SUPREME COURT OF THE UNITED STATES

No. 02–1580

RICHARD VIETH, NORMA JEAN VIETH, AND SUSAN FUREY, APPELLANTS *v.* ROBERT C. JUBELIRER, PRESIDENT OF THE PENNSYLVANIA SENATE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[April 28, 2004]

JUSTICE SCALIA announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE THOMAS join.

Plaintiffs-appellants Richard Vieth, Norma Jean Vieth, and Susan Furey challenge a map drawn by the Pennsylvania General Assembly establishing districts for the election of congressional Representatives, on the ground that the districting constitutes an unconstitutional political gerrymander.[1] In *Davis* v. *Bandemer,* 478 U. S. 109 (1986), this Court held that political gerrymandering claims are justiciable, but could not agree upon a standard to adjudicate them. The present appeal presents the questions whether our decision in *Bandemer* was in error, and, if not, what the standard should be.

[1] The term "political gerrymander" has been defined as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Black's Law Dictionary 696 (7th ed. 1999).

I

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

Plaintiffs, registered Democrats who vote in Pennsylvania, brought suit in the United States District Court for the Middle District of Pennsylvania, seeking to enjoin implementation of Act 1 under Rev. Stat. §1979, 42 U. S. C. §1983. Defendants-appellees were the Commonwealth of Pennsylvania and various executive and legislative officers responsible for enacting or implementing Act 1. The complaint alleged, among other things, that the legislation created malapportioned districts, in violation of the one-person, one-vote requirement of Article I, §2, of the United States Constitution, and that it constituted a political gerrymander, in violation of Article I and the Equal Protection Clause of the Fourteenth Amendment. With regard to the latter contention, the complaint alleged that the districts created by Act 1 were "meandering and irregular," and "ignor[ed] all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage." Juris. Statement 136a, ¶22, 135a, ¶20.

A three-judge panel was convened pursuant to 28 U. S. C. §2284. The defendants moved to dismiss. The District Court granted the motion with respect to the political gerrymandering claim, and (on Eleventh Amendment grounds) all claims against the Commonwealth; but it declined to dismiss the apportionment claim as to other defendants. See *Vieth* v. *Pennsylvania*, 188 F. Supp. 2d 532 (MD Pa. 2002) *(Vieth I)*. On trial of the apportionment claim, the District Court ruled in favor of plaintiffs. See *Vieth* v. *Pennsylvania*, 195 F. Supp. 2d 672 (MD Pa. 2002) *(Vieth II)*. It retained jurisdiction over the case pending the court's review and approval of a remedial redistricting plan. On April 18, 2002, Governor Schweiker signed into law Act No. 2002–34, Pa. Stat. Ann., Tit. 25, §3595.301 (Purdon Supp. 2003) (Act 34), a remedial plan that the Pennsylvania General Assembly had enacted to cure the apportionment problem of Act 1.

Plaintiffs moved to impose remedial districts, arguing that the District Court should not consider Act 34 to be a proper remedial scheme, both because it was malapportioned, and because it constituted an unconstitutional political gerrymander like its predecessor. The District Court denied this motion, concluding that the new districts were not malapportioned, and rejecting the political gerrymandering claim for the reasons previously assigned in *Vieth I*. *Vieth* v. *Pennsylvania*, 241 F. Supp. 2d 478, 484–485 (MD Pa. 2003) *(Vieth III)*. The plaintiffs appealed the dismissal of their Act 34 political gerrymandering claim.[2] We noted probable jurisdiction. 539 U. S.

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[2] The plaintiffs apparently never amended their complaint to allege that Act 34 was a political gerrymander, yet the District Court's decision in *Vieth III* resolved that claim on the merits. Because subject-matter jurisdiction is not implicated and neither party has raised the point, we assume that the District Court deemed the plaintiffs' original complaint to have been constructively amended.

957 (2003).

II

Political gerrymanders are not new to the American scene. One scholar traces them back to the Colony of Pennsylvania at the beginning of the 18th century, where several counties conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives. See E. Griffith, The Rise and Development of the Gerrymander 26–28 (1974) (hereinafter Griffith). In 1732, two members of His Majesty's Council and the attorney general and deputy inspector and comptroller general of affairs of the Province of North Carolina reported that the Governor had proceeded to "divide old Precincts established by Law, & to enact new Ones in Places, whereby his Arts he has endeavored to prepossess People in a future election according to his desire, his Designs herein being . . . either to endeavor by his means to get a Majority of his creatures in the Lower House" or to disrupt the assembly's proceedings. 3 Colonial Records of North Carolina 380–381 (W. Saunders ed. 1886); see also Griffith 29. The political gerrymander remained alive and well (though not yet known by that name) at the time of the framing. There were allegations that Patrick Henry attempted (unsuccessfully) to gerrymander James Madison out of the First Congress. See 2 W. Rives, Life and Times of James Madison 655, n. 1 (reprint 1970); Letter from Thomas Jefferson to William Short, Feb. 9, 1789, reprinted in 5 Works of Thomas Jefferson 451 (P. Ford ed. 1904). And in 1812, of course, there occurred the notoriously outrageous political districting in Massachusetts that gave the gerrymander its name—an amalgam of the names of Massachusetts Governor Elbridge Gerry and the creature ("salamander") which the outline of an election district he was credited

with forming was thought to resemble. See Webster's New International Dictionary 1052 (2d ed. 1945). "By 1840 the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." Griffith 123.

