”¹⁸² But, unlike the plurality, he was not prepared to reach that conclusion just yet.

For one thing, pessimism that a manageable standard might emerge was premature. The fact, heavily relied upon by the plurality, that no adequate standard has emerged since *Bandemer*, means little because “during these past 18 years the lower courts could do no more than follow” *Bandemer*.¹⁸³ Besides, “by the timeline of the law 18 years is rather a short period.”¹⁸⁴ All the more so because claims of partisan gerrymandering had generally relied most heavily on the Equal Protection Clause. But, Kennedy observed, the First Amendment might prove to be the “more relevant constitutional provision.”¹⁸⁵

Yet more fundamentally, Kennedy showed himself to be more sensitive to the grotesque affront to democratic principles that extreme partisan gerrymandering represents, and less sanguine that the practice could be meaningfully limited without judicial intervention. Ironically, just as the

181. *Id.* at 1796–97 (Kennedy, J., concurring). Although no doubt happy to receive Kennedy’s vote, the plurality nonetheless objected that dismissal was not a disposition available to him: “It is logically impossible to affirm [the district court’s] dismissal without either (1) finding that the unconstitutional-districting standard applied by the District Court, or some other standard that it should have applied, has not been met, or (2) finding (as we have) that the claim is nonjusticiable.” *Id.* at 1790 (plurality opinion).

I believe that the plurality is correct that Kennedy ought not to have dismissed the complaint for failure to state a claim. True, given Kennedy’s flirtation with the First Amendment as a possible basis for adjudicating partisan gerrymandering claims, *see infra* note 185 and accompanying text, I suppose he could have rejoined that he aims to leave open hope only under that constitutional provision and agrees with the plurality that the Equal Protection Clause does not provide the basis for justiciable claims of partisan gerrymandering. *Cf.* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 543 (2004) (arguing that “no matter how difficult judicial review of political gerrymandering claims may be . . . the overall doctrinal structure governing redistricting makes it impossible actually to render such claims nonjusticiable”). Had the plaintiffs not pleaded the First Amendment, affirmation of the district court’s dismissal would have been appropriate. I am not myself sympathetic to this provision-by-provision approach to justiciability. In any event, the plaintiffs *did* plead the First Amendment, and Kennedy did not take this route, so the gist of his response to the plurality on this score, *see Vieth*, 124 S. Ct. at 1797 (Kennedy, J., concurring), is not entirely clear.

Kennedy’s better response might have been to challenge the plurality’s insistence that he was duty-bound to supply a standard. At the heart of Kennedy’s opinion is the judgment that it is the plaintiffs’ burden to persuade the court that the Constitution has been violated, and that they have not done this. On this (admittedly ad hoc) approach, decision for the state defendant would have been proper, but it would have been a decision on the merits, not a dismissal for failure to state a claim.

182. *Vieth*, 124 S. Ct. at 1794 (Kennedy, J., concurring).

183. *Id.* at 1796 (Kennedy, J., concurring).

184. *Id.*

185. *Id.* at 1797 (Kennedy, J., concurring) (“After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.”).

plurality had criticized Breyer's opinion for failing to undertake any cost-benefit analysis concerning whether judicial intervention is justified,¹⁸⁶ Kennedy's disagreement with the plurality can be seen as a charge that the plurality also failed to take the relevant costs into account. But whereas the plurality thought Breyer ignored the costs of judicial intervention, Kennedy charged the plurality with understating the costs of judicial abdication.

"The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself," he wrote.¹⁸⁷ And the Pennsylvania legislature's abandonment of that restraint, he continued, "should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works."¹⁸⁸ Although he, like the plurality, voted to uphold the Pennsylvania partisan gerrymander for want of a manageable standard, Kennedy explicitly left open hope for the future. "If workable standards do emerge," he insisted, "courts should be prepared to order relief."¹⁸⁹

II. Two Problems of Manageability

Although *Vieth* could be read to introduce ever more confusion to partisan gerrymandering jurisprudence,¹⁹⁰ in one key respect it brought more light. For the first time,¹⁹¹ all the Justices agreed that the pursuit of partisan

186. Justice Breyer had recognized that several avenues of redress may be available for a majority to prevent minority entrenchment—the governor, redistricting commissions, Congress, and the people via ballot initiatives and referenda. *Id.* at 1826 (Breyer, J., dissenting). Because of this, the plurality pointed out, the cost of judicial inaction might not be great. Accordingly, it argued, Breyer should have attended to the costs of action. And these, the plurality contended were substantial, for "court action that is available tends to be sought, not just where it is necessary, but where it is in the interest of the seeking party. And the vaguer the test for availability, the more frequently interest rather than necessity will produce litigation." *Id.* at 1789 (plurality opinion). The plurality concluded that "the regular insertion of the judiciary into districting, with the delay and uncertainty that brings to the political process and the partisan enmity it brings upon the courts" was not "worth the benefit to be achieved—an accelerated (by some unknown degree) effectuation of the majority will." *Id.* at 1789 (plurality opinion).

187. *Id.* at 1798 (Kennedy, J., concurring).

188. *Id.*

189. *Id.* at 1799 (Kennedy, J., concurring).

190. *Cf.* J. Clark Kelso, *United States Supreme Court Case Preview: Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47, 50 (2004) (noting that "forecasting a result [in *Vieth*] is hopeless," but identifying as one "real possibility" that the case would produce "a split decision that leaves the law either unchanged or even less certain than it is now").

191. In his *Vieth* dissent, Justice Stevens announced that "our opinions referring to political gerrymanders have consistently assumed that they were at least undesirable, and we always have indicated that political considerations are among those factors that may not dominate districting decisions." *Vieth*, 124 S. Ct. at 1811 (Stevens, J., dissenting). But the cases he cites in support of that claim—*Davis v. Bandemer*, 478 U.S. 109 (1986); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Burns v. Richardson*, 384 U.S. 73 (1966); *Fortson v. Dorsey*, 379 U.S. 433 (1965)—do not strictly bear it out, for all involved decisions to resort to multi-member districts, not the decisions of how to draw the lines separating single-member districts. Moreover, the lead case in the series, *Fortson*, specifically left as an open question the

advantage in redistricting is sometimes unconstitutional.¹⁹² Also, all justices agreed that whether the relevant constitutional prohibition should be judicially enforced depends, at least in part, on whether the Court can craft a judicially manageable standard.¹⁹³

The central question that divided the Court in *Vieth* is the same issue that has confounded the judicial response to partisan gerrymandering since *Bandemer* and, indirectly, since *Colegrove*: whether the courts can develop manageable standards for policing the practice. But as Kennedy's concurrence rightly argues, the problem of manageability is really two analytically distinct problems, not one.¹⁹⁴ Unfortunately, as I will argue below, the precise way in which Kennedy conceptualizes the first of the two problems risks obscuring as much as it illuminates. But his core claim that there are two problems remains of critical importance. All members of *Vieth* agreed that some forms of partisan gerrymandering are unconstitutional. We cannot hope for progress in crafting judicially manageable standards for curbing the practice until we carefully tease apart the twin elements that comprise the manageability challenge.¹⁹⁵

constitutionality of a multi-member districting scheme that “operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population.” *Fortson*, 379 U.S. at 439.

192. See, e.g., *Vieth*, 124 S. Ct. at 1785 (plurality opinion) (implying agreement with the proposition that “severe partisan gerrymanders [are incompatible] with democratic principles” and “violate the Constitution”); *id.* (acknowledging that an “excessive injection of politics [into districting] is unlawful”); *id.* at 1793 (Kennedy, J., concurring) (explaining that redistricting violates the Constitution when a state applies political “classifications . . . in an invidious manner or in a way unrelated to any legitimate legislative objective”); *id.* at 1798 (Kennedy, J., concurring) (agreeing with the plurality that “partisan gerrymandering that disfavors one party is [not] permissible”); *id.* at 1810 (Stevens, J., dissenting) (stating that “partisanship [can] be a permissible consideration in drawing district lines, so long as it does not predominate”); *id.* at 1815 (Souter, J., dissenting joined by Ginsburg, J.) (acknowledging “that some intent to gain political advantage is inescapable whenever political bodies devise a district plan” and describing the equal protection issue as “one of how much [partisanship] is too much”); *id.* at 1824–25 (Breyer, J., dissenting) (arguing that “the legislature’s use of political boundary drawing considerations ordinarily does *not* violate the Constitution’s Equal Protection Clause,” but that there are circumstances “where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse”) (emphasis in original).

193. But see Issacharoff & Karlan, *supra* note 181 (manuscript at 21) (observing rightly that, although the plurality opinion ultimately rested only on the manageability prong of *Baker*, “it began with an intriguing feint in the direction of treating gerrymandering claims as nonjusticiable” on *Baker*’s textually demonstrable commitment prong).

194. *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring) (“[W]hen presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries Second is the absence of rules to limit and confine judicial intervention.”).

195. Rick Hasen likewise observes that “the judicial manageability debate in *Vieth* conflates two separate concerns.” Rick Hasen, Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after *Vieth* 5 (July 2004) (unpublished manuscript on file with Texas Law Review). But he describes these two concerns as “one about consistency of result across the courts and a second about the justifiability of a standard for judging partisan gerrymandering claims.” *Id.* The twin concerns on which I will focus (and which I do not think *Vieth* fully conflates) involve, first, the elucidation of excessive partisanship as a matter of constitutional meaning and, second, the manageability of judicial doctrine crafted to administer that meaning.

I have just said that all members of the *Vieth* Court acknowledged that pursuit of partisan aims in redistricting violates the Constitution under some circumstances. They acknowledged as well that the challenge is to craft a manageable standard for enforcing the constitutional prohibition.¹⁹⁶ But my claim that this challenge is comprised of two analytically distinct components does not hold true for *all* views of the circumstances under which partisan gerrymandering is unconstitutional. We can get a better grasp on the nature of the discrete tasks by understanding why this is so.

The most important difference of opinion concerning what constitutes unconstitutional partisan gerrymandering is this: For many members of the Court, some recourse to partisanship in districting is constitutional; the Constitution forbids only that pursuit of partisan advantage which is excessive or otherwise improper. For Justice Stevens, in contrast, any pursuit of partisan advantage in redistricting is unconstitutional.¹⁹⁷

For one who holds Stevens's view, the problem of manageability really does present just one challenge: the judiciary must articulate a standard or test that permits courts to adjudicate this rather clear principle in a "manageable" fashion. Now, the criteria that bear upon whether given doctrine *is* manageable are not self-evident. Surely not *all* respects in which proposed constitutional doctrine might be considered defective count against that doctrine's "manageability." After all, "unmanageable" is not synonymous with "unwise" or "imprudent" or "undesirable, all things considered." Yet Justices have disagreed concerning precisely which of the many sorts of features that might render doctrine *suboptimal* count against that doctrine's "manageability."¹⁹⁸ And if there is no consensus regarding the sorts of defects that count in the manageability calculus at all (and because manageability is a continuum concept not a binary one), so much

196. See, e.g., *Vieth*, 124 S. Ct. at 1777–79 (plurality opinion) (pointing out that since "there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights").

197. *Vieth*, 124 S. Ct. at 1801 (Stevens, J., dissenting).

198. See, for example, *supra* note 104. That given doctrine is likely to produce unpredictable and inconsistent results are paradigmatic considerations that bear upon its "manageability." Not so, it seems to me, that the doctrine either generates interbranch friction because it often results in judicial holdings that the state acted unconstitutionally, or provokes substantial litigation by overly optimistic plaintiffs. This is not to contend that judges may not take these factors into account when crafting doctrine. Whether they may is an important and challenging question. See Berman, *Constitutional Decision Rules*, *supra* note 18, at 88–100. My point here is only to question whether these sorts of flaws are the sorts of flaws that count against the doctrine's "manageability" and that are therefore properly taken into account for purposes of deciding whether a claim raises a nonjusticiable political question. For a like recognition that *Baker's* "judicially manageable standards" criterion is not intended to cover the full range of respects in which judicial standards might be thought nonideal, but is instead "focused firmly on the *Court's* ability to do a good job deciding the case," see Sanford Levinson & Ernest A. Young, *Who's Afraid of the Twelfth Amendment?*, 29 FLA. ST. U. L. REV. 925, 957 (2001).

more certainly will Justices and judges disagree over whether a particular proposed doctrine presents the relevant sorts of defects, or threatens the relevant sorts of unfortunate consequences, to sufficient degree to warrant labeling that doctrine unmanageable (rather than, say, “manageable enough, though less manageable than we’d like”). Notwithstanding these important caveats, however, for those who believe that the Constitution prohibits *any* pursuit of partisan advantage in redistricting, the heart of the manageability challenge is easy to grasp: we need an in-court test, rule, or standard that does an adequate job of catching those cases in which partisanship has been present, without relying upon too much judicial subjectivity in application and generating too much unpredictability and instability (or, perhaps, producing other kindred ills).

Things are different for those—a majority in *Vieth*—who believe that pursuit of partisan advantage is constitutionally permissible so long as it is not “excessive.”¹⁹⁹ Like Justice Stevens, they must be able to meet what we might call the challenge of manageability proper: they must articulate a judicial decisional procedure that is not so indeterminate as to make results in partisan gerrymandering cases “disparate and inconsistent.”²⁰⁰ But adherents of the view that partisanship in redistricting becomes unconstitutional only when excessive confront a challenge that Justice Stevens does not: they must provide some content or meaning to the wholly vague notion of “excessive partisanship.”²⁰¹

199. In *Cox v. Larios*, 124 S. Ct. 2806 (2004), a post-*Vieth* case in which the Court summarily affirmed a lower court judgment that Georgia’s state legislative reapportionment violated one person, one vote, Justice Scalia observed that every Justice in *Vieth*, save Stevens, agreed that the pursuit of partisan advantage in redistricting is permissible “so long as it does not go too far.” *Id.* at 2809 (Scalia, J., dissenting).

200. *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring).

201. I take this point to be comparable, but possibly not identical, to Kennedy’s reference to the need for a “subsidiary standard.” *Id.* at 1797 (Kennedy, J., concurring); see also Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1413–14 (2002) (explaining that implementing *Baker* required the Court to settle on a “mediating” principle or theory to give content to the foundational norm of equality that *Baker* endorsed). Compare, as well, Keith Whittington’s distinction between constitutional interpretation and constitutional construction. See generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999). We might say that, having interpreted the Constitution to prohibit excessive partisanship, the Court ought then to develop a construction of that interpreted meaning.

Closer to home, Backstrom, Robins, and Eller distinguish two concepts that are involved in the judicial quest to police partisan gerrymandering—measures and standards:

A *measure* is a device or method of detecting and calibrating disparities. A *standard* is how great that disparity must be to constitute an inequity . . . or a discrimination

Thus in dealing with partisan gerrymandering, the Court will have to first adopt a measure to ascertain whether and to what degree a disparity is present, and then choose a standard of how much disparity is acceptable before a specific districting act will be overturned.