It is significant that the Framers provided a remedy for such practices in the Constitution. Article 1, §4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to "make or alter" those districts if it wished.[3] Many objected to the congressional oversight established by this provision. In the course of the debates in the Constitutional Convention, Charles Pinkney and John Rutledge moved to strike the relevant language. James Madison responded in defense of the provision that Congress must be given the power to check partisan manipulation of the election process by the States:

> "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature?" 2 Records of the Federal Con-

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[3] Article I, §4, provides as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

vention of 1787, pp. 240–241 (M. Farrand ed. 1911).

Although the motion of Pinkney and Rutledge failed, opposition to the "make or alter" provision of Article I, §4—and the defense that it was needed to prevent political gerrymandering—continued to be voiced in the state ratifying debates. A delegate to the Massachusetts convention warned that state legislatures

> "might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; But the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." 2 Debates on the Federal Constitution 27 (J. Elliot 2d ed. 1876).

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

Today, only the single-member-district-requirement remains. See 2 U. S. C. §2c. Recent history, however, attests to Congress's awareness of the sort of districting practices appellants protest, and of its power under Article I, §4 to control them. Since 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting. See H. R. 5037, 101st Cong., 2d Sess. (1990); H. R. 1711, 101st Cong., 1st Sess. (1989); H. R. 3468, 98th Cong., 1st Sess. (1983); H. R. 5529, 97th Cong., 2d Sess. (1982); H. R. 2349, 97th Cong., 1st Sess. (1981).[4]

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

III

As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. See, *e.g.*, *Nixon* v. *United States,* 506 U. S. 224 (1993) (challenge to procedures used in Senate impeachment proceedings); *Pacific States Telephone & Telegraph Co.* v. *Oregon,* 223 U. S. 118 (1912) (claims

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[4] The States, of course, have taken their own steps to prevent abusive districting practices. A number have adopted standards for redistricting, and measures designed to insulate the process from politics. See, *e.g.*, Iowa Code §42.4(5) (2003); N. J. Const., Art. II, §2; Haw. Rev. Stat. §25–2 (1993); Idaho Code §72–1506 (1948–1999); Me. Rev. Stat. Ann., Tit. 21–A, §§1206, 1206–A (West Supp. 2003); Mont. Code Ann. §5–1–115 (2003); Wash. Rev. Code §44.05.090 (1994).

arising under the Guaranty Clause of Article IV, §4). Such questions are said to be "nonjusticiable," or "political questions."

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

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.,* at 217.

These tests are probably listed in descending order of both importance and certainty. The second is at issue here, and there is no doubt of its validity. "The judicial Power" created by Article III, §1, of the Constitution is not *whatever* judges choose to do, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U. S. 464, 487 (1982); cf. *Grupo Mexicano de Desarrollo, S. A.* v. *Alliance Bond Fund, Inc.,* 527 U. S. 308, 332–333 (1999), or even *whatever* Congress chooses to assign them, see *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 576–577 (1992); *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.,* 333 U. S. 103, 110–114 (1948). It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and

ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.

Over the dissent of three Justices, the Court held in *Davis* v. *Bandemer* that, since it was "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided," 478 U. S., at 123, such cases *were* justiciable. The clumsy shifting of the burden of proof for the premise (the Court was "not persuaded" that standards do not exist, rather than "persuaded" that they do) was necessitated by the uncomfortable fact that the six-Justice majority could not discern what the judicially discernable standards might be. There was no majority on that point. Four of the Justices finding justiciability believed that the standard was one thing, see *id.*, at 127 (plurality opinion of White, J., joined by Brennan, Marshall, and Blackmun, JJ.); two believed it was something else, see *id.*, at 161 (Powell, J., joined by STEVENS, J., concurring in part and dissenting in part). The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years. In that time, they have considered numerous political gerrymandering claims; this Court has never revisited the unanswered question of what standard governs.

Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in *Bandemer*'s four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time—but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: judicial intervention has been refused. As one commentary has put it, "[t]hroughout its

subsequent history, *Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress." S. Issacharoff, P. Karlan, & R. Pildes, The Law of Democracy 886 (rev. 2d ed. 2002). The one case in which relief was provided (and merely preliminary relief, at that) did *not* involve the drawing of district lines[5]; in *all* of the cases we are aware of involving that most common form of political gerrymandering, relief was denied.[6]

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[5] See *Republican Party of North Carolina* v. *Martin*, 980 F. 2d 943 (CA4 1992) (upholding denial of Federal Rule of Civil Procedure 12(b)(6) judgment for the defendants); *Republican Party of North Carolina* v. *North Carolina State Board of Elections*, 27 F. 3d 563 (CA4 1994) (unpublished opinion) (upholding, as modified, a preliminary injunction). *Martin* dealt with North Carolina's system of electing superior court judges statewide, a system that had resulted in the election of only a single Republican judge since 1900. 980 F. 2d, at 948. Later developments in the case are described in n. 8, *infra*.

[6] For cases in which courts rejected prayers for relief under *Davis* v. *Bandemer,* 478 U. S. 109 (1986), see, *e.g.*, *Duckworth* v. *State Administrative Bd. of Election Laws*, 332 F. 3d 769 (CA4 2003); *Smith* v. *Boyle*, 144 F. 3d 1060 (CA7 1998); *La Porte County Republican Central Comm.* v. *Bd. of Comm'rs of County of La Porte*, 43 F. 3d 1126 (CA7 1994); *Session* v. *Perry*, 298 F. Supp. 2d 451 (ED Tex. 2004) *(per curiam)*; *Martinez* v. *Bush*, 234 F. Supp. 2d 1275 (SD Fla. 2002) (three-judge panel); *O'Lear* v. *Miller*, 222 F. Supp. 2d 850 (ED Mich.), summarily aff'd, 537 U. S. 997 (2002); *Marylanders for Fair Representation, Inc.* v. *Schaefer*, 849 F. Supp. 1022 (Md. 1994) (three-judge panel); *Terrazas* v. *Slagle*, 821 F. Supp. 1162 (WD Tex. 1993) (three-judge panel); *Pope* v. *Blue*, 809 F. Supp. 392 (WDNC) (three-judge panel), summarily aff'd, 506 U. S. 801 (1992); *Illinois Legislative Redistricting Comm'n* v. *LaPaille*, 782 F. Supp. 1272 (ND Ill. 1992); *Fund for Accurate and Informed Representation, Inc.* v. *Weprin*, 796 F. Supp. 662 (NDNY) (three-judge panel), summarily aff'd, 506 U. S. 1017 (1992); *Holloway* v. *Hechler*, 817 F. Supp. 617 (SD W. Va. 1992) (three-judge panel), summarily aff'd, 507 U. S. 956 (1993); *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634 (ND Ill. 1991) (three-judge panel); *Anne Arundel County Republican Central Comm.* v. *State Administrative Bd. of Election Laws*, 781 F. Supp. 394 (Md. 1991) (three-judge panel), summarily aff'd, 504 U. S. 938 (1992); *Republican Party of Virginia* v. *Wilder*, 774 F. Supp. 400 (WD Va. 1991) (three-judge panel); *Badham* v. *Eu*, 694

Moreover, although the case in which relief was provided seemingly involved the *ne plus ultra* of partisan manipulation, see n. 5, *supra*, we would be at a loss to explain why the *Bandemer* line should have been drawn just there, and should not have embraced several districting plans that were upheld despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results. See, *e.g.*, *Session* v. *Perry*, 298 F. Supp. 2d 451 (ED Tex. 2004) *(per curiam)*; *O'Lear* v. *Miller*, 222 F. Supp. 2d 850 (ED Mich.), summarily aff'd, 537 U. S. 997 (2002); *Badham* v. *Eu*, 694 F. Supp. 664, 670 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989). To think that this lower-court jurisprudence has brought forth "judicially discernible and manageable standards" would be fantasy.

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

A

We begin our review of possible standards with that proposed by Justice White's plurality opinion in *Bandemer* because, as the narrowest ground for our decision in that case, it has been the standard employed by the lower courts. The plurality concluded that a political gerryman-

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F. Supp. 664, 670 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989); *In re 2003 Legislative Apportionment of House of Representatives*, 2003 ME 81, 827 A. 2d 810; *McClure* v. *Secretary of Commonwealth,* 436 Mass. 614, 766 N. E. 2d 847 (2002); *Legislative Redistricting Cases,* 331 Md. 574, 629 A. 2d 646 (1993); *Kenai Peninsula Borough* v. *State*, 743 P. 2d 1352 (Alaska 1987).

dering claim could succeed only where plaintiffs showed "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." 478 U. S., at 127. As to the intent element, the plurality acknowledged that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.*, at 129. However, the effects prong was significantly harder to satisfy. Relief could not be based merely upon the fact that a group of persons banded together for political purposes had failed to achieve representation commensurate with its numbers, or that the apportionment scheme made its winning of elections more difficult. *Id.*, at 132. Rather, it would have to be shown that, taking into account a variety of historic factors and projected election results, the group had been "denied its chance to effectively influence the political process" as a whole, which could be achieved even without electing a candidate. *Id.*, at 132–133. It would not be enough to establish, for example, that Democrats had been "placed in a district with a supermajority of other Democratic voters" or that the district "departs from preexisting political boundaries." *Id.*, at 140–141. Rather, in a challenge to an individual district the inquiry would focus "on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." *Id.*, at 133. A statewide challenge, by contrast, would involve an analysis of "the voters' direct *or indirect* influence on the elections of the state legislature as a whole." *Ibid.* (emphasis added). With what has proved to be a gross understatement, the plurality acknowledged this was "of necessity a difficult inquiry." *Id.*, at 143.

In her *Bandemer* concurrence, JUSTICE O'CONNOR predicted that the plurality's standard "will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality." *Id.*, at 155 (opinion concurring in judgment, joined by Burger, C. J., and REHNQUIST, J.). A similar prediction of unmanageability was expressed in Justice Powell's opinion, making it the prognostication of a majority of the Court. See *id.*, at 171 ("The . . . most basic flaw in the plurality's opinion is its failure to enunciate any standard that affords guidance to legislatures and courts"). That prognostication has been amply fulfilled.

In the lower courts, the legacy of the plurality's test is one long record of puzzlement and consternation. See, *e.g.*, *Session*, *supra,* at 474 ("Throughout this case we have borne witness to the powerful, conflicting forces nurtured by *Bandemer*'s holding that the judiciary is to address 'excessive' partisan line-drawing, while leaving the issue virtually unenforceable"); *Vieth I*, 188 F. Supp. 2d, at 544 (noting that the "recondite standard enunciated in *Bandemer* offers little concrete guidance"); *Martinez* v. *Bush*, 234 F. Supp. 2d 1275, 1352 (SD Fla. 2002) (three-judge court) (Jordan, J., concurring) (the "lower courts continue to struggle in an attempt to interpret and apply the 'discriminatory effect' prong of the [*Bandemer*] standard"); *O'Lear*, *supra,* at 855 (describing *Bandemer*'s standard for assessing discriminatory effect as "somewhat murky"). The test has been criticized for its indeterminacy by a host of academic commentators. See, *e.g.*, L. Tribe, American Constitutional Law §13–9, p. 1083 (2d ed. 1988) ("Neither Justice White's nor Justice Powell's approach to the question of partisan apportionment gives any real guidance to lower courts forced to adjudicate this issue . . ."); Still, Hunting of the Gerrymander, 38 UCLA L. Rev. 1019, 1020 (1991) (noting that the plurality opinion has "confounded legislators, practitioners, and academics alike"); Schuck,

The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325, 1365 (1987) (noting that the *Bandemer* plurality's standard requires judgments that are "largely subjective and beg questions that lie at the heart of political competition in a democracy"); Issacharoff, Judging Politics: The Elusive Quest for Judicial Review of Political Fairness, 71 Texas L. Rev. 1643, 1671 (1993) ("*Bandemer* begot only confusion"); Grofman, An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies, 21 Stetson L. Rev. 783, 816 (1992) ("[A]s far as I am aware I am one of only two people who believe that *Bandemer* makes sense. Moreover, the other person, Daniel Lowenstein, has a diametrically opposed view as to *what* the plurality opinion means"). Because this standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by the appellants, we decline to affirm it as a constitutional requirement.

B

Appellants take a run at enunciating their own workable standard based on Article I, §2, and the Equal Protection Clause. We consider it at length not only because it reflects the litigant's view as to the best that can be derived from 18 years of experience, but also because it shares many features with other proposed standards, so that what is said of it may be said of them as well. Appellants' proposed standard retains the two-pronged framework of the *Bandemer* plurality—intent plus effect—but modifies the type of showing sufficient to satisfy each.

To satisfy appellants' intent standard, a plaintiff must "show that the mapmakers acted with a *predominant intent* to achieve partisan advantage," which can be shown "by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were

subordinated to the goal of achieving partisan advantage." Brief for Appellants 19 (emphasis added). As compared with the *Bandemer* plurality's test of mere intent to disadvantage the plaintiff's group, this proposal seemingly makes the standard more difficult to meet—but only at the expense of making the standard more indeterminate.