The plurality makes this point—that those adherents have not successfully accomplished this analytically primary task—when criticizing Justice Souter for skipping too quickly to offer his two-step, five-part test. Souter’s test is intended to cure the problems of subjectivity and indeterminacy.²⁰² The plurality, recall, doubts that the test responds adequately even to those problems. More fundamentally, however, they chastise Souter for proposing a test without first giving more concrete meaning to the notion of excessive partisanship: “No test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing for.”²⁰³ The plurality is right. A satisfactory test must not only avoid the evils of unconstrained discretion; it must also adequately fit the underlying violation.²⁰⁴ Without a clearer definition of excessive partisanship, we cannot know whether Souter’s test does a tolerable job of separating excessive partisanship from permissible partisanship.²⁰⁵

This is Justice Kennedy’s point as well. His appeal to some acceptable “substantive definition of fairness in districting” is best understood, I think, as a plea that meaning be given to the amorphous notion of “excessive partisanship.”²⁰⁶ Unfortunately, Kennedy’s suggestion that we need an understanding of fairness in districting to make meaningful the notion of excessive partisanship is mistaken. We can give content or meaning to “excessive partisanship” without adopting a prior understanding of fairness. Indeed, Kennedy might have things exactly backwards: an understanding of what is a fair redistricting could be a function of an understanding of how much partisanship is excessive, not the reverse. This would be so if what makes some degree of partisanship excessive is not the fact that it is inherently unfair but that it is likely to produce other sorts of ills, such as that it undermines democracy.

The remainder of this Article assumes, as a majority of Justices in *Vieth* plainly have accepted, that a gerrymander is unconstitutional when it excessively pursues partisan advantage in districting.²⁰⁷ And it pursues, in

Backstrom et al., *supra* note 114, at 159–60. Although that is a useful distinction, the subject on which I aim to focus attention—what is meant by excessive partisanship—is conceptually prior to both measure and standard, as the authors employ those terms.

202. See *supra* text accompanying notes 131–37.

203. *Vieth*, 124 S. Ct. at 1787 (plurality opinion).

204. I recently argued that Commerce Clause doctrine would also benefit from greater judicial sensitivity to this lesson. See Mitchell N. Berman, Guillen and Gullibility: *Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1527–29 (2004) [hereinafter Berman, Guillen and Gullibility].

205. Indeed, it appears that Souter’s test is better designed to capture *any* partisanship than the subset of *extreme* or *excessive* partisanship.

206. *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring).

207. This is least clear in the case of Justice Breyer. In arguing that it is unconstitutional for a party with minority popular support to entrench itself in power through partisan manipulation of district lines, Breyer left open whether partisan gerrymandering could be unconstitutional in other circumstances too. My own view is that “unjustified entrenchment” of a minority party as a

three steps, a manageable standard for administering this constitutional principle. This Part takes the first step by explaining that the notion of “excessive partisanship” is not only amorphous, but also ambiguous.²⁰⁸ That is, the effort to give content to the idea of excessive partisanship can take one in identifiably distinct directions. This Part, accordingly, describes what might be meant, and what should be meant, by excessive pursuit of partisan advantage.²⁰⁹

A. *The Meanings of Excessive Partisanship*

If the Constitution prohibits “too much partisanship”²¹⁰ in districting, it must permit *some* partisanship.²¹¹ It might seem to follow, as Justice Souter

majority and “unjustified entrenchment” of a majority party as a supermajority are not meaningfully distinguishable as a constitutional matter. For one thing, where congressional redistricting is at issue, majority-to-supermajority entrenchment at the state level can produce minority-to-majority entrenchment at the national level.

Second, even if we focus only at the state level, Breyer’s narrow concern with minority-to-majority entrenchment seems not to adequately appreciate the feedback mechanism that can obtain between popular support and electoral success. For example, the likelihood that a potential voter will cast a ballot is probably proportional, all things being equal, to her perception of the likelihood that her favored party will control the legislature. Put otherwise, persons who are actual or potential supporters of a minority party are more energized and more likely to vote when they believe that becoming an electoral majority is possible. Consequently, the fact that a party enjoys popular majority support at one point in time can itself be partly a function of the fact that, at an earlier point in time, it engaged in partisan manipulations to translate a bare electoral majority into an electoral supermajority.

For these reasons, I believe that the distinction between minority-to-majority entrenchment and majority-to-supermajority entrenchment that Breyer at least contemplates is not ultimately tenable. (And even were it a normatively attractive distinction as a matter of constitutional meaning, to embody the distinction in constitutional doctrine would only compound the manageability problem in cases of closely divided states—as my colleague Douglas Laycock has pointed out to me.) Accordingly, I will read Breyer’s dissent as expressing the following three-part view: that excessive partisanship in gerrymandering is unconstitutional; that one circumstance in which a partisan gerrymander is unconstitutionally excessive is when it results in unjustified entrenchment; and that the concept of excessive partisanship is otherwise underspecified at present.

208. Rick Pildes has observed that “[l]aw and social science are perhaps nowhere more mutually dependent than in the voting-rights field.” Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1518 (2002). He may well be right; I don’t know. The dependence has not, however, been an unmitigated good. It has encouraged lawyers and legal scholars to argue first in terms of what is measurable without taking pains to ascertain what we would like to measure if we could.

209. This strategy can also be read as a partial response to a telling criticism of *Bandemer* that Daniel Lowenstein leveled fifteen years ago. See generally Daniel Hays Lowenstein, *Bandemer’s Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra* note 13, at 64. Disagreeing with those who had attributed the confusion that had greeted the Supreme Court’s decision to the plurality’s failure “to lay down sufficiently clear ‘standards’ for the adjudication of gerrymandering cases,” *id.* at 65, Lowenstein diagnosed, as “[t]he true source of confusion in interpreting *Bandemer*,” the plurality’s provision of “an incomplete definition and explanation of the nature of the constitutional violation that may inhere in a partisan gerrymander.” *Id.* at 66. “[R]ules or standards to govern matters of great complexity,” he further observed, “cannot be precise or comprehensive enough to give adequate guidance in particular cases without an explanation of the principles that those rules and standards are intended to implement.” *Id.* at 67.

210. *Vieth*, 124 S. Ct. at 1815 (Souter, J., dissenting).

observed and the plurality agreed, that “the issue is one of how much is too much.”²¹² And so it does. But not immediately. Before we can hope to identify and articulate even a remotely intelligent answer to Souter’s question, we will need a clearer grasp on what it means for partisanship to be present a lot rather than a little. And for this, we will need to articulate a *measure* in which the partisanship of the scheme will be quantified, and we will need to identify a *baseline* against which the challenged districting scheme will be compared. Each of these needs, I will propose, comes in two varieties: the measure can be (what we may inelegantly call) “cost-based” or “ends-based”; the baseline can be normative or positive. Because the choices of measure and baseline are independent of each other, we are left with a 2 x 2 matrix of possibilities for conceptualizing amounts of partisanship.

This subpart argues that the usual ways of conceptualizing “too much partisanship” are misguided; in effect, judges and scholars have been looking in the wrong boxes of the matrix. It then explains that the better concept and measure of too much partisanship consist of measuring an *ends-based* conceptualization against a *positive baseline*. Correct conceptualization will put us in position to meet the plurality’s challenge to Justice Souter—i.e., to explicate what we’re testing *for*—without adopting an answer to that question as lenient as that accepted by Justice Stevens (*any* partisanship in districting) or as stringent as that at least entertained by Justice Breyer (*only* the use of partisanship to entrench a minority as a majority).

I. Two Scalar Measures of Partisanship.—Although commentators often draw attention to the need for a baseline,²¹³ the more fundamental, yet less obvious, need is to conceptualize partisanship in a way that is amenable to assessment in quantitative terms. Put otherwise, we need to conceptualize partisanship as a scalar concept,²¹⁴ so that it can be present in greater or lesser degree.

It is fairly easy (though not entirely unproblematic) to conceptualize partisanship in binary terms, as present or absent. Partisanship in

211. This is open to quibble. Literally speaking, one could maintain both that the Constitution prohibits too much partisanship and that any partisanship is too much. But the more straightforward way to convey this idea is that the Constitution prohibits any partisanship in districting. So I will stand by the statement in the text.

212. *Vieth*, 124 S. Ct. at 1815 (Souter, J., dissenting); *id.* at 1788 (plurality opinion).

213. See, e.g., Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 542 (1997) (arguing that “judicial competence turns on the existence of an uncontroversial baseline against which to measure entrenchment effects”); Pildes, *Democratic Politics*, *supra* note 165, at 59 (“The difficulty for courts addressing gerrymandering has long been thought to be defining a baseline for what constitutes a party’s ‘proper’ share of political representation given the distribution of votes.”).

214. Scalar measures are customarily distinguished from vectors, in possessing only magnitude, not direction as well. Here, I am distinguishing scalars from binaries.

redistricting refers, first and foremost, to partisan motivation.²¹⁵ So to ask whether partisanship lay behind any given redistricting is equivalent to asking whether the legislature²¹⁶ drew district lines, or otherwise decided how the electoral system would be structured,²¹⁷ with a purpose of promoting a favored party's electoral chances. In a mixed-motive case, we frequently conceptualize issues of this sort in but-for terms:²¹⁸ Would the lines have been drawn just as they were drawn had the legislature not sought to promote the party's electoral chances?

But if partisan motivation was present,²¹⁹ if the redistricter acted for the purpose of realizing partisan advantage, what does it mean for that motivation to be present more or less, a little or a lot? Until we settle on an answer to this question, the ultimate issue that six Justices (the plurality plus Justices Souter and Ginsburg) explicitly identify as central—"how much is too much"—will be unanswerable.

This point can hardly be overemphasized because there are at least two plausible ways to make sense of partisan motivation as a scalar concept. Partisanship in redistricting, recall, refers to a certain sort of purpose—a purpose to promote a favored party's electoral prospects. One way to think

215. That is, when we speak of "partisanship" in redistricting, we are referring to the character of the purposes, motives, or intentions held by the actors responsible for the redistricting. A partisan purpose or partisan motivation is an "intent to gain political advantage." *Vieth*, 124 S. Ct. at 1815 (Souter, J., dissenting); *see also id.* at 1801 (Stevens, J., dissenting) (observing that, for claims of gerrymandering, "purpose [is] the ultimate inquiry"); *id.* at 1788 (plurality opinion) (discussing "efforts to maximize partisan representation"). To have a partisan purpose is to use, as a line-drawing "consideration," predictions regarding the expected electoral success of a party's candidates under different scenarios.

216. Except where otherwise specified, I will assume that the redistricting authority is the legislature, so I speak interchangeably of "legislatures" and "redistricters."

217. Attention to the structure of the system and not only to the placement of district lines is necessary to accommodate such decisions as whether and where to replace single-member districts with multi-member districts. But having flagged this wrinkle, I will now disregard it in what follows. For ease of analysis and exposition I shall marginally simplify the problem of partisan gerrymandering by assuming that the redistricting decision consists of deciding where to locate the boundaries of single-member districts.

218. Relying on but-for causation here produces familiar difficulties in cases of causal overdetermination, which I am content to put aside.

219. We can say that partisan motivation was present, and causally efficacious, if the final product would not have been precisely as it was if the legislature had not been motivated, at all, by that purpose. We could also say that partisan motivation was effective, or produced a partisan effect, if the final product did in fact result in the election of more members of the legislature's preferred party than would likely have been elected had the partisan motivation not been present. Precisely because we could be concerned with whether the partisan motivation succeeded in achieving its partisan effects, we might not want to reduce partisanship in redistricting to partisan motivation alone. This is why I say, above, that "partisanship in redistricting refers, first and foremost, to partisan motivation." At the same time, to reduce the notion of partisanship in redistricting to partisan effects alone, without regard for partisan motivation, is to fundamentally misconceive the character of the phenomenon under investigation. Here, then, is one rarely noted difference between malapportionment and gerrymandering: malapportionment is entirely a function of effects, gerrymandering is centrally about purposes.

about that purpose as being present in greater or lesser degree is *cost-based*. The amount, or weight, of partisanship at work is a function of what the redistricter has paid to realize its partisan goal. And payment, in this context, is measured in terms of how much satisfaction of competing interests the legislature has willingly foregone to achieve its end. The more that the redistricter has sacrificed for partisan advantage, the more partisanship it has exhibited. A second and contrasting way to think about partisanship in quantitative terms is *ends-based*. Under this conception, the measure of partisanship is supplied by the partisan advantage sought. The greater the electoral advantage that the legislature has tried to secure, the greater its partisan motivation.²²⁰

Choosing between the cost-based and ends-based conceptions of partisanship is necessary in order to supply content to the “how much” part of the ultimate issue on which Justices Souter and Scalia alike are focused—“How much partisanship is too much?” For without settling on one or the other conceptualization, we have no basis for determining whether a given redistricting reflects a lot of partisan motivation or a little.

To see that this is so, suppose that redistricters in State *A*, which is controlled by Party *A*, pursued only marginal partisan advantage—say, they tried to eke out only one more seat for their party²²¹—but at substantial cost, as measured by the extent to which other values were sacrificed to this goal. That is, let us assume, the redistricters did value (or should have valued) compactness of districts and the integrity of political subdivisions, but ended up adopting a scheme that is very noncompact and slices through subdivisions right and left, all in order to pick up that marginal increase in seats—say, one. In contrast, suppose that redistricters in State *B*, controlled by Party *B*, aim to satiate a large appetite for partisan gain. And as it happens, the geographic and demographic characteristics of that state enable them to achieve their goal at little sacrifice to traditional districting criteria such as compactness or respect for political subdivisions. The resulting map does not look odd, but it gives Party *B* many more seats.

In sum, redistricters in State *A* pursued slight partisan ends at substantial cost. Their counterparts in State *B* pursued substantial partisan ends at slight cost. Which scheme exhibits or embodies more partisanship? It depends. Until we self-consciously conceptualize partisanship in cost-based or ends-based terms, we can’t know, even in principle, whether more partisanship affected redistricting in State *A* or in State *B*. For this reason, adopting one

220. In order for these two measures to be different, we must assume that the units of cost are not themselves defined by reference to the ends sought, namely seats-per-party. This is, of course, a fair assumption in this context: some considerations other than partisan advantage do and should matter to redistricters.

221. “‘Only one more seat’ than *what*?” you might wonder. That will indeed be the next question. See *infra* section II(A)(2).

or the other conception of partisanship is a necessary step to give content to the notion of excessive partisanship.²²²

2. *Two Baselines for Measurement.*—It is not, however, sufficient. The previous discussion speaks in terms of how many more seats the gerrymandering party obtained and the extent to which they sacrificed other considerations. But in order to make sense of either notion, we need a baseline. How many more seats than what? From what starting point do we assess the magnitude of any sacrifice?

The gerrymandering literature supplies a common answer: unconstitutionally excessive partisanship is reliance on partisanship that departs too far from what fairness dictates. As my colleague Sandy Levinson put it, “[J]udicial intervention with regard to gerrymandering will require analysis of the substantive fairness of representation”²²³ This is a normative baseline. Starting with some notion of what, ideally, the legislature should have done, proponents of this approach ask whether what the legislature actually did departs too far from this normative ideal. The alternative is to measure the actual plan against a non-normative, or positive, standard. Such a positive baseline could take a variety of forms. In theory, for example, it could be constituted by what the legislature of some actual or hypothetical State *C* would have done, or what the plaintiff’s attorneys propose. It seems to me, however, that the most sensible positive baseline is counterfactual—what the actual redistricters would have done had they not been motivated at all to achieve partisan outcomes.²²⁴ Accordingly, and at the admitted risk of some oversimplification, the following analysis contrasts

222. At the urging of Micah Altman, let me make clear that neither the cost-based nor the ends-based conception would capture the redistricters’ utility function with respect to tradeoffs between seat and nonseat districting considerations.

223. Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?*, 33 UCLA L. REV. 257, 281 (1985); see also Pildes, *Democratic Politics*, *supra* note 165, at 66 (noting that common view that, “if the Court is going to rule excessive partisan gerrymandering unconstitutional, it must first be able to specify a fair partisan distribution of districts”).

224. The most familiar of such “positive baseline” approaches would measure the expected partisan consequences of the actual plan against the outcomes that could be expected under randomly generated plans. For a proposal of this sort, see Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 316–18; for criticisms, see Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 56–62 (1985), and Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185, 207–08 (1985). Relatedly, one commentator has proposed that redistricting plans be measured for excessive partisanship against the baseline of what a hypothetical bipartisan commission would have done. Michael E. Lewyn, *How To Limit Gerrymandering*, 45 FLA. L. REV. 403 (1993). These formulations might constitute useful proxies for the counterfactual baseline, but do not otherwise have much to recommend them, I think. Their possible value as heuristics will be considered *infra* subpart IV(A).

the normative baseline with the counterfactual one, rather than with the more generic positive baseline.

Because each of the two measures of partisanship set forth in the previous section could be measured against both counterfactual (positive) and normative baselines, we are left with four distinct ways—each of which is quantitatively sensitive—to conceptualize partisanship in redistricting. These different conceptions do not, I reiterate, specifically address the question of how much partisanship is “too much”; they speak to the analytically prior question of how to understand how much partisanship there has been.²²⁵ (See Table.)

CONCEPTUALIZATIONS OF PARTISANSHIP IN REDISTRICTING		
	<i>Normative Baseline</i>	<i>Counterfactual Baseline</i>
<i>Cost-based Measure</i>	2	3
<i>Ends-based Measure</i>	1	4

The amount of partisanship present under a cost-based, counterfactual-baseline conception (Box 3) is determined by asking: Compared to the considerations that the redistricters would have employed, and thus compared to the state of the world that the redistricters would have brought about had they not considered party advantage at all, to what extent were those considerations and outcomes²²⁶ sacrificed in the actually adopted redistricting scheme? The amount of partisanship at work under a cost-based, normative-baseline conception (Box 2) is determined by asking the nearly identical question, replacing “would” with “should”: Compared to the considerations that the redistricters should have employed, and thus compared to the state of the world that the redistricters should have brought about had they not considered party advantage at all, to what extent were those considerations and outcomes sacrificed in the actually adopted redistricting scheme?

An ends-based, normative-baseline view (Box 1) conceptualizes amount of partisanship as a function of the number of seats the redistricting party expects under its adopted plan compared to the number of seats it should

225. Readers familiar with the partisan gerrymandering literature may discern some points of similarity between these four conceptions and the common trichotomy among “formal,” “result-oriented,” and “process-oriented” gerrymandering criteria. See Bruce E. Cain, *Simple vs. Complex Criteria for Partisan Gerrymandering: A Comment on Niemi and Grofman*, 33 UCLA L. REV. 213, 214 (1985). Any resemblance is only superficial. I am classifying ways to conceptualize how much partisanship is present in any given redistricting scheme. I am not yet attending to what the judicially manageable test should be. The districting criteria that law professors and political scientists discuss, taxonomize, and critique are often proposed as full or partial answers to that analytically distinct and logically subsequent question.

226. By “outcomes,” here and later in this paragraph, I mean mostly formal features like levels of average district compactness, not electoral outcomes.

receive or to which it is entitled. Lastly, an ends-based, counterfactual-baseline conception (Box 4) measures partisanship in terms of the number of seats the redistricting party expects under its adopted plan compared to the number of seats it would have expected had it not pursued partisan ends.

This effort to identify the range of distinct ways in which partisanship can be intelligibly conceptualized in scalar terms is not a scholastic exercise. It provides a powerful framework for critically assessing extant judicial and scholarly arguments that purport to show that the judiciary could not manageably police the practice of partisan gerrymandering. The framework will show that the conclusion does not follow from the arguments because critics almost universally focus their fire on only one of these four conceptions of excessive partisanship without recognizing the availability of others.

B. Three Wrong Turns

1. The Specter of Proportional Representation.—The particular normative baseline most frequently discussed in the gerrymandering literature is supplied by principles of proportional representation.²²⁷ According to this view, the ideally fair scheme of electoral representation would apportion seats in proportion to the parties' respective shares of the votes cast. Some departure from this ideal can be permitted. But it is unconstitutional for a redistricting plan to depart too far from proportionality in pursuit of partisan gain.

As Justice O'Connor's *Bandemer* concurrence exemplifies,²²⁸ the notion that we can make sense of unconstitutionally partisan gerrymandering only by measuring a challenged scheme against the baseline of proportional representation is frequently affirmed by those who would declare claims of partisan gerrymandering nonjusticiable.²²⁹ Simply put, they argue, regardless of whether proportional representation is an attractive electoral system—and political scientists are increasingly divided on the question—it is not a system with constitutional credentials. Nothing in our constitutional text or history supports the judgment that states act unconstitutionally by creating voting mechanisms and district lines that produce wholly disproportional representation.

Tellingly, it is hard to find a dissenter. Those who argue that some forms of partisanship in districting are unconstitutional, and should be justiciable, rarely explicitly propose proportional representation as the standard against which challenged schemes can be measured for

227. See, e.g., Lowenstein & Steinberg, *supra* note 224, at 52 (“The most popular conception of how votes and seats in legislative elections should be related is that they should be proportional.”).

228. See *supra* text accompanying note 97.

229. See, e.g., Lowenstein & Steinberg, *supra* note 224, at 15.

constitutionality and often take great pains to insist otherwise.²³⁰ But their opponents often contend that they have no alternative. As Peter Schuck has argued, “[C]ourts attempting to adjudicate partisan gerrymandering claims will find it impossible to vindicate those claims unless they adopt a proportional representation standard.”²³¹

Our taxonomy of conceptualizations reveals that this is not so. A model of excessive partisanship that is conceptually dependent upon the ideal of proportional representation falls in Box 1: it is an ends-based conception measured against a normative baseline.²³² Accordingly, the generally accepted proposition that no party or community is constitutionally entitled to proportionate representation in the legislature—hence that proportional representation cannot constitute an appropriate normative baseline—reveals, at most, only that the appropriate conceptualization of excessive partisanship resides elsewhere than in Box 1.

2. *Fairness in Districting.*—But where? Let us start again with the notion of what it means for partisanship to be present at all. Districting is a reason-directed activity. Mapmakers draw district lines in order to advance some combination of ends. Put otherwise, the drawing of lines is responsive to practical reason. It is not performance art.²³³ Legitimate objectives in the shaping of electoral districts include (and are nearly limited to) the following: guarding against excessive population disparities, maintaining contiguity and compactness, following major geographical features like rivers and mountains, tracking political subdivisions, preserving communities of interest, ensuring no diminution in the voting strength of racial and ethnic minorities, protecting incumbents, securing public acceptance, and

230. See, e.g., Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 158–59 (1985) [hereinafter Grofman, *Criteria for Districting*] (“The relevant question in analysis of partisan gerrymandering is not whether proportionality has been achieved (it will not have been), but rather whether there have been egregious violations of fairness in terms of inequality of treatment.”); Niemi, *supra* note 224, at 186 (“I argue that ultimately the Court will have to confront directly the gerrymandering issue; but I maintain that the Court need not in any way support proportional representation.”).

231. Peter Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, in POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 13, at 240, 240; see also Levinson, *supra* note 223 (arguing that approaches to claims of partisan gerrymandering can be driven by structural or rights-based concerns and that those who adopt the latter perspective will be irresistibly drawn to proportional representation).

232. Some readers might be inclined to view the proportional representation model also as falling within Box 2: How much of the ideal proportionate representation does the actual scheme sacrifice? But for reasons suggested earlier, see *supra* note 220, if we measure what a redistricter sacrifices in order to achieve partisan advantage by reference to the very thing the pursuit of which causes the cost to be sustained—a party’s seats in the legislature—then the distinction between the cost-based and ends-based measures collapses.

233. But consider Congressman Phillip Burton, architect of the notorious 1981 California congressional redistricting, who defended his blatant Democratic gerrymander as a “contribution to modern art.” See JOHN JACOBS, A RAGE FOR JUSTICE: THE PASSION AND POLITICS OF PHILLIP BURTON 435 (1995).

promoting party electoral success. These are possible purposes. It is not the case that a given redistricter attends to all of these purposes all of the time.

But perhaps legislatures ought to weigh or respect these various sorts of considerations in some particular manner. Perhaps, for example, they ought to ensure that all districts fall within some specified percentage of the average district's population, are contiguous, and undivided by hard-to-traverse geographic features; that each is maximally compact; that once compactness of districts is assured, integrity of political subdivisions should be maintained to the greatest extent possible; and that, if no single redistricting plan is yet determined, communities of interest should be preserved.²³⁴

A formula or recipe of this sort would provide a normative baseline against which a challenged districting plan could be measured. But whereas the normative baseline of proportional representation is ends-based, this normative baseline is cost-based. It depends on the difference, not between what the balance of legislative seats should have been and what it is, but between how the legislature should have balanced competing districting considerations and how it did so. We are now in Box 2, not Box 1. The hope, however, remains the same. If we could reach agreement on principles of fairness in districting—how the legislature ought to accommodate competing districting considerations—we could speak intelligently about whether some challenged redistricting plan departs too far from fair principles.

Kennedy's ruminations about principles of fair districting can be read in just this way. By complaining that the Court's "attention ha[d] not been drawn to statements of principled, well-accepted rules of fairness that should govern districting, or to helpful formulations of the legislator's duty in drawing district lines,"²³⁵ Kennedy strongly implies that we could develop a rough sense of what a redistricting scheme should look like if only we could agree on what fairness in districting requires—how much regard for compactness, how much regard for political subdivisions, et cetera. If a challenged district does not look like the ideally fair district, and if the departure from ideally fair lines seems well explained by pursuit of partisan advantage, then we can conclude that partisan motivation was present. Moreover, the greater the gap between the extent to which each interest should be realized and its actual realization, the greater the pursuit of partisan advantage.

234. See, e.g., Lowenstein & Steinberg, *supra* note 224, at 4 (arguing that, in order to identify a gerrymander in a pejorative sense, we would need to "identify 'neutral' or 'pre-political' public interest criteria for legislative districting which could command assent from persons who, despite opposing partisan affiliations and diverse ideological viewpoints, share a commitment to democratic processes and values").

235. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1794 (2004) (Kennedy, J., concurring).

Plainly, an approach of this sort would confront difficulties in application.²³⁶ The more fundamental difficulty, however, is simply that we do not have a normative baseline of this sort²³⁷—which, of course, is also Kennedy’s point. Without judicial acceptance of principles of fair districting that direct how redistricters should pursue each of the legitimate districting interests, we cannot create the normative baseline against which a cost-based conception of excessive partisanship must be measured.

3. *Compactness Fetishists.*—Justice Kennedy is right to observe that we lack agreement on principles of fair districting that tell us how much realization of various interests a legislature should pursue and that, therefore, enable us to draw the normatively ideal district lines. But one might think it a little naïve to suppose that a more thorough investigation into relevant historical materials could conceivably produce what we are looking for. Were it true that manageable standards for administering the constitutional ban on excessive partisanship in districting depend upon our ability to articulate and agree upon principles of fair districting in the sense I have described, then Kennedy might as well have joined the plurality in *Vieth*. A search for fair principles of this sort is a fool’s errand.²³⁸

Long before *Vieth*, many commentators had argued just that—we cannot agree on principles of fairness in districting and should, therefore, declare partisan gerrymandering nonjusticiable.²³⁹ Some who agree with the premise reject the conclusion. Even if we cannot reach agreement on what constitutes fair, they reason, we can recognize cases that are unfair.²⁴⁰ As a general proposition, this is plainly true. But I am skeptical that the insight is as useful in this context as its proponents may assume. We still need to articulate this insight in a way that, at the end of the day, can be useful to courts. A general direction that courts should uphold a challenged district unless persuaded that it is unfair (or “severely unfair”) will be less intrusive than a direction that would require reviewing courts to assure themselves of the plan’s fairness, but not obviously much more easily managed.²⁴¹

236. To start, political scientists would have to develop, and the courts would have to accept, individual metrics to measure differences between plans (the actual and the normative) on each of the possibly relevant dimensions (e.g., compactness, political subdivision integrity, incumbency protection, and the like). Furthermore, we would need a means to translate deviations on these distinct dimensions into a single common metric.

237. See Lowenstein & Steinberg, *supra* note 224, at 4 (arguing that “there are no coherent public interest criteria for legislative districting independent of substantive conceptions of the public interest, disputes about which constitute the very stuff of politics”).

238. For an extended critique of Kennedy’s concurrence on essentially these grounds, see Hasen, *supra* note 195.

239. See, e.g., Cain, *supra* note 225; Lowenstein & Steinberg, *supra* note 224.

240. See, e.g., Baker, *Unfinished Reapportionment Revolution*, *supra* note 22, at 23–24; Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611–15 (1999).

241. It is essentially for this reason, I think, that Martin Shapiro, who first pressed the point that inquiry into the *unfair* requires far less agreement than does inquiry into the *fair*, nonetheless

Fortunately, the premise of Kennedy's argument—that we cannot give content to the concept of excessive partisanship without recourse to a plausible normative baseline, or to “principles of fairness”—is false. We can conceptualize “too much partisanship” in a fully adequate manner, not by shifting attention from “fair” to “unfair,” but by abandoning both “fairness” and “unfairness” as organizing constructs. The better response to Kennedy, I believe, is that normative baselines fail to capture our intuitive prereflective conception of excessive partisanship. We need a counterfactual (or, more generally, positive) baseline, not a normative one. In terms of the 2 x 2 matrix presented earlier, we should be looking in the second column, not the first.

Once we decide to measure amounts of partisanship by reference to the state of the world had the redistricters not pursued partisan ends at all, we still must choose between cost-based and ends-based measures. To repeat, a cost-based measure (Box 3) asks what the redistricters would have done absent partisan motives and then determines how far the actual scheme departs from the counterfactual one on dimensions such as compactness and the integrity of political subdivisions. The impulse here is simple. All else being equal, the less compact are the districts in a given redistricting plan (relative to how compact they would have been had partisanship not been considered), or the more pieces into which a given redistricting plan carves up political subdivisions (again, relative to the counterfactual baseline), in order to advance the dominant party's chances for electoral success, the greater the legislature's partisan motivation.

There are, however, two principal problems with this way of conceptualizing amounts of partisan motivation. First, the core measurement challenges that confront a cost-based conception measured against a normative baseline²⁴² remain when a counterfactual baseline is employed. This is especially true because “all else” is rarely equal. So if the challenged scheme is less compact than the counterfactual scheme but happens to better respect the integrity of political subdivisions, then the question of how much partisanship is afoot might be conceptually unanswerable.

Second, it is unclear why this particular scalar conception of partisanship should have any hold on us. Commentators frequently criticize proposals to use noncompactness as a measure of partisan gerrymandering on the grounds that if the state is under no obligation to create the most compact districts—indeed, if it is not obligated to create even minimally compact districts—then lack of compactness is constitutionally irrelevant. Proponents of a cost-based, normative-baseline conception accept the conclusion but deny the antecedent. They claim that redistricters do have some form of

concluded by throwing his lot in with the nonjusticiability crowd. *See generally* Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227 (1985).

242. *See supra* note 236 and accompanying text.

constitutional duty (even if defeasible) to attend to considerations like compactness. As we have seen, Justice Kennedy denies (reasonably) that any such case has been persuasively advanced. But proponents of a cost-based, counterfactual-baseline conception do not have even this response available to them. If compactness and other sorts of districting considerations have no independent constitutional significance, why should we care how greatly a legislature sacrificed such interests in pursuit of partisan advantage?

C. A Solution

We are left, then, with a final possibility (Box 4): the amount of partisanship manifested or embodied in a given redistricting scheme is the delta between the controlling party's expected electoral success under the scheme actually adopted and the party's expected electoral success under the scheme that the redistricter would have adopted had securing partisan advantage not been a motivating purpose at all.²⁴³

Suppose, for example, that the Republican-controlled Pennsylvania legislature expected the scheme it adopted after the 2000 census to net the Republicans thirteen seats in the state's nineteen-person congressional delegation. Suppose too that only ten Republicans would have been expected to win election under the redistricting scheme that the legislature would have adopted had it not considered partisan advantage at all. We can now describe the amount of partisanship in play as a function of the difference between the actually expected thirteen seats and the counterfactually expected ten seats. To be sure, we could describe this difference in varied ways—for example, in absolute numbers (three), or as a percentage increase in the number of expected seats (30%), or as a percentage of the total delegation (15.8%). But all of these options provide us, finally, with a way to answer the “how much” part of the question that a majority of the Justices in *Vieth* explicitly made central: “how much is too much?”

No doubt it will have already occurred to you that this conception of excessive partisanship will confront difficulties in application. Here are three: (1) the *counterfactual problem* of ascertaining what the legislature would have done had it not considered partisan advantage at all; (2) the *prediction problem* of estimating how many seats the actual and counterfactual schemes can be expected to produce for the relevant parties; and (3) the *standard problem* of deciding the magnitude of the delta that separates permissible from excessive.

243. To be sure, a redistricter must be aware of partisan characteristics of the electorate when trying to pursue other legitimate objectives—most notably incumbent protection, but also, perhaps, ensuring against diminution in the voting strength of racial and ethnic minorities. See *supra* section II(B)(2). But this fact does not transform those purposes into the purpose of securing partisan advantage.

All this is true. And Part IV will address the magnitude of these practical difficulties. For now, it is enough to recognize that they are problems of application, not conceptualization. As a conceptualization, the ends-based, counterfactual-baseline approach has significant virtues.

First, it meets the stated need. The ends-based, counterfactual-baseline conception of the amount of partisanship enables us to reach a conclusion in the hypothetical case of States *A* and *B*.²⁴⁴ Because Party *B* sought a greater increase in its electoral fortunes than did Party *A*, its scheme reflects more partisanship, even though that greater increase was bought at lower cost. Second, it meets the need in an acceptable way. It does not rely upon either the quixotic hope for “principles of fair districting” or the coherent but unacceptable baseline of proportional representation. Third, it is a structural, not rights-based approach.²⁴⁵ Most basically, it does not require that we identify any person whose rights were infringed or “burdened,” or who was treated “unfairly.” This approach rests strictly on the assumption (admittedly, not defended here) that partisan greed²⁴⁶ produces systemic harms or is antithetical to (constitutionally endorsed) democratic values.²⁴⁷ Fourth, whereas a cost-based conception could apply at both statewide and individual district levels, this ends-based conception is intelligible only at the statewide level. Commentators are increasingly recognizing that district-specific partisan gerrymandering claims are misguided.²⁴⁸ This approach makes clear why that is so.

Indeed, despite passages from Justice Kennedy’s *Vieth* opinion that (I have already suggested) point toward a cost-based, normative-baseline conceptualization of degrees of partisanship, the ends-based, counterfactual-baseline conceptualization resonates with an otherwise somewhat curious passage from that concurrence. After noting that the “excessiveness” of

244. See *supra* text accompanying notes 221–22.

245. The principal academic advocates of a structural approach to election law problems generally, and to gerrymandering in particular, are Samuel Issacharoff and Rick Pildes, writing together and separately. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) [hereinafter Issacharoff, *Political Cartels*]; Pildes, *supra* note 240; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

246. I take it to be insightful, not accidental, that election law scholars like Bernard Grofman refer to “partisan lust,” not “partisan injustice.” See, e.g., Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 114 (1985) (attributing the phrase to David R. Mayhew, *Congressional Reapportionment: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970S, at 249, 284 (N. Polsby ed. 1982)).

247. Like other analyses that identify structural or systemic harms, this approach raises questions regarding the appropriate plaintiffs to satisfy standing doctrine. Although these questions are answerable, defending any particular solution would consume more space than seems warranted here.

248. See, e.g., Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 767 n.60 (2004) (“Measuring partisan gerrymandering at [the] institutional levels is common in both the jurisprudence and the literature . . .”); Pildes, *Democratic Politics*, *supra* note 165, at 73 (“The concept of an unfair partisan gerrymander of an individual district is not intelligible.”).

“partisan interests in the redistricting process . . . is not easily determined,”²⁴⁹ Kennedy invites the reader to imagine two redistricting schemes:

In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat. In three other States, Party Y controls the apportionment process. It is not so blatant or egregious, but proceeds by a more subtle effort, capturing less than all the seats in each State. Still, the total effect of Party Y’s effort is to capture more new seats than Party X captured. Party X’s gerrymander was more egregious. Party Y’s gerrymander was more subtle. In my view, however, each is culpable.²⁵⁰

For present purposes, the most critical point to observe about this passage is that Kennedy focuses on the number of seats that a party seeks to capture, rather than on the extent to which the party disregards traditional criteria. The measure of partisanship, in short, is ends-based, not cost-based. Furthermore, in referring ultimately to the number of “new seats” that the parties have endeavored to capture, the baseline appears positive, not normative. Conspicuously, Kennedy is not attending to the number of “undeserved” or “unwarranted” or “unfairly obtained” seats that a party might obtain.

True, this particular positive baseline is not obviously a counterfactual one.²⁵¹ Reference to the number of “new seats” that a party sets out to capture (and succeeds in capturing) most naturally suggests a comparison, not to a counterfactual baseline—the number of seats that the party would have captured had it not specifically set out to capture seats for itself—but to a historical one—the number of seats that the party used to have. I am skeptical, however, that a historical baseline is tenable in this context. Ordinary (on-cycle) redistricting is necessitated by the fact of demographic change. The district lines must be redrawn. If the status quo simply cannot be preserved, it is not easy to see why the past ought to be thought directly relevant.²⁵² Possibly, then, interpreting this passage to imply a historical baseline reflects a misreading. Perhaps “new seats” is just a shorthand for those seats that are secured by application of the particular purpose under investigation, namely the purpose of satisfying “partisan interests.” If this is

249. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1798 (2004) (Kennedy, J., concurring).

250. *Id.* Perhaps the most conspicuous lesson from this passage (though not the one most immediately relevant) is that Justice Kennedy, seemingly unlike Justice Breyer, *see supra* note 207, recognizes that the problem of partisan congressional gerrymandering must ultimately be appreciated from a nationwide perspective. Because parties exist across state lines and because congressional gerrymandering by a state impacts a national body, we ought not to think about the partisan advantages that parties seek wholly in state-by-state isolation.

251. *See supra* note 224 and accompanying text (explaining that, strictly speaking, the counterfactual baseline is only a species of positive baselines).

252. It is true that I will later make some use of a historical baseline myself. *See infra* section IV(B)(2). But that is as a proxy for the counterfactual baseline, not as a conceptualization of what excessive partisanship itself means.

so, the baseline implicitly invoked in this passage is the counterfactual. In sum (though I don't insist on the point), it seems to me that the ends-based, counterfactual-baseline conception of degrees of partisanship makes best sense of Kennedy's intriguing hypothetical.

III. From Meaning to Doctrine

We have taken a great stride. By attending seriously to Justice Kennedy's observation that the problem of manageability consists of two issues, not one, we have carefully identified conceptually distinct ways in which the injection of partisanship into districting could be excessive. And we have given reasons to prefer one of those conceptions—the ends-based, counterfactual-baseline conception—over the others. This is the conception of excessive partisanship that I will employ for the remainder of this Article; when I speak of excessive partisanship without qualification, I will be referring to a legislature's effort to secure for the dominant party too much of an electoral advantage relative to what it would have been likely to receive had it not taken partisanship into account. Having settled on this conception, at least provisionally, we nonetheless have some distance yet to travel. If the problem of elaborating the constitutional principle is part of the manageability problem writ large, we now arrive at the manageability problem writ small.

I have observed that a clear majority of the *Vieth* Justices—and perhaps all of them—endorse the following constitutional principle: excessive partisanship in redistricting is unconstitutional.²⁵³ And I have offered a coherent and sensible elaboration of this principle: it is unconstitutional for a state to pursue too many more seats for a party than the party would likely secure if the state did not take partisan considerations into account at all. This is a proposed statement of constitutional meaning.

But meaning is not the same as doctrine. Judge-announced constitutional meaning is just that: the courts' interpretation of what the Constitution means or provides of its own force. Judge-crafted constitutional doctrine is the rule of constitutional law to be applied by courts when enforcing constitutional claims. As leading scholars are increasingly emphasizing, these need not be the same thing.²⁵⁴ The next task, then, is to

253. See *supra* note 192.

254. See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 79 (2000) (observing that the Constitution “envisions that in deciding cases arising under it, judges will offer interpretations of its meaning, . . . develop mediating principles, and craft implementing frameworks enabling the document to work as in-court law”); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (“Identifying the ‘meaning’ of the Constitution is not the Court’s only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”). Of course, Henry

craft manageable doctrine to implement this meaning of excessive partisanship.

Given the extraordinary unlikelihood, and perhaps impossibility, of ever learning just what the legislature really would have done had it not considered partisanship, any doctrine designed to implement this meaning of excessive partisanship is likely to employ some sorts of proxies or heuristics. That is, instead of directing courts to discover what the legislature would have done had it not done what it did do, our doctrine should identify a different target of inquiry that can serve as an adequate proxy for the counterfactual baseline. Courts would then be directed to treat that proxy as though it were the counterfactual baseline itself, for purposes of measuring the extent of the partisanship employed.

That, indeed, is the strategy I will propose. But we can anticipate at least one objection at the outset—namely, that the project of doctrine-creation is illegitimate.²⁵⁵ If judge-crafted constitutional doctrine is something other than what the judiciary interprets the Constitution to mean, we might wonder whether the Court has constitutional license to announce doctrine in the first place, let alone to impose it upon political actors like Congress or the States. What warrant do courts have to adjudicate constitutional disputes by application of “doctrine” that, no matter how “manageable,” is something other than constitutionally discoverable “meaning”? Is this not to claim that the “Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful ‘prophylactic’ restrictions upon Congress and the States”?²⁵⁶ And if it is, then we confront a challenge. As Justice Scalia contended in his *Dickerson* dissent, “That is an immense and frightening anti-democratic power, and it does not exist.”²⁵⁷

I believe that Justice Scalia is wrong. Unfortunately, though, the *Dickerson* majority did not favor him with a reply. So it will be useful to address this objection up front, before we even embark on the project of formulating doctrine to implement the constitutional meaning we have thus far fleshed out. It will be helpful, in other words, to examine in rather more detail the proper relationship between meaning and doctrine.²⁵⁸

Monaghan pressed essentially this point a generation ago. See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

255. A second objection would be that no adequate proxy exists. This is not an objection that could be met at the threshold. Better to treat this worry as an expression of understandable skepticism and acknowledge that a burden will lie upon the proponent of any particular doctrine to persuade us that the proxies she proposes are likely to serve the task adequately.

256. *Dickerson v. United States*, 530 U.S. 428, 446 (2000) (Scalia J., dissenting).

257. *Id.*

258. That we may acknowledge a distinction between meaning and doctrine without appreciating the nature of that distinction or its consequences exemplifies a common phenomenon observed by H.L.A. Hart:

[I]t is characteristic not only of the use of legal concepts, but also of many concepts in other disciplines and in ordinary life, that we may have adequate mastery of them for

A. Operative Propositions and Decision Rules

Suppose that a majority of the Court were to agree with Justice Stevens's view of constitutional meaning: It is impermissible for a legislature to pursue *any* partisan advantage in redistricting.²⁵⁹ I observed earlier that a Justice who accepts this view must still craft a manageable standard.²⁶⁰ But this is admittedly not self-evident. One might suppose that the Court could simply announce that, henceforth, courts must evaluate claims of unconstitutional partisan gerrymandering by reference to the constitutional meaning alone: A challenged redistricting is an unconstitutional partisan gerrymander if and only if the legislature did in fact make some line-drawing decisions in order to realize partisan advantage. Under this approach, we might say that the courts would employ only meaning, not doctrine. Equivalently, we could say that this constitutional doctrine consists only of (the Justices' view of) constitutional meaning.

This conclusion runs into a difficulty, though. Courts called upon to apply this doctrine (or this meaning, if you prefer) would lack unmediated access to the fact of the matter. Not only would judges not know for sure whether the legislature was motivated by partisanship, at least sometimes they would know that they do not know. That is to say, they would be aware of the need for some rule, even if implicit, for resolving this epistemic uncertainty.

Now, the solution to this epistemic problem might seem clear. Courts must administer the judge-interpreted constitutional meaning by something like a more-likely-than-not standard of review. Hypothesizing, as we have, that the Supreme Court has announced that it is unconstitutional for states to pursue any partisan advantage when drawing electoral district lines, future courts would be instructed to uphold a claim of unconstitutional partisan gerrymandering if and only if persuaded that it is more likely than not that the redistricters did in fact pursue partisan advantage to any degree. This solution, it is true, does require that we revise the assumption made two paragraphs earlier that constitutional doctrine could consist only of the judiciary's view of constitutional meaning. But the revision appears trivial. We should say, instead, merely that the constitutional doctrine consists of

the purpose of their day-to-day use; and yet they may still require elucidation; for we are puzzled when we try to understand our own conceptual apparatus. We may know how to *use* these concepts, but we cannot say how we do this in ways which are intelligible to others and indeed to ourselves. We know, and yet do not fully understand This surely is the predicament which makes the philosophical elucidation of concepts necessary

H.L.A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 964 (1957).

259. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1811–12 (2004) (Stevens, J., dissenting); *see also supra* text accompanying notes 126–30.

260. *See supra* text accompanying note 196.

judge-interpreted constitutional meanings and the more-likely-than-not standard of review.

That is not, however, quite the right lesson to draw. What the inescapable fact of epistemic uncertainty really reveals is that constitutional doctrine must consist of judge-interpreted constitutional meaning (like Justice Stevens's view that the Constitution prohibits any pursuit of partisan advantage in redistricting) conjoined to some rule that directs courts how to determine whether that meaning is complied with. In previous work, I have proposed to call the former doctrinal component a "constitutional operative proposition" and the latter a "constitutional decision rule."²⁶¹ That is to say, "constitutional doctrine" is not reducible to "constitutional meaning"; it must consist of (at the least) a constitutional operative proposition and a constitutional decision rule. The more-likely-than-not standard is a possible decision rule, indeed the most common one. We might fairly call it the "default" or "standard" decision rule. But it is not the only possible decision rule, and, in many contexts, it may not be the best.