"Predominant intent" to disadvantage the plaintiff political group refers to the relative importance of that goal as compared with all the other goals that the map seeks to pursue—contiguity of districts, compactness of districts, observance of the lines of political subdivision, protection of incumbents of all parties, cohesion of natural racial and ethnic neighborhoods, compliance with requirements of the Voting Rights Act of 1965 regarding racial distribution, etc. Appellants contend that their intent test *must* be discernible and manageable because it has been borrowed from our racial gerrymandering cases. See *Miller* v. *Johnson,* 515 U. S. 900 (1995); *Shaw* v. *Reno,* 509 U. S. 630 (1993). To begin with, in a very important respect that is not so. In the racial gerrymandering context, the predominant intent test has been applied to the challenged district in which the plaintiffs voted. See *Miller*, *supra; United States* v. *Hays,* 515 U. S. 737 (1995). Here, however, appellants do not assert that an apportionment fails their intent test if any single district does so. Since "it would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines," Brief for Appellants 3, appellants propose a test that is satisfied only when "partisan advantage was the predominant motivation *behind the entire statewide plan*," *id.*, at 32 (emphasis added). 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? If three-fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political-subdivision lines, and only two-fifths ignore those lines to disadvantage the plaintiffs, is the observance of political subdivisions the "predominant" goal between those two? We are sure appellants do not think so.

Even within the narrower compass of challenges to a single district, applying a "predominant intent" test to *racial* gerrymandering is easier and less disruptive. The Constitution clearly contemplates districting by political entities, see Article I, §4, and unsurprisingly that turns out to be root-and-branch a matter of politics. See *Miller, supra,* at 914 ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition . . ."); *Shaw, supra,* at 662 (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . ."); *Gaffney* v. *Cummings,* 412 U. S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences"). By contrast, the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered. 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. 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. 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 discrimina-

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

The effects prong of appellants' proposal replaces the *Bandemer* plurality's vague test of "denied its chance to effectively influence the political process," 478 U. S., at 132–133, with criteria that are seemingly more specific. The requisite effect is established when "(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party's voters,[7] *and* (2) the court's examination of the 'totality of circumstances' confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats." Brief for Appellants 20 (emphasis and footnote added). This test is loosely based on our cases applying §2 of the Voting Rights Act, 42 U. S. C. §1973, to discrimination by race, see, *e.g.*, *Johnson* v. *De Grandy,* 512 U. S. 997 (1994). But a person's politics is rarely as readily discernible—and *never* as permanently discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy. See *Ban-*

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[7] "Packing" refers to the practice of filling a district with a supermajority of a given group or party. "Cracking" involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts.

demer, *supra,* at 156 (O'CONNOR, J., concurring in judgment).[8]

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

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[8]A delicious illustration of this is the one case we have found—alluded to above—that provided relief under *Bandemer*. See n. 5, *supra.* In *Republican Party of North Carolina* v. *Hunt,* No. 94–2410, 1996 WL 60439 (CA4, Feb. 12, 1996) *(per curiam)* (unpublished), judgt. order reported at 77 F. 3d 470, the district court, after a trial with no less than 311 stipulations by the parties, 132 witness statements, approximately 300 exhibits, and 2 days of oral argument, concluded that North Carolina's system of electing superior court judges on a statewide basis "had resulted in Republican candidates experiencing a consistent and pervasive lack of success and exclusion from the electoral process as a whole and that these effects were likely to continue unabated into the future." 1996 WL 60439, at *1. In the elections for superior court judges conducted just *five days* after this pronouncement, "every Republican candidate standing for the office of superior court judge was victorious at the state level," *ibid.*, a result which the Fourth Circuit thought (with good reason) "directly at odds with the recent prediction by the district court," *id.*, at *2, causing it to remand the case for reconsideration.

strength proportionate to their numbers.[9]

Even if the standard were relevant, however, it is not judicially manageable. To begin with, how is a party's majority status to be established? Appellants propose using the results of statewide races as the benchmark of party support. But as their own complaint describes, in the 2000 Pennsylvania statewide elections some Republicans won and some Democrats won. See Juris. Statement 137a–138a (describing how Democrat candidates received more votes for President and auditor general, and Republicans received more votes for United States Senator, attorney general, and treasurer). Moreover, to think that majority status in statewide races establishes majority status for district contests, one would have to believe that the only factor determining voting behavior at all levels is political affiliation. That is assuredly not true. As one law review comment has put it:

> "There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is. If the districts change, the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes. Political par-

[9] The Constitution also does not share appellants' alarm at the asserted tendency of partisan gerrymandering to create more partisan representatives. Assuming that assertion to be true, the Constitution does not answer the question whether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because Democratic voters are "effectively" distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts). Choosing the former "dilutes" the vote of the radical Democrat; choosing the latter does the same to the moderate. Neither Article I, §2, nor the Equal Protection Clause takes sides in this dispute.

> ties do not compete for the highest statewide vote totals or the highest mean district vote percentages: They compete for specific seats." Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory, 33 UCLA L. Rev. 1, 59–60 (1985).