One obvious alternative to the more-likely-than-not decision rule would be to impose upon the challenger a heightened standard of proof. For example, were the Court to adopt Justice Stevens's view of constitutional meaning—if, in my jargon, they endorsed his preferred constitutional operative proposition—they could administer it by means of a decision rule that required excessive partisanship to be proved by clear and convincing evidence.²⁶² But a nonstandard decision rule could do more than merely tweak the standard of proof. It could employ a rebuttable or conclusive presumption. Tellingly, that is precisely Stevens's proposed solution. Having claimed that any pursuit of partisan advantage is unconstitutional, he proposed to administer this operative proposition by means of an underenforcing decision rule by which courts would be permitted to conclude that there was some partisanship only "if the only possible explanation" for a particular district's shape was that partisan motivation "predominate[d]."²⁶³

261. Two notes about this vocabulary. First, the "constitutional operative proposition" is the judicial understanding of constitutional meaning. It is not "constitutional meaning" simpliciter because what the Constitution means may still be in dispute—outside the Court and within it—even after a majority of the Court has announced what it takes the constitutional meaning to be. Second, I use the term "constitutional decision rule" to signify the rule or procedure a court is instructed to apply in order to "decide" whether the operative proposition is complied with. It is not the same as a "rule of decision" as the Rules of Decision Act uses that term. For more detailed remarks about this nomenclature, see Berman, *Constitutional Decision Rules*, *supra* note 18, at 58 n.192.

262. *Compare* *Erfer v. Commonwealth*, 794 A.2d 325, 331 (Pa. 2002) ("A plaintiff bears a heavy burden to prove it unconstitutional. 'A statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution.'" (citation omitted)).

263. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1809–12 (2004) (Stevens, J., dissenting). In claiming that Justice Stevens's approach nicely reflects the distinction between operative propositions and decision rules, I do not mean to endorse his reliance on the notion of "dominant" and "predominant" purposes. Whether employed in an operative proposition or a decision rule, this notion is not, I

B. *The Ubiquity of Nonstandard Decision Rules*²⁶⁴

Judge-announced constitutional doctrines cannot be just the Court's view of constitutional meaning. They must additionally contain decision rules. And while the more-likely-than-not decision rule is the most intuitive and common, it is far from the only possibility. As Justice Stevens's *Vieth* dissent manifests, a given constitutional doctrine could consist of an operative proposition conjoined to what we might term a "nonstandard" decision rule—a decision rule that either requires that the operative proposition be proved by some quantum of proof greater or less than more-likely-than-not or that incorporates rebuttable or conclusive presumptions.

Importantly, judicial resort to nonstandard decision rules is not merely a logical possibility. There are good reasons why the Court might wish to craft them. Whenever the operative proposition takes the form of a standard, rather than a rule, or contains a predicate (like governmental purposes) that is hard to discover, an intelligently chosen nonstandard decision rule can increase the predictability and consistency of judicial review, reduce litigation, and perhaps ameliorate interbranch tension. In short, a nonstandard decision rule can make judicial review much more manageable.²⁶⁵ That is why Justice Stevens endorsed one in his *Vieth* dissent. That is also why nonstandard decision rules turn out to be a common feature of our constitutional landscape.

One of the clearest examples of the Court's use of a nonstandard decision rule is the *Miranda* doctrine. *Miranda* provides (roughly) that statements made by a criminal defendant during custodial interrogation are not admissible against him in the state's case in chief unless the police had previously supplied the suspect with a canonical set of warnings.²⁶⁶ The legitimacy and status of this rule have befuddled academic commentators and Supreme Court Justices for decades—as my earlier reference to Justice Scalia's *Dickerson* dissent exemplifies. As I have argued at length elsewhere,²⁶⁷ however, this confusion can be cleared up once we analyze this doctrine into its likely operative-proposition and decision-rule components. The operative proposition states that the constitutional privilege against self-

believe, coherent (if intended to capture any notion short of lexical primacy). See, e.g., Ely, *supra* note 109, at 611–14. And the *Vieth* plurality was right to ridicule its use by Stevens. Or perhaps I should say the plurality would have been right to ridicule that use had all members of the plurality not endorsed precisely this test in the racial gerrymandering context. See *Miller v. Johnson*, 515 U.S. 900, 916 (1995). But see *Bush v. Vera*, 517 U.S. 952, 1000–03 (1996) (Thomas, J., concurring joined by Scalia, J.) (preferring a doctrine under which any use of race in redistricting would provoke strict scrutiny).

264. With apologies to David Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

265. But see *supra* note 198 (observing that at least some of these benefits accruing from a nonstandard decision rule might not be best conceived in terms of improving doctrine's "manageability").

266. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

267. See Berman, *Constitutional Decision Rules*, *supra* note 18, at 114–66.

incrimination²⁶⁸ prohibits courts from admitting into evidence out-of-court statements by the accused that had been compelled from him by the police. The decision rule directs that courts must conclusively presume that a statement was compelled (in the sense that the operative proposition contemplates) if it was elicited during custodial interrogation not preceded by a specified set of warnings.

Now, to mention *Miranda* might seem against interest. Even if the case does appear to employ a nonstandard decision rule, it is such an exceptional—even notorious—example as perhaps to bolster, rather than to allay, doubts about the legitimacy of decision rules of this form. This criticism is misplaced. To be sure, the particular nonstandard decision rule adopted in *Miranda* might have been poorly chosen. But the mere fact that the *Miranda* Court crafted a conclusive presumption decision rule to administer its view of Fifth Amendment meaning is not at all unusual. Nonstandard decision rules are standard fare—employed by Justices with widely varied judicial philosophies, across every field of constitutional law.²⁶⁹

Consider, for example, another clause of the Fifth Amendment—the Takings Clause. In *Nollan v. California Coastal Commission*, the Court, per Justice Scalia, held that a condition on the grant of a permit to exceed an otherwise valid land use restriction constitutes an unconstitutional taking if the condition does not serve the same governmental purpose as does the restriction itself.²⁷⁰ But the Court did not adequately explain why the Constitution forbids a state from trading some reduction in its ability to realize the particular interest served by a given land use restriction for an increased realization of another bona fide and legitimate state interest.

Nollan does make sense, however, if we suppose that the Court was employing a nonstandard decision rule. Think of the permit condition (e.g., that the landowner would provide a public easement in exchange for a desired development permit) not as a condition but as a command. In that case, the state would be engaged in a taking for which it would owe just compensation. The operative proposition that emerges from *Nollan* might be that it is unconstitutional for a state to withhold a development right it would otherwise provide for the purpose of pressuring the landowner on whom the “permit condition” is imposed to waive her right to just compensation. That is a plausible understanding of constitutional meaning. It is not, however, easily managed by courts. How would a court determine whether the state was acting in good faith when refusing the requested development permit upon the landowner’s refusal to comply with the condition? The short

268. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

269. Some of the following examples are drawn from Berman, *Constitutional Decision Rules*, *supra* note 18, at 61–78, 108–13, where other illustrations are also provided.

270. 483 U.S. 825, 837 (1987).

answer is that a court will not have to, for the *Nollan* decision rule directs courts to conclusively presume that a state would be withholding an offered development right for the purpose of pressuring the landowner to waive her Fifth Amendment right to compensation whenever the condition serves a different governmental interest than the development ban to which the condition is attached.

Or consider the Fourth Amendment right to be free from “unreasonable searches and seizures.”²⁷¹ This language seems to make unconstitutional any search or seizure that, under all the circumstances, is not reasonable. Yet the Court’s Fourth Amendment doctrine provides, inter alia, that a police officer who has probable cause to believe that an individual has committed an offense in his presence does not violate the Fourth Amendment by executing a full custodial arrest no matter how trivial the criminal offense, how low the risk of flight, and how high the cost to the arrested person and innocent third parties.²⁷² Furthermore, in order to ensure that the arrestee cannot use a weapon to resist arrest and cannot conceal or destroy evidence, the arresting officer may—again without violating the Fourth Amendment—search the entire passenger compartment of the car in which the arrestee was found, even if the arrestee is securely held beyond the reach of the car at the time of the search.²⁷³ Doctrines such as these make little sense as elaborations of what it truly means for a search or seizure to be constitutionally reasonable. They might make sense, however, as decision rules that instruct courts to conclusively presume searches and seizures to be reasonable under the specified circumstances.

Equal protection jurisprudence is also profitably conceived as comprised of nonstandard decision rules. Very possibly, the equal protection operative proposition is best understood as a genuine balancing norm under which the stringency of the justification constitutionally demanded of any classification is always a function of the harm that the classification imposes. Under this view, strict scrutiny would be a decision rule. And an overenforcing one at that: The (concededly unusual, but surely imaginable) sort of racial classification that produces only trivial individual and social harm would satisfy the operative proposition so long as supported by moderate justification, but would be adjudged to have violated the Equal Protection Clause unless narrowly tailored to achieve a compelling interest.

The rational basis test is even more plainly a nonstandard decision rule. It might well be that, outside of classifications that discriminate against suspect and quasi-suspect classes or that infringe fundamental rights, state action does not violate the equal protection operative proposition so long as reasonably adopted to serve any genuine and legitimate state interest. The

271. U.S. CONST. amend. IV.

272. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

273. See *New York v. Belton*, 453 U.S. 454, 460–63 (1981).

rational basis decision rule, however, directs courts, in effect, to conclude that the challenged classification does in fact reasonably serve the state's ends "if there is any reasonably conceivable state of facts" under which the rational relationship would hold true.²⁷⁴

Nonstandard decision rules are not somehow limited to individual rights. They are at home in federalism and separation of powers contexts, too. It appears, for instance, that the Court will uphold an exercise of Congress's tax power²⁷⁵ against the claim that it was adopted for an impermissible regulatory purpose so long as the tax does in fact produce revenue.²⁷⁶ Is this the Court's understanding of constitutional meaning? Not likely. As Justice Jackson suggested, it makes more sense to understand Congress's constitutional taxing authority not to extend beyond the "rational or good-faith revenue measure."²⁷⁷ But, as Jackson also acknowledged, this is not an easy rule for courts to administer. The tax decision rule, accordingly, directs courts to conclusively presume that the challenged measure is supported by a bona fide revenue-raising purpose (as the operative proposition requires) so long as it does produce revenue.

Commerce Clause doctrine can be understood similarly. The doctrine presently being developed by the Rehnquist Court is frequently and fairly criticized on the ground (among others) that the question of whether the intrastate activity being regulated has an economic or noneconomic character cannot sensibly have the constitutional significance that *Lopez* and *Morrison* attribute to it.²⁷⁸ But the aggregate effects test is similarly subject to criticism on the ground (among others) that it confers upon Congress a de facto police power. It could be, though, that both approaches embody decision rules crafted to administer a similar operative proposition, perhaps one requiring that Commerce Clause legislation have a genuine commercial purpose or design. On this view, the Rehnquist Court has essentially decided to replace a post-1937 decision rule that underenforced what limits on congressional power the Constitution, properly interpreted, imposes with one that threatens to overenforce such limits.²⁷⁹

Admittedly, the foregoing arguments are condensed and, in places, telegraphic. But no elaboration could fully prove my case. I have been reverse-engineering existing doctrines to show how they can be more satis-

274. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

275. U.S. CONST. art. I, § 8, cl. 1.

276. See *Kahriger v. United States*, 345 U.S. 22, 28 (1953).

277. *Id.* at 35 (Jackson, J., concurring).

278. While stopping just short of declaring that intrastate activities must always be economic in order to be regulable on a substantial-effects rationale, *United States v. Morrison*, 529 U.S. 598, 613 (2000), the Court has nonetheless made clear that this is an extraordinarily important consideration. See generally *id.* at 610–15.

279. This thought is developed at greater length in Berman, Guillen and Gullibility, *supra* note 204.

factorily conceptualized as consisting of operative propositions administered by nonstandard decision rules. It is therefore in the nature of the project that one could always resist the proffered classifications.²⁸⁰ However, I am not committed to the view that each of my illustrations is correct. I hope, instead, to focus the reader's attention on the forest, not the trees. Perhaps the number and variety of plausible examples will persuade even those who are not fully persuaded by any one example alone that nonstandard decision rules are too essential a feature of our constitutional jurisprudence to be easily dismissed as illegitimate.

If doubt nonetheless remains, election law jurisprudence should allay it. Consider first the racial gerrymandering doctrine. Under *Shaw* and its progeny, courts must apply strict scrutiny to the drawing of a challenged district if persuaded that race was the "predominant factor motivating the legislature's decision to place a significant number of voters within or without" that district.²⁸¹ What in this doctrine is operative proposition, what is decision rule? If, as Kennedy observes in *Vieth*, "[r]ace is an impermissible classification,"²⁸² full stop, then the *Shaw* rule must involve a nonstandard decision rule: Conclusively presume that race has been employed only if it appears to predominate.

The clincher, of course, is the one-person, one-vote rule itself. As Justice O'Connor noted in *Bandemer*, the *Baker* Court ruled that "the reach and meaning of the Equal Protection Clause" prohibited "arbitrary and capricious discrimination against individual voters with respect to the weight of their votes."²⁸³ It follows that the one-person, one-vote rule, at least as applied in congressional districting, is a decision rule that directs courts to conclusively presume that the challenged scheme is arbitrary and capricious from the mere fact that it minimally departs from perfect equipopulousness.

C. *Decision Rules and Justiciability*

The task left open after Part II was to craft manageable doctrine to administer the understanding of excessive partisanship in redistricting that that Part had put forth. This Part has argued that the logical structure of constitutional adjudication yields a conceptual distinction between judicial statements of interpreted constitutional meaning ("constitutional operative

280. This is famously true of any suggestion that a decision rule takes the form of a conclusive presumption. The nominal doctrine, in each case, seems to say "X is unconstitutional." I propose, in contrast, that the doctrine is most felicitously analyzed as an operative proposition that says "Y is unconstitutional" conjoined to a decision rule that directs "conclude Y if persuaded by a preponderance that X." Because an analysis of this sort is not provably correct unless and until the authoritative doctrine maker endorses the recharacterization, it will always remain open to the objection that the nominal doctrine is really just the operative proposition ("X is unconstitutional") and that the unstated decision rule directs "conclude X if persuaded of X by a preponderance."

281. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

282. *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1793 (2004) (Kennedy, J., concurring).

283. *Davis v. Bandemer*, 478 U.S. 109, 149 (1986) (O'Connor, J., concurring).

propositions”) and directions regarding how courts should decide whether those meanings are complied with (“constitutional decision rules”). It has further sought to demonstrate that “nonstandard” decision rules that aim to get at an operative proposition obliquely by employing proxies and conclusive presumptions are pervasive. Armed with this understanding, we can slightly restate where we have been and where we must go. Part II suggested that the Court should recognize, as a constitutional operative proposition, that redistricters may not pursue too much of an electoral advantage for the dominant party relative to the electoral success that party would likely have enjoyed had the redistricter not taken partisanship into account. Part IV will explore how the Court can best craft decision rules to administer that meaning.

But can a manageable decision rule satisfy the commands of justiciability? *Baker*, after all, indicates that the absence of a “judicially discoverable and manageable standard” spells a political question.²⁸⁴ Does this mean that the entirety of the judicially announced doctrine—the decision rule as well as the operative proposition—must be, in the language of the *Vieth* plurality, “discernible in the Constitution”?²⁸⁵

Surely not. Were that the case, then courts would be running afoul of the political question doctrine whenever they adjudicated constitutional claims by application of nonstandard decision rules.²⁸⁶ All that can be demanded, in the context of partisan gerrymandering as elsewhere, is a judicially manageable test for sensibly administering the constitutionally discernible standard. That is, the operative proposition need be discoverable;²⁸⁷ the decision rule need not be. Its relationship to the constitutionally discernible standard is instrumental and pragmatic. Accordingly, the plurality’s suggestions that the “judicially manageable standard” must be (merely) “constitutionally based”²⁸⁸ or must bear a “*relation* to constitutional harms”²⁸⁹ put things more aptly.

284. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

285. *Vieth*, 124 S. Ct. at 1786 (plurality opinion).

286. This is not strictly so given that the manageability test operates prospectively only, not retrospectively. See Levinson & Young, *supra* note 198, at 961–62. And the fact that a court has ultimately decided to craft a nonstandard decision rule (a component of doctrine that I am assuming is not itself “discernible in the Constitution”) does not entail that that court realized—at the moment of assessing a claim’s justiciability—that deployment of a nonstandard decision rule would be necessary. But the gist of the point remains: Even early on, the Court surely understood (or should have understood) that it would not be able to administer such majestic constitutional generalities as the Equal Protection Clause without crafting doctrine whose every jot and title could not possibly be described as constitutionally discoverable.

287. The operative proposition must be “discoverable” only in the sense that it must arise from application of generally (but not unanimously) accepted modalities of constitutional interpretation, including, for example, structure and history. That is, the command of discoverability does not entail clause-bound textualism.

288. *Vieth*, 124 S. Ct. at 1784 (plurality opinion) (emphasis added).

289. *Id.* at 1786 (plurality opinion) (emphasis added).

IV. Partisan Gerrymandering Doctrine

What shape, finally, should this instrumental decision rule take? How should the Court administer the ends-based, counterfactual-baseline understanding of excessive partisanship?²⁹⁰ Generally speaking, the Court can proceed in at least two ways. It can adopt a single decision rule that would govern all claims of excessive partisanship in gerrymandering, or it could craft separate decision rules each of which is predicated on different circumstances.²⁹¹ In Sunstein's terms, the first approach is wide, the latter is narrow.²⁹² To signify that these are not just points on a continuum, but two qualitatively distinct alternatives, I will refer to them as wholesale and retail. Subpart A proposes one wholesale decision rule designed to cover the waterfront. Subpart B sketches the beginnings of a retail approach by identifying three decision rules that courts might reasonably adopt to start filling out the relevant space.

A. A Wholesale Decision Rule

A wholesale, or one-size-fits-all, option must successfully navigate the three difficulties already noted: (1) the *counterfactual problem* of ascertaining what the legislature would have done had it not considered partisan advantage at all; (2) the *prediction problem* of estimating how many seats the actual and counterfactual schemes can be expected to produce for the relevant parties; and (3) the *standard problem* of deciding the magnitude of the delta that separates permissible from excessive.

The standard problem is hardly a problem at all, so long as the counterfactual and prediction problems are met. The Supreme Court routinely concretizes into more-or-less arbitrary numbers the Justices' intuitions about where, on a continuum, the proper cut-off point lies.²⁹³ Thus, for example, it has held that a population disparity between the most and least populous state legislative districts of up to 10% presumptively

290. Issacharoff has proposed that the Court should "establish a prophylactic per se rule that redistricting conducted by incumbent powers is constitutionally intolerable"—i.e., that redistricting must be undertaken by nonpolitical commissions. Issacharoff, *Political Cartels*, *supra* note 245, at 601. In my terminology, he is proposing that our best understanding of constitutional meaning in this area be administered by a nonstandard decision rule that employs a conclusive presumption. Naturally, I approve of the basic strategy. His particular decision rule, however, is so overinclusive (presumably, many legislative redistrictings stop short of embodying "excessive" partisanship) as to have precious little chance of being adopted, or so it seems to me. Of course, this is a predictive claim. It is agnostic regarding whether the harms produced by excessive partisanship in redistricting are so grave as to justify such a substantial degree of prophylaxis.

291. Of course, the Supreme Court need not do the crafting itself. It could simply endorse decision rules crafted by litigants or lower courts.

292. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 241–43 (1999).

293. *Cf.* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 284–89 (1980) (discussing Aquinas's notion of "determinatio").

satisfies *Reynolds*.²⁹⁴ The prediction problem is also surmountable. Courts already admit and evaluate expert submissions that, wielding tools developed by political scientists, predict electoral outcomes from specified district lines. Indeed, the lower court did it in *Vieth*.²⁹⁵

The counterfactual problem, in contrast, is a big one. It is foolish to expect that plaintiffs could, by relying on whatever political evidence they think is probative, establish to any reasonable degree of confidence what the lines would likely have looked like had the legislature not considered partisan advantage. We will have to proceed by proxy.

Imagine, for example, that we could generate all possible electoral maps. If so, we could then rank them according to the expected partisan outcome each would produce, and presume that the legislature would have adopted a map that would have yielded the median outcome. That is, we would treat the median outcome as though it were the counterfactual one. Of course, this would be artificial: The true counterfactual map might have produced electoral outcomes different from the median outcome of all possible maps. But this is no objection once we acknowledge the ineliminability of decision rules. Given epistemic uncertainty, even the default (generally invisible) more-likely-than-not decision rule will produce some erroneous outcomes. So too, necessarily, will nonstandard decision rules. To conclusively treat the median outcome of all maps as though it were the outcome of the counterfactual map would produce some errors that favor the plaintiff, and some that favor the defendant—as would any decision rule.

No, the inescapable inaccuracy of this approach does not doom it. What dooms it is that it is impossible. Not only is the task of identifying all possible electoral maps beyond the reach of today's fastest supercomputers (even if we restrict ourselves to the subset of all possible maps that satisfy the criteria of contiguity and substantial population equality), current views about the theoretical limits of computation suggest that a complete enumeration will be forever unrealizable.²⁹⁶ It is precisely this impossibility

294. See *Voinovich v. Quilter*, 507 U.S. 146, 160–62 (1993); *Brown v. Thompson*, 462 U.S. 835, 842 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). But see *Cox v. Larios*, 124 S. Ct. 2806, 2806 (2004) (holding that Georgia's legislative reapportionment plan, although falling under the 10% rule, violated the one-person, one-vote rule because of partisan political motivation). For another example of an arbitrary number, see *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003) (recognizing that “awards exceeding a single-digit ratio between punitive to compensatory damages” rarely satisfy due process).

295. See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546–47 (M.D. Pa. 2002) (considering plaintiffs' expert witness evidence that Pennsylvania's new congressional districts would “guarantee” that thirteen of nineteen elected representatives would be Republican). In claiming that the prediction problem is surmountable, I do not mean to deny that the problem remains challenging. See Transcript of Oral Argument at 11–13, *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004) (No. 02-1580) (questioning the worth of expert testimony on issues of this sort).

296. See Micah Altman, *Is Automation the Answer: The Computational Complexity of Automated Redistricting*, 23 RUTGERS COMPUTER & TECH. L.J. 81, 94–112 (1997).

that leads one to a familiar idea in the gerrymandering literature: random baselines. If we could generate some random subset of all possible electoral maps²⁹⁷ and treat that random sample as representative of all possibly adopted maps, then we could treat the median outcome from this random and representative sample as the counterfactual baseline.

This is getting closer. Unfortunately, true randomness is also impossible because the maps “randomly” generated are constrained by the assumptions loaded into the algorithm, which are themselves the product of design.²⁹⁸ The algorithm might assume, for example, that each district is contiguous and that the scheme as a whole respects specified parameters for average and differential district compactness, as well as other specified parameters regarding the extent to which various types of political subdivisions may be partitioned. Presumably it would also select only those plans that comply with legal requirements supplied by, for example, the Voting Rights Act and the Court’s apportionment and racial gerrymandering jurisprudence. The question, then, is whether recognizing that the random-baseline approach is really only a pseudo-random-baseline approach is necessarily fatal to it.

Let us explore why one might think so. There is no reason to believe that the median outcome of all possible maps or of a truly random subset of all possible maps will be systematically biased in any particular direction from the outcome that the true (but undiscoverable) counterfactual baseline map would have produced. Any divergence is equally likely to understate as to overstate the number of seats that the party in control of the redistricting would have realized had it not taken partisanship into account. Not so, perhaps, the median outcome of all maps selected by a pseudo-random algorithm. In particular, critics of the proposal to treat the median outcome of the pseudo-random set of maps as the proxy for the counterfactual map are likely to believe that the median outcome under such maps will understate the outcome that the redistricting party would have achieved had no partisanship infected its decisionmaking. It is not particularly important at this time to evaluate whether a contention of this sort is likely to be sound. My point is only that, because the critics of partisan gerrymandering are constantly battling uphill—first facing the extraordinarily inhospitable *Bandemer* test, now facing the prospect that such claims will be held nonjusticiable—the pseudo-random-baseline approach is more likely to be resisted on the ground of its being too plaintiff-friendly, not too defendant-friendly.²⁹⁹

297. For just one example of an attempt along these lines, see Carmen Cirincione et al., *Assessing South Carolina’s 1990s Congressional Districting*, 19 POL. GEOGRAPHY 189 (2000).

298. For a demonstration, see Micah Altman & Michael McDonald, *A Method of Revealed Preferences for Evaluating Intent in Redistricting* (unpublished manuscript, undated), at app. A. For early insistence on this point, see Lowenstein & Steinberg, *supra* note 224, at 62.

299. Admittedly, it might also be resisted on the ground of being too Republican-friendly: Insofar as compactness will inevitably feature in the randomizing algorithm, the outcomes at every percentile are likely to systematically favor Republican interests given that Democratic voters tend

But if this is so, one possible fix suggests itself. We could simply treat as the counterfactual baseline, not the median outcome produced by the set of pseudo-random maps, but some outcome at a specified distance from the median. For example, we could allow the defendant to adopt as the counterfactual baseline any outcome within a standard deviation of the mean outcome, or between, say, the 25th and 75th percentiles. So long as the algorithm that produced the pseudo-random maps were reasonable (a standard far short of ideal), some defendant-friendly revision of this sort should correct against overly intrusive judicial intervention.

Putting all this together, we see the form that a decision rule could take. The Supreme Court could direct courts to conclude that the legislature pursued partisan advantage to an unconstitutional extent if the plaintiff proves by a preponderance of the evidence that the expected partisan value of the challenged scheme (to the party with majority control of the legislature) is more than $x\%$ greater than the expected partisan value of the redistricting scheme in the y th percentile of all maps generated in an appropriately pseudo-random fashion.

Admittedly, this is more the framework for a decision rule than it is a fully formed proposal. The Court, likely after considerable percolation in the lower courts, would have to select values for x and y . Yet more challenging, it would have to provide sufficient guidance regarding the acceptable parameters of the pseudo-randomizing algorithm. There is no obviously right answer on matters such as these. One solution would be to announce some values for x and y as presumptions and authorize lower courts to pass on pseudo-randomizing algorithms supplied by the parties themselves.³⁰⁰ In this way, the decision rule could continue to take shape over time, common-law style.

An illustration, based on the *Vieth* litigation, might help illustrate the proposed methodology. To start, I am assuming that the median electoral outcome produced by all the maps that could be generated given a range of

to cluster in cities. However, it does not strike me as a persuasive argument against this approach that reliance on pseudo-random baselines (as a proxy for the counterfactual baseline) might prove to be more favorable to Republicans, and less favorable to Democrats, than some other possible approaches to the problem, including nonjusticiability. But this might be mistaken.

300. Two thoughts come to mind, both very tentative. First, the algorithm ought not be permitted to include any parameters for “communities of interest” because this notion is too nebulous and serves as too ready a proxy for partisan affiliation. And although excluding communities of interest from the pseudo-random districting schemes is a little artificial—some such communities might matter to a nonpartisanly motivated legislature—the consequence of this omission would be slight insofar as genuinely nonpartisan accommodation of these communities is likely to cancel out, from the perspective of the partisan ledger. Second, although courts are in no position to write algorithms themselves, they could find that parties present them with very palatable alternatives if courts employ baseball-style arbitration as the means for selecting from among the universe of plausible candidates. This might be especially true if courts turn a skeptical eye to aspects of a party’s proposal that differ from what the party has advanced in litigation in other states.

plausible map-drawing assumptions is a fair proxy for the electoral outcome that would have obtained under the map that the legislature would have enacted had it not considered partisanship at all, i.e., the counterfactual map. For example, if the median expected electoral outcome in Pennsylvania, under all the maps that *could* have been drawn consistent with specified line-drawing assumptions would have given Republicans 9.9 out of the state's 19 seats,³⁰¹ then it seems reasonable to assume that the map that *would* have been drawn had partisanship not entered into the redistricting calculus would have resulted in the election of 9.9 Republicans. By calling this a reasonable assumption, I mean that we lack compelling reason to accept either of the two competing assumptions that the counterfactual map would likely have produced for the Republicans (a) more than 9.9 seats or (b) less than 9.9 seats. Consequently, had the Court interpreted the Constitution to provide that redistricters may take *no* account of partisan advantage, then it might sensibly adopt a decision rule under which any map that would have likely yielded for the Republicans more than 9.9 expected seats would be presumed (or adjudged) to be unconstitutional.

But the Court has not interpreted the Constitution to proscribe all pursuit of partisan advantage. Instead, it has declared that the Constitution forbids only *excessive* pursuit of partisan advantage, some such partisan motivation being constitutionally permissible. This is the reason for introducing x : even if the expected electoral outcome under the counterfactual map would have been 9.9 Republican seats, a Republican-dominated legislature is constitutionally entitled to adopt a map that can be expected to yield something more than 9.9 seats. If x is, say, 10% of the party's otherwise expected seats, then the decision rule might direct courts to adjudge any plan adopted by the Republican-controlled Pennsylvania legislature to reflect unconstitutionally excessive partisanship if it is expected to yield more than 10.89 Republican seats.

Variable y is designed to give the state one additional layer of protection. I have said above that if the pseudo-randomizing formula were good, then the median outcome supplies the single most reasonable assumption for the counterfactual map; no single other assumption is more reasonable. But, invariably, the formula will be contested by both sides. The state might argue, for example, that even had it not considered partisanship at all, it would have drawn district lines with far more concern for preserving the integrity of subdivisions, and concomitantly less concern for average district compactness, than the algorithm reflects. As a result, the median Republican outcome *understates* the success that the Republican Party could

301. That application of this decision rule introduces fractional representatives should not be treated as a problem. Sophisticated models for predicting electoral delegations will always generate fractional results. A moment's reflection reveals why this should be: Although districts with 55% and 85% Republican majorities are both likely to produce Republican office holders, they are not equally likely to do so.

have expected under the counterfactual map. Plaintiffs would argue, in essence, the opposite—say, that the formula does not give sufficient weight to district compactness, or mistakenly weights average district compactness more heavily than minimizing the distance between the most and least compact districts, or wrongly employs a dispersion measure of compactness when it should have employed a perimeter measure. Whatever the particular arguments, they would be designed to establish, of course, that the median Republican outcome under the pseudo-randomly generated maps *overstates* what the Republicans could have expected to achieve under the counterfactual map.