See also Schuck, Partisan Gerrymandering: A Political Problem Without Judicial Solution, in Political Gerrymandering and the Courts 240, 241 (B. Grofman ed. 1990).

But if we could identify a majority party, we would find it impossible to assure that that party wins a majority of seats—unless we radically revise the States' traditional structure for elections. In any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party. The point is proved by the 2000 congressional elections in Pennsylvania, which, according to appellants' own pleadings, were conducted under a judicially drawn district map "free from partisan gerrymandering." Juris. Statement 137a. On this "neutral playing fiel[d]," the Democrats' statewide majority of the major-party vote (50.6%) translated into a minority of seats (10, versus 11 for the Republicans). *Id.*, at 133a, 137a. Whether by reason of partisan districting or not, party constituents may always wind up "packed" in some districts and "cracked" throughout others. See R. Dixon, Democratic Representation 462 (1968) ("All Districting is 'Gerrymandering'"); Schuck, 87 Colum. L. Rev., at 1359. Consider, for example, a legislature that draws district lines with no objectives in mind except compactness and respect for the lines of political subdivisions. Under that system, political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a "natural" packing effect. See *Bandemer*, 478 U. S., at 159

(O'CONNOR, J., concurring in judgment).

Our one-person, one-vote cases, see *Reynolds* v. *Sims,* 377 U. S. 533 (1964); *Wesberry* v. *Sanders,* 376 U. S. 1 (1964), have no bearing upon this question, neither in principle nor in practicality. Not in principle, because to say that each individual must have an equal say in the selection of representatives, and hence that a majority of individuals must have a majority say, is not at all to say that each discernable group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers. And not in practicality, because the easily administrable standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.

For these reasons, we find appellants' proposed standards neither discernible nor manageable.

C

For many of the same reasons, we also reject the standard suggested by Justice Powell in *Bandemer*. He agreed with the plurality that a plaintiff should show intent and effect, but believed that the ultimate inquiry ought to focus on whether district boundaries had been drawn solely for partisan ends to the exclusion of "all other neutral factors relevant to the fairness of redistricting." 478 U. S., at 161 (opinion concurring in part and dissenting in part); see also *id.*, at 164–165. Under that inquiry, the courts should consider numerous factors, though "[n]o one

factor should be dispositive." *Id.*, at 173. The most important would be "the shapes of voting districts and adherence to established political subdivision boundaries." *Ibid.* "Other relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted and legislative history reflecting contemporaneous legislative goals." *Ibid.* These factors, which "bear directly on the fairness of a redistricting plan," combined with "evidence concerning population disparities and statistics tending to show vote dilution," make out a claim of unconstitutional partisan gerrymandering. *Ibid.*

While Justice Powell rightly criticized the *Bandemer* plurality for failing to suggest a constitutionally based, judicially manageable standard, the standard proposed in his opinion also falls short of the mark. It is essentially a totality-of-the-circumstances analysis, where all conceivable factors, none of which is dispositive, are weighed with an eye to ascertaining whether the particular gerrymander has gone too far—or, in Justice Powell's terminology, whether it is not "fair." "Fairness" does not seem to us a judicially manageable standard. Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party's not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us 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.

IV

We turn next to consideration of the standards proposed by today's dissenters. We preface it with the observation that the mere fact that these four dissenters come up with

three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard.

A

JUSTICE STEVENS concurs in the judgment that we should not address plaintiffs' statewide political gerrymandering challenges. Though he reaches that result via standing analysis, *post*, at 12, 13 (dissenting opinion), while we reach it through political-question analysis, our conclusions are the same: these statewide claims are nonjusticiable.

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

We have examined, *supra*, at 15–18, the many reasons why that is not so. Only a few of them are challenged by JUSTICE STEVENS. He says that we "mistakenly assum[e] that race cannot provide a legitimate basis for making political judgments." *Post*, at 23. But we do not say that race-conscious decisionmaking is always unlawful. Race can be used, for example, as an indicator to achieve the purpose of neighborhood cohesiveness in districting. What

we have said is impermissible is "the purpose of segregating voters on the basis of race," *supra*, at 16—that is to say, racial gerrymandering for race's sake, which would be the equivalent of political gerrymandering for politics' sake. JUSTICE STEVENS says we "er[r] in assuming that politics is 'an ordinary and lawful motive'" in districting, *post*, at 8—but all he brings forward to contest that is the argument that an *excessive* injection of politics is *un*lawful. So it is, and so does our opinion assume. That does not alter the reality that setting out to segregate voters by race is unlawful and hence rare, and setting out to segregate them by political affiliation is (so long as one doesn't go too far) lawful and hence ordinary.