There are sound reasons, grounded in concern for the separation of powers, to consider an erroneous judicial invalidation of a challenged scheme to be a weightier social harm than an erroneous judicial validation. Courts can partially accommodate this fact by pegging the counterfactual electoral baseline (the expected electoral outcome under the map that the legislature would have enacted had it not considered partisan advantage) not at the median of all maps produced pseudo-randomly, but at some distance y from the median—say, a quartile. Suppose now that, although the median electoral outcome of the pseudo-random assortment of maps would yield 9.9 Republicans, the outcome in the 75th percentile of maps would have been expected to produce 10.7 Republican victories. Because the in party is constitutionally permitted to strive to increase its electoral success by up to 10% (we are assuming), it follows that a redistricting scheme adopted by the Pennsylvania Republicans could be presumed to be infected by excessive partisanship were it expected to yield more than 11.77 Republican victories.³⁰²

Lest I be read as overselling a decision rule of this form, let me clearly acknowledge some of its deficits. It is complex and inelegant. Particulars of the pseudo-randomizing algorithms will always be contestable and contested. At the level of detail represented by the variables x and y , it is inescapably arbitrary. But it is a conceptually coherent solution to the problem and, I believe, feasible. Can any decisive objections be leveled against it? Twenty

302. To make clear, although x and y are both intended to offer state defendants protection against overly intrusive judicial intervention, they do so in different ways. Variable x reflects the fact that, according to the Court, the line of constitutionality runs between excessive and permissible degrees of partisanship, not between some partisanship and none; variable y modifies an admittedly imperfect decision rule in a defendant-friendly direction. It is tempting, but wrong, to suppose that we could achieve the same result more simply by eliminating y and increasing x . The cash value of moving from the median to the y th percentile for purposes of fixing the supposed counterfactual baseline will depend upon the demographic and geographic characteristics of the state in question. In some states, plausible nonpartisan districting criteria might produce a very wide range of electoral outcomes. In other states, the electoral outcomes that could be expected under plausible nonpartisan criteria would be much more narrowly circumscribed. It seems appropriate that, all else being equal, courts should accept as constitutional a more skewed electoral outcome under the former conditions than under the latter. This can be accomplished by incorporating factors x and y into the decision rule; it cannot be accomplished by using only the single variable x .

years ago, for example, Richard Niemi lodged the following two objections against reliance on pseudo-random baselines:³⁰³ First, it is “difficult to find a constitutional basis for requiring” their use. Second,

to require use of this type of baseline would entail heavy reliance on proportional representation. Even though such a baseline would not force the proportion of seats and votes to be equal, it would impose a statistical test to see if the seats to votes ratio was “too far” from what would occur naturally.³⁰⁴

Do these criticisms tell against my proposed decision rule too?

They don't. The second objection simply has no bearing. The analysis I propose entails no reliance on proportional representation. There is no need to consider seat-to-vote ratios at all.

Niemi's first objection is slightly different. He is right that it is difficult to understand why a departure from a baseline of what the partisan distribution of seats would be under a set of districting schemes identified pseudo-randomly renders a particular plan unconstitutional. Put in my terms, it is hard to see why the pseudo-random-district baseline would function as any part of the constitutional operative proposition. But, of course, that is not my claim. If a plan is unconstitutional it is because the expected electoral outcome departs too far from the expected electoral outcome under the counterfactual plan. The constitutionally relevant baseline is the counterfactual one. We would consider expected electoral outcomes under a pseudo-random assortment of redistricting plans only as a proxy for the expected outcome under the plan that the legislature would have adopted had it not pursued partisan advantage. I do not contend—indeed, I deny—that reference to any sort of pseudo-random baseline is “constitutionally required.”

B. Some Retail Decision Rules

Although I believe that a wholesale decision rule roughly of the form just outlined holds promise, there is no denying that it is an ambitious solution. A more modest alternative approach, still consistent with the arguments developed in Parts II and III of this Article, would be for courts to develop decision rules more closely tailored to the facts of the cases in which claims of unconstitutionally partisan gerrymandering arise. This strategy would produce some number of decision rules all predicated on different circumstances: Under circumstances C_1 , conclude that the legislature violated the ban on unconstitutionally excessive partisanship in redistricting if M ; under circumstances C_2 , conclude that the legislature violated the ban on unconstitutionally excessive partisanship in redistricting if N ; et cetera.

303. Although Niemi nominally focused on “random district” baselines, his criticisms necessarily apply to pseudo-random variants. Niemi, *supra* note 224, at 207.

304. *Id.* at 208.

Because it involves a mid-decade gerrymander, the Texas case, *Session v. Perry*,³⁰⁵ provides a textbook example of what one sensible retail decision rule would look like. Accordingly, this final section concentrates on a decision rule tailored to the context of mid-decade redistricting. But even a reader who finds such a decision rule justifiable and attractive might nonetheless worry that it is more likely to exhaust than to illustrate the universe of sensible and manageable retail decision rules. As a response to understandable skepticism of this sort, this subpart concludes by offering two brief additional examples of possible retail decision rules designed to administer the constitutional ban on excessive partisanship in redistricting. The basic thrust here is not to insist that any one of these proposed retail decision rules is optimal. More modestly, it is to offer some grounds to be optimistic that the general strategy I recommend—embracing my proposed understanding of excessive partisanship, and then constructing instrumental decision rules—is likely to prove fruitful when litigants and lower courts are enlisted into the effort.

1. Mid-decade Redistricting.—One consequence of the Court’s rule that electoral districts be nearly equipopulous is to require legislatures to redraw state districts after each decennial census. Perhaps because the process is contentious, costly, and time-consuming, however, states have not traditionally redistricted with any greater frequency than that. In 2003, though, Texas did.³⁰⁶ Prodded by House majority leader Tom DeLay, the Texas Legislature, under unified Republican control, took up the issue of congressional redistricting even though a lawful map was already in place. Resisting this unprecedented move, a group of Democratic members of the Texas House fled to Oklahoma to break the quorum and prevent the redistricting legislation from being considered that session. In response, Republican Governor Rick Perry called the legislature into special session for the sole purpose of considering redistricting. This time, the plan hit a snag in the Texas Senate, as 11 of the 31 senators announced that they opposed redistricting. Because long-standing tradition in the senate had required that a measure be supported by two-thirds of the membership before the full senate will consider it, this opposition doomed the legislation.

Undeterred, the Republican lieutenant governor announced that he would not recognize the two-thirds rule and called a second special session on congressional redistricting. This session too ended in failure when the 11 senators fled to New Mexico, depriving the Senate of a quorum. Later, when one of their number returned to Texas, Governor Perry called a third special

305. 298 F. Supp. 2d 451 (E.D. Tex. 2004).

306. Texas was not alone. The Republican-controlled Colorado legislature did the same. Interpreting the Colorado state constitution to prohibit mid-decade congressional redistricting, however, the Colorado Supreme Court struck it down on state-law grounds. See *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1237–40 (Colo. 2003).

session at which the Republican plan—designed to give Republicans a 22–10 edge in the state’s congressional delegation—passed on a nearly perfect party-line vote.³⁰⁷

Although the Texas redistricting effort provided more drama than its Pennsylvania cousin, the output was in many respects similar. Like the Pennsylvania gerrymander, the Texas plan reflects only moderate regard for compactness and the integrity of political subdivisions, and it also pairs many Democratic incumbents with each other or with Republican incumbents in heavily Republican districts. More significantly, the partisan motivation was, again, both extreme and avowed. As State Representative Phil King, one of the House leaders of the redistricting battle, admitted, the Republican leadership’s goal was to “get as many seats as we could.”³⁰⁸ Or, as a Republican staffer put it, the plan was designed to “assure that Republicans keep the house [of Representatives] no matter the national mood.”³⁰⁹

In one conspicuous respect, however, the Texas gerrymander differs from the Pennsylvania gerrymander upheld in *Vieth*: The Pennsylvania legislature was constitutionally obligated to redistrict as a result of the 2000 census. In contrast, when the Texas legislature got started, a constitutionally valid districting plan based on 2000 census data was already in place, having been adopted by judicial order in 2001.³¹⁰ The Texas scheme, but not the Pennsylvania one, was adopted mid-decade to replace a legally valid scheme. It was a redistricting of choice, not necessity.

For at least two reasons, the mid-decade, or off-cycle, character of the Texas gerrymander represents a distinction with a difference.³¹¹ First, the

307. The Texas gerrymander received considerable attention in the media. The foregoing facts have been pulled from a collection of sources. For a general overview of the events surrounding the Texas gerrymander, see R.G. Ratcliffe et al., *78th Texas Legislature; On the lam in Oklahoma; Fugitive Democrats, GOP Point Fingers across Red River; House will Stay Shut, Rebels Vow*, HOUS. CHRON., May 14, 2003, at A1; Bennett Roth & Rachel Graves, *Special Session, Texas Legislature; DeLay: Senators Violating Constitution; Says 11 Who Fled to Derail Redistricting ‘Don’t Understand Honor’*, HOUS. CHRON., Aug. 18, 2003, at A13. For a discussion of the role of House majority leader Tom DeLay, see LOU DUBOSE & JAN REID, *THE HAMMER: TOM DELAY, GOD, MONEY, AND THE RISE OF THE REPUBLICAN CONGRESS* 199 (2004). As further evidence of the redistricting’s partisan influence, Texas Republicans gained six congressional seats in the November 2004 election. See Chuck Lindell, *A New Map, A New Rise to Power*, AUSTIN AMERICAN-STATESMAN, Nov. 4, 2004, at A1 (reporting that redistricting “not only cost Texas Democrats six congressional seats” but also “the combined loss of 102 years of House experience as members retired, switched parties or lost elections”).

308. Jurisdictional Statement at 13 n.25, *Jackson v. Perry*, 2004 WL 792334 (2004) (No. 03-1391).

309. *Id.* at 12.

310. *Session v. Perry*, 298 F. Supp. 2d 451, 458 (E.D. Tex. 2004) (citing *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2002), *aff’d mem.*, *Balderas v. Texas*, 536 U.S. 919 (2002)); see also *Session*, 298 F. Supp. 2d at 528 (Ward, J., concurring in part and dissenting in part) (describing the previous, court-ordered plan as “a plan that is beyond dispute a legal one”).

311. Plaintiffs have challenged the Texas scheme on a variety of additional grounds, including racial gerrymandering and violations of the Voting Rights Act. See *Session*, 298 F. Supp. 2d at 457. In examining only the partisan gerrymandering issues, I do not intend to express any view on the

possibility of off-cycle redistricting permits legislatures to pursue much more extreme partisan gerrymanders. Second, the fact of an off-cycle redistricting constitutes powerful evidence that the legislature was in fact motivated to pursue extreme partisan goals.³¹²

To appreciate the first point, one need only attend, ironically, to the reasons Justice O'Connor gave in *Bandemer* for holding claims of partisan gerrymandering nonjusticiable. Relying on the work of political scientist Bruce Cain, O'Connor based her position in part on the assertion that "there is good reason to think that political gerrymandering is a self-limiting enterprise."³¹³ In a nutshell, Cain's (and O'Connor's) argument goes as follows: The extremity of a gerrymander is a function of the extent to which the controlling party can make its own districts efficient (involving very small margins of victory) and the opposing party's districts inefficient (very large margins of victory). But the more efficient the district, the bigger the risk. Because the party itself and the individual incumbents will be somewhat risk averse, they will draw districts to produce larger cushions than rigorous pursuit of partisan advantage would seem to dictate.

This is persuasive as far as it goes. But the efficiency that a party or an incumbent will tolerate is not only a function of its or her degree of risk aversion, it is also a function of the time horizon. The riskiness of any given district is inversely proportional to the expected margin of victory in the next election and directly proportional to the expected number of elections before the next redistricting—as Cain's own analysis makes clear.³¹⁴ Therefore, O'Connor's argument that political gerrymandering is likely to be self-limiting depends heavily on the assumption that redistricting will occur only once per decade.³¹⁵ Significantly, if a party's control of the state legislature

possible validity of any other sorts of claims. Although the three-judge district court upheld the scheme against all of these challenges, and although, presumably, only the partisan gerrymandering issue is alive on remand, any of the claims could potentially serve as the basis for a successful subsequent appeal to the Supreme Court.

312. If the Court wanted to eliminate all partisan gerrymanders, not only the "excessively partisan" variety, it would have an additional reason to disfavor off-cycle redistricting. If legislatures are permitted to redistrict whenever they want, they can choose to do so when the state government is fully in the hands of a single party. But permitting redistricting to occur only at specified times (for instance, after each decennial census is reported) increases the chance that the legislature to whom the obligation falls will be unable to advance strictly partisan goals. See Cox, *supra* note 248, at 800–02. Because a solid majority of the Court has made clear that it does not view all partisan motivation as unconstitutional, however, I do not rely on this consideration.

313. *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring) (citing BRUCE CAIN, *THE REAPPORTIONMENT PUZZLE* 151–59 (1984)).

314. See, e.g., CAIN, *supra* note 313, at 152 (explaining that a majority party's willingness to gerrymander depends on its "estimate of long-range political and demographic trends"); *id.* at 156 (referring to one study that "suggests that whatever partisan advantage the controlling party gets from reapportionment tends to erode quickly over time with changes in the composition of districts" and concluding that "partisan gerrymandering is technically difficult because time and geography can undo the reapportioner's craft").

315. Incidentally, Justice O'Connor's conclusion is suspect for another reason too. The severity of a gerrymander is a function not only of the efficiency that the controlling party will

is secure, the mere possibility of off-cycle redistricting can be enough to embolden gerrymanders more extreme than would otherwise occur: The party can accept narrower expected margins of victory in its “own” districts than it otherwise would so long as it can be confident that off-cycle redistricting will be possible in the event that those highly efficient districts threaten to become too efficient—i.e., too risky. So a regime that permits off-cycle redistricting is likely to produce more egregious gerrymanders *even when the option is not exercised*.

And what if that option *is* exercised? As suggested earlier, redistricting is, across a number of dimensions, a costly enterprise. This is well illustrated by the Texas experience, which consumed, among other things, three special sessions, scores of hearings across the state, one long-standing state senate rule, and, by most accounts, much of whatever amity had existed between the two parties in Texas. It is elementary that the more costly an optional activity, the greater must be the expected payoff before a rational actor will engage in it. Because the most obvious types of payoff that redistricters expect from redistricting are incumbency protection and partisan advantage, we can expect—*courts* can expect—that the partisan advantage pursued in an off-cycle redistricting is likely to be substantial, not modest.

These two reasons, in combination, strongly recommend one retail decision rule that courts can adopt to administer the *Vieth*-recognized constitutional ban on excessive partisanship in redistricting: Courts should conclude that mid-decade redistrictings undertaken by a single-party-controlled state government are motivated by excessive partisanship—hence are unconstitutional—unless narrowly tailored to achieve a compelling interest.³¹⁶ The three-judge district court to which the Supreme Court

tolerate (which is itself a function of the time between redistrictings), but also of the extent to which that party is willing to flout traditional districting criteria. The more noncompactness that mapmakers are willing to tolerate, the bigger the cushion it can provide itself to ameliorate risk. It is worth noting, therefore, that Cain’s relatively sanguine assessment that partisan gerrymandering can be kept within acceptable bounds without judicial intervention seems to rest on the assumption that redistricters won’t “resort[] to wildly noncompact shapes.” *Id.* at 150.

316. Just as a single constitutional operative proposition (i.e., a court’s understanding of constitutional meaning) could be successfully administered by a variety of decision rules, a single decision rule could be well suited to administer more than one operative proposition. I have proposed the decision rule in the text as a means to implement what we might call the *Vieth* operative proposition—a constitutional ban on excessive partisanship in redistricting, as this Article fleshes out what “excessive partisanship” means. As it happens, however, this same decision rule, or something very much like it, might constitute an appropriate means to implement the *Baker* operative proposition that bars “arbitrary and capricious discrimination against individual voters with respect to the weight of their votes.” See *supra* note 283 and accompanying text.