JUSTICE STEVENS's confidence that what courts have done with racial gerrymandering can be done with political gerrymandering rests in part upon his belief that "the same standards should apply," *post*, at 20. But in fact the standards are quite different. A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw,* 509 U. S., at 650 (internal citation omitted). That quoted passage was in direct response to (and rejection of) the suggestion made by JUSTICES White and STEVENS in dissent that "a racial gerrymander of the sort alleged here is functionally equivalent to gerrymanders for nonracial purposes, such as political gerrymanders." *Ibid.* See also *Bush* v. *Vera,* 517 U. S. 952, 964 (1996) (plurality opinion) ("We have not subjected political gerrymandering

to strict scrutiny").

JUSTICE STEVENS relies on *First Amendment cases* to suggest that politically discriminatory gerrymanders are subject to strict scrutiny under the *Equal Protection Clause*. See *post*, at 8–9. It is elementary that scrutiny levels are claim specific. An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim because the underlying rights, and consequently constitutional harms, are not comparable. To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny. Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs. What cases such as *Elrod* v. *Burns,* 427 U. S. 347 (1976), require is not merely that Republicans be given a decent share of the jobs in a Democratic administration, but that political affiliation *be disregarded*.

Having failed to make the case for strict scrutiny of political gerrymandering, JUSTICE STEVENS falls back on the argument that scrutiny levels simply do not matter for purposes of justiciability. He asserts that a standard imposing a strong presumption of invalidity (strict scrutiny) is no more discernible and manageable than a standard requiring an evenhanded balancing of all considerations with no thumb on the scales (ordinary scrutiny). To state this is to refute it. As is well known, strict scrutiny readily, and almost always, results in invalidation. Moreover, the mere fact that there exist standards which this Court could apply—the proposition which much of JUSTICE STEVENS's opinion is devoted to establishing, see,

e.g., *post*, at 5–11, 25–26—does not mean that those standard are discernible in the Constitution. This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms. JUSTICE STEVENS points out, see *post*, at 11, n. 15, that *Bandemer* said differences between racial and political groups "may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case." 478 U. S., at 125. As 18 years have shown, *Bandemer* was wrong.

B

JUSTICE SOUTER, like JUSTICE STEVENS, would restrict these plaintiffs, on the allegations before us, to district-specific political gerrymandering claims. *Post*, at 6, 12 (dissenting opinion). Unlike JUSTICE STEVENS, however, JUSTICE SOUTER recognizes that there is no existing workable standard for adjudicating such claims. He proposes a "fresh start," *post*, at 4: a newly constructed standard loosely based in form on our Title VII cases, see *McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792 (1973), and complete with a five-step prima facie test sewn together from parts of, among other things, our Voting Rights Act jurisprudence, law review articles, and apportionment cases. Even if these self-styled "clues" to unconstitutionality could be manageably applied, which we doubt, there is no reason to think they would detect the constitutional crime which JUSTICE SOUTER is investigating—an "extremity of unfairness" in partisan competition. *Post*, at 2–3.

Under JUSTICE SOUTER's proposed standard, in order to challenge a particular district, a plaintiff must show (1) that he is a member of a "cohesive political group"; (2) "that the district of his residence . . . paid little or no heed" to traditional districting principles; (3) that there were "specific correlations between the district's deviations from

traditional districting principles and the distribution of the population of his group"; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that "the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group." *Post*, at 5, 6, 7, 8, 9. When those showings have been made, the burden would shift to the defendants to justify the district "by reference to objectives other than naked partisan advantage." *Post*, at 10.

While this five-part test seems eminently scientific, upon analysis one finds that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards: *How much* disregard of traditional districting principles? *How many* correlations between deviations and distribution? *How much* remedying of packing or cracking by the hypothetical district? *How many legislators* must have had the intent to pack and crack—and *how efficacious* must that intent have been (must it have been, for example, a *sine qua non* cause of the districting, or a *predominant* cause)? At step two, for example, JUSTICE SOUTER would require lower courts to assess whether mapmakers paid "little or no heed to . . . traditional districting principles." *Post*, at 6. What is a lower court to do when, as will often be the case, the district adheres to some traditional criteria but not others? JUSTICE SOUTER's only response to this question is to evade it: "It is not necessary now to say exactly how a district court would balance a good showing on one of these indices against a poor showing on another, for that sort of detail is best worked out case by case." *Post*, at 7. But the devil lurks precisely in such detail. The central problem is determining when political gerrymandering has gone too far. It does not solve that problem to break down the original unanswerable question (How

much political motivation and effect is too much?) into four more discrete but equally unanswerable questions.