When adjudicating malapportionment challenges, courts have (understandably) indulged the legal fiction that a state’s population remains constant until the census reveals otherwise. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). No matter how obvious it might be to demographers that, because of differential rates of migration, mortality, or fertility, the population of one district is likely to grow faster or slower than in another, courts assume that districts equipopulous at the start of a districting cycle remain equipopulous throughout the cycle. This makes sense when the districts are created at the cycle’s start. But to respect this fiction even when

remanded the Texas litigation can announce this rule.³¹⁷ I believe that it should.

Let me consider three objections. Critics might object, first, that mid-decade redistricting is constitutionally permissible.³¹⁸ And so it is. This is where my approach—which depends heavily on an explicit and reasonably precise distinction between judge-interpreted constitutional meaning and the doctrinal rules crafted to implement that meaning—differs from those advanced by the *Session* plaintiffs³¹⁹ and by other academic commentators.³²⁰ The instant question is whether the incidence of excessive partisanship in mid-decade redistrictings is likely to be sufficiently high that it becomes reasonable to adopt a decision rule that directs courts to presume excessive partisanship from mid-decade redistricting. I have already provided reasons to believe that the answer to that question is yes, and it is an answer that the empirical evidence supports. The two modern instances of mid-decade congressional redistricting—Texas and Colorado—are widely understood as textbook examples of extreme partisanship.

districts are created mid-cycle is an invitation to abuse. Consequently, courts might reasonably adopt a decision rule that requires judges to presume that a mid-decade redistricting scheme constitutes an unconstitutional malapportionment unless, say, the state can meet the compelling interest test or can establish that the challenged plan comports, at the time of its introduction, with the demands of at least rough equipopulousness. (I am indebted to Steve Bickerstaff and Renea Hicks for independently pressing this argument upon me.) Indeed, an argument broadly consistent with this view (though not clearly distinguishing between operative propositions and decision rules, or between meaning and doctrine) has been urged upon the three-judge court in *Session* on remand. See Brief of University Professors Concerned about Equal Representation for Equal Numbers of People as Amicus Curiae, *Session v. Perry* (E.D. Tex. 2005) (No. 2:03-CV-354) [hereinafter Brief of University Professors as Amicus Curiae].

317. The Texas gerrymander involves congressional redistricting. It is worth noting that a rule of this sort is, if anything, even more obviously appropriate in cases of mid-decade redrawing of electoral districts for state legislatures. As Justice Breyer argues in his *Vieth* dissent, gerrymandering is most profoundly antithetical to democratic principles when it serves to entrench a minority party in power for an extended period of time. See *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1825 (2004) (Breyer, J., dissenting). That can happen if a state legislature becomes controlled by a party with minority electoral support and then redraws the electoral districts in its favor. But if redistricting occurs only once a decade, then the minority party that seeks to entrench itself must craft new electoral lines that give it a majority not only in the immediately following election, but in the election eight years later that will produce the legislature that will next redistrict. The demographic changes that naturally occur over the course of a decade might make entrenchment of this sort difficult. We might say that if partisan gerrymandering stacks the electoral deck against the disfavored party, demographic changes somewhat reshuffle that deck before it can be stacked again. Not so if the minority party can redistrict every few years. Simply put, frequent and partisan redistricting is all the more dangerous when what is at stake includes the power to redistrict itself. Off-cycle partisan gerrymandering of state electoral districts cannot be tolerated by anyone who worries about minority entrenchment.

318. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 594 (1964) (Harlan, J., dissenting).

319. Jurisdictional Statement, *supra* note 308, at 11 (arguing that the Court should hold that the Constitution bars “congressional redistricting motivated solely by partisanship” when the “mid-decade replacement of a perfectly lawful plan has nothing to do with population equality”).

320. See, e.g., Cox, *supra* note 248, at 777–78 (advancing a procedural rule that would prohibit states from redistricting outside the decennial census cycle).

To be sure, a decision rule of this sort might be modestly overinclusive: Some mid-decade redistrictings might not issue from excessive partisan motivation. But a modest degree of overbreadth does not doom an otherwise manageable standard. Indeed, that is one important lesson that the distinction between operative propositions and decision rules is designed to teach. Moreover, the degree of likely overbreadth ought not to be overstated. Here, as elsewhere, strict scrutiny need not be fatal in fact. As the Texas litigation itself evidences, states might contend that the mid-decade redistricting was justified to cure a grossly partisan plan adopted by the previous legislature.³²¹ Perhaps a “remedial” objective of this sort ought to qualify as a compelling state interest. If so, the challenged mid-decade plan should be upheld so long as it is narrowly tailored to cure the prior partisan offense, not to replace one excessively partisan plan with its mirror image.

A second and related objection takes the form of a distinction: Even if a decision rule of the sort I propose might be appropriately applied to off-cycle redistrictings adopted to replace a valid plan that had itself been adopted in the democratically preferred way—by the legislature or by a districting commission—it should not apply where, as in Texas, the mid-decade redistricting was enacted to replace a court-ordered plan. This is not a wholly implausible position. But it is not ultimately persuasive.

It is true that courts have often assumed that their plans are only stopgap measures that legislatures are constitutionally free to replace. Nothing I have said is to the contrary. But, again, the important question is not whether it is constitutionally permissible to redistrict mid-decade, whether replacing a court-ordered plan or even a legislatively adopted one. For the answer to that question is clear: it is permissible, but only so long as the mid-decade redistricting does not exhibit excessive partisanship (or any other constitutional vice). The appropriate question, rather, is whether a single-party controlled legislature that exercises its option to replace a court-ordered plan with one of its own devising is likely to be motivated by excessive partisanship. And, in answering that question, it is surely relevant that states rarely if ever accept the invitation to replace a court-drawn plan when permitted to do so.³²² When the legislature is under bipartisan control, the benefits of redistricting when not required are rarely thought to outweigh the costs.

More pointedly, to except from the decision rule cases where the state redistricts mid-decade to replace a court-ordered plan that was adopted

321. See Motion to Affirm at 5, *Jackson v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (No. 03-1391) (characterizing the 2003 redistricting as an effort to “remov[e] the dead-hand effect of the 1991 Democratic gerrymander”).

322. See Brief of University Professors as Amicus Curiae, *supra* note 316, at 9 n.10 (reviewing all of the cases cited in *Session* as support for the proposition that courts generally assume that the plans they adopt can be changed or replaced by subsequent legislative action and concluding that, “[a]lthough in some instances the state legislature enacted laws codifying a court’s plans, it does not appear that in any of the cases the state legislature enacted a substantively new redistricting plan”).

because the state had failed to act would encourage precisely the evil we are seeking to prevent. If a party lacked control of the state government, but anticipated gaining control in the next election, they could block passage of any redistricting scheme, thereby parking the issue in the courts until they could successfully work an extreme partisan gerrymander. Indeed, some expert observers contend that is exactly what the Texas Republicans did. In 2001, Republicans controlled the Texas State Senate and the Governorship, while Democrats clung to a thin majority in the State House. Yet, instead of compromising with their Democratic colleagues, these commentators claim, the Republicans made a tactical decision to let the redistricting go to federal court just so they could replace whatever plan the judges adopted with an extreme partisan gerrymander as soon as the 2002 state elections turned the house over to Republican control.³²³

To protect against such tactics, courts should apply the mid-decade decision rule proposed above even when the challenged redistricting replaces a court-ordered plan—at least when the court-ordered plan was a response to the state’s failure, as in Texas, to enact any redistricting scheme at all. I leave open the possibility that the decision rule should not be applied when a mid-decade plan adopted by a single-party controlled government replaces a judicially drawn map that had been ordered as a remedy following judicial invalidation of a timely enacted legislative scheme. How to deal with that small corner of the possible universe of cases raises an important question, but not one that must be resolved in order to dispose of the Texas case.

If the second objection urges that the off-cycle decision rule is overbroad, a third objection, or combination of objections, might react to the rule’s admitted underinclusiveness—the fact that it has no application to cases of on-cycle redistricting. I take it that the underinclusiveness of this rule could not be a decisive objection against it if the effective upshot were that claims of unconstitutionally partisan on-cycle redistricting were nonjusticiable. Surely this is an objection that members of the *Vieth* plurality, and its defenders, would be singularly ill-situated to advance. To paraphrase Justice Scalia from a dissimilar context, if it is constitutionally permissible for the Court not to enforce constitutional meaning at all, surely it is constitutionally permissible for the Court to enforce constitutional meaning a little.³²⁴ In short, those who would hold claims that a legislature

323. As John Alford, a Rice political scientist and one-time expert witness for Governor Perry, explained, “Republicans used the court-drawn plan as a place to park redistricting until they could address the issue when they were in control of the House and obviously better off in the Senate.” David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. TIMES, July 1, 2003, at A1 (quoting Professor Alford).

324. “If it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.” *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting).

has enacted an unconstitutionally excessive partisan gerrymander nonjusticiable lack standing to complain if justiciability is preserved but the claims are adjudicated by means of an underenforcing decision rule.³²⁵

A more plausible worry, I suppose, arises if the negative implication of this off-cycle decision rule is not that on-cycle redistricting is nonjusticiable. If, instead, claims challenging “ordinary” redistricting should be adjudicated under the default (and essentially invisible) more-likely-than-not standard, then the familiar cries about the unmanageability of the task again rise to the surface. But there is a third possibility: This one decision rule that, by its terms, applies only to off-cycle redistricting ought to be supplemented by one or more decision rules that apply in the more usual context of on-cycle redistricting. The following two examples are intended to suggest that such rules can be crafted, and therefore that the underinclusiveness of this one decision rule ought not to prevent its adoption.

2. *Departures from a Bipartisan Status Quo.*—I have argued that the best understanding of what it means for a state to exhibit excessive partisanship in redistricting depends upon the notion of a counterfactual baseline: The electoral success the party in control can be expected to have realized under the scheme it would have adopted had it not considered partisan outcomes at all. I have also acknowledged that the difficulty in identifying this counterfactual baseline constitutes one problem—the biggest problem—for operationalizing this understanding. It is therefore tempting to somehow generate this counterfactual baseline from the status quo ante.

As the Texas litigation exemplifies, however, state defendants are likely to object to this maneuver on the grounds that the status quo itself is the product of partisan manipulation by the previous party in power.³²⁶ This can be a fair objection. But only when the opposing party effectively controlled redistricting the last time around. This suggests another retail decision rule: Whenever a redistricting scheme was adopted under conditions of single-party control to replace a plan that was not (i.e., if the prior scheme had been adopted by a court, a nonpartisan commission, or a legislature under conditions of divided government), courts should presume³²⁷ that the

325. Of course, the putative greater does not always include the lesser. And it would be entirely consistent with his judicial philosophy were Justice Scalia to resist this claimed lesser (judicial deployment of an underenforcing decision rule) in favor of the claimed greater (a total refusal to adjudicate claims of unconstitutional partisan gerrymandering) if the underenforcing decision rule here proposed relied on the sort of judicial subjectivity that Scalia denounces. But it doesn't. The predicate for application of the rule—that the redistricting was adopted mid-decade under conditions of single-party control—can be determined almost mechanically. And the compelling interest test, albeit somewhat subjective, is a doctrinal staple.

326. See *supra* note 321.

327. I put aside how, if at all, the presumption could be overcome, except to acknowledge that to construe the presumption as a mere burden-shifting mechanism is not likely to allay the Court's manageability concerns. It might be appropriate to require states to produce clear and convincing

challenged plan reflects excessive partisanship if it can be expected to net for the dominant party a proportion of the seats in the next election that exceeds by more than $x\%$ (say, for illustration, 20%) the proportion of the seats it had averaged under the prior plan.

3. *Disparate Shacking*.—As already noted, the two fundamental partisan gerrymandering tools are to make the opposing party's districts highly inefficient and to make one's own party's districts efficient. These twin tactics are familiarly termed "packing" and "cracking." A third tactic—what Samuel Issacharoff and Pamela Karlan label "shacking"—involves "redrawing the lines to place the residences of two incumbents in the same district, thereby forcing at least one of them out of office."³²⁸ Given the traditionally recognized state interest in protecting and enhancing its influence in the national legislature by protecting its congressional incumbents, partisanship is overwhelmingly likely to be at work whenever a party uses its control of the state redistricting process to shack incumbents from the opposing party. Disparate shacking, therefore, serves as a natural predicate for the construction of a sensible decision rule. One such rule, for example, could direct courts to presume constitutionally excessive partisanship whenever a challenged plan adopted by a single-party controlled legislature shacks more incumbents from the out party than incumbents from the in party.

V. Conclusion

Despite the splintering it produced, the Court's decision in *Vieth v. Jubelirer* announces clearly that excessive partisanship in redistricting is unconstitutional. The remaining challenge, accordingly, is to craft judicially manageable standards to administer this constitutional norm. Unfortunately, the difficulty of the task is commensurate with its importance.

For those, like Justice Kennedy, who are prepared to take the challenge seriously, the first step must be to make clearer what we mean by excessive partisanship. Remarkably, though, legal scholars and political scientists have generally overlooked this need in their rush to formulate manageable tests. Votes-to-seat ratios, S-curves, swing ratios, and compactness measures might or might not be judicially administrable. But they are assuredly irrelevant unless they bear upon what it means for a redistricting to be infected by excessive partisanship, in the constitutionally relevant sense.

However, before we can even take a stab at articulating the line that separates permissible amounts or degrees of partisanship from excessive

evidence regarding what it claims an electoral map untainted by partisan motivation would have looked like.

328. Issacharoff & Karlan, *supra* note 181, at 552.

amounts, we must first conceptualize partisanship as something that can exist in amounts or degrees. We need, that is, to conceptualize partisanship in redistricting in scalar, not just binary, terms. This Article has identified four conceptually and practically distinct scalar notions of partisanship, and has argued in favor of one of the four—one that employs an ends-based measure and a counterfactual baseline. It follows that the best sense to be made of excessive partisanship is this: A districting scheme manifests excessive partisanship, hence is unconstitutional, if the controlling party is trying to grab too many more seats than it would likely receive under the plan it would have adopted had it not considered partisanship at all. This conception of excessive partisanship does not rely upon proportional representation or principles of “fair” districting.

To nail down what we mean by excessive partisanship is a critical step in the project of implementing *Vieth*, but only the first. Courts must then craft manageable doctrine to administer this understanding. Put in terms I have proposed, courts must announce one or more constitutional “decision rules” to implement this fleshed-out understanding of constitutional meaning. This Article has proposed several decision rules that could fit the bill. In so doing, it has demonstrated, I hope, that courts can manage gerrymandering—adequately, not, to be sure, perfectly. In denying that this was possible, the four *Vieth* Justices who would have held claims of partisan gerrymandering unjusticiable were, as Justice Kennedy suspected, precipitous.

But it is not essential that the Supreme Court ultimately sanction any one of the particular decision rules here advanced. More important is that the Court clearly conceptualize both excessive partisanship (as a ban on an excessive pursuit of partisan advantage relative to what advantage would have accrued to the dominant party “naturally,” which is to say, counterfactually) and the logical structure of constitutional adjudication (as consisting of judge-interpreted constitutional meanings and judge-crafted decision rules that direct judges how to determine whether those meanings have been complied with). If the Court does these things, then the stage will be set for lower courts, aided by scholars and litigants, to craft decision rules that can sensibly manage the constitutional command that all nine Justices recognized in *Vieth*: States may not pursue excessive partisanship in redistricting.