JUSTICE SOUTER's proposal is doomed to failure for a more basic reason: No test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing *for*. In the present context, the test ought to identify deprivation of that minimal degree of representation or influence to which a political group is constitutionally entitled. As we have seen, the *Bandemer* test sought (unhelpfully, but at least gamely) to specify what that minimal degree was: "[a] chance to effectively influence the political process." 478 U. S., at 133. So did the appellants' proposed test: "[the] ability to translate a majority of votes into a majority of seats." Brief for Appellants 20. JUSTICE SOUTER avoids the difficulties of those formulations by never telling us what his test is looking for, other than the utterly unhelpful "extremity of unfairness." He vaguely describes the harm he is concerned with as vote dilution, *post*, at 10, a term which usually implies some actual effect on the weight of a vote. But no element of his test looks to the effect of the gerrymander on the electoral success, the electoral opportunity, or even the political influence, of the plaintiff group. We do not know the precise constitutional deprivation his test is designed to identify and prevent.

Even if (though it is implausible) JUSTICE SOUTER believes that the constitutional deprivation consists of merely "vote dilution," his test would not even identify *that* effect. Despite his claimed reliance on the *McDonnell Douglas* framework, JUSTICE SOUTER would allow the plaintiff no opportunity to show that the mapmakers' compliance with traditional districting factors is pretextual.[10] His reason for this is never stated, but it certainly

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[10] JUSTICE SOUTER would allow a State, in proving its affirmative

cannot be that adherence to traditional districting factors negates any possibility of intentional vote dilution. As we have explained above, packing and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines. See *supra*, at 20. An even better example is the traditional criterion of incumbency protection. JUSTICE SOUTER has previously acknowledged it to be a traditional and constitutionally acceptable districting principle. See *Vera*, 517 U. S., at 1047–1048 (dissenting opinion). Since that is so, his test would not protect those who are packed, and often tightly so, to ensure the reelection of representatives of either party. Indeed, efforts to maximize partisan representation statewide might well begin with packing voters of the opposing party into the districts of existing incumbents of that party. By this means an incumbent is protected, a potential adversary to the districting mollified, and votes of the opposing party are diluted.

Like us, JUSTICE SOUTER acknowledges and accepts that "some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent." *Post*, at 2. Thus, again like us, he recognizes that "the issue is one of how much is too much." *Ibid*. And once those premises are conceded, the only line that can be drawn must be based, as JUSTICE SOUTER again candidly admits, upon a substantive "notio[n] of fairness." *Ibid*. This is the same flabby goal that deprived Justice Powell's test of all determinacy. To be sure, JUSTICE SOUTER frames it some-

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defense, to demonstrate that the reasons given for the district's shape "were more than a mere pretext for an old-fashioned gerrymander." *Post*, at 11. But the need to establish that affirmative defense does not arise until the plaintiff has established his prima facie case. And that prima facie case fails when, under step two, the district on its face complies with traditional districting criteria.

what differently: courts must intervene, he says, when "partisan competition has reached an *extremity* of unfairness." *Post*, at 2–3 (emphasis added). We do not think the problem is solved by adding the modifier.

C

We agree with much of JUSTICE BREYER's dissenting opinion, which convincingly demonstrates that "political considerations will likely play an important, and proper, role in the drawing of district boundaries." *Post*, at 4. This places JUSTICE BREYER, like the other dissenters, in the difficult position of drawing the line between good politics and bad politics. Unlike them, he would tackle this problem at the statewide level.

The criterion JUSTICE BREYER proposes is nothing more precise than "the *unjustified* use of political factors to entrench a minority in power." *Post*, at 6 (emphasis in original). While he invokes in passing the Equal Protection Clause, it should be clear to any reader that what constitutes *unjustified* entrenchment depends on his own theory of "effective government." *Post*, at 2. While one must agree with JUSTICE BREYER's incredibly abstract starting point that our Constitution sought to create a "basically democratic" form of government, *ibid.*, that is a long and impassable distance away from the conclusion that the judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent *unjustified* political machinations (whatever that means).

JUSTICE BREYER provides no real guidance for the journey. Despite his promise to do so, *post*, at 1, he never tells us what he is testing for, beyond the unhelpful "*unjustified* entrenchment." *Post*, at 6. Instead, he "set[s] forth several sets of circumstances that lay out the indicia of abuse," "along a continuum," *post*, at 12, proceeding (pre-

sumably) from the most clearly unconstitutional to the possibly unconstitutional. With regard to the first "scenario," he is willing to assert that the indicia "would be sufficient to support a claim." *Post*, at 12. This seems refreshingly categorical, until one realizes that the indicia consist not merely of the failure of the party receiving the majority of votes to acquire a majority of seats in two successive elections, *but also* of the fact that there is no "neutral" explanation for this phenomenon. *Ibid*. But of course there *always is* a neutral explanation—if only the time-honored criterion of incumbent protection. The indicia set forth in JUSTICE BREYER's second scenario "*could* also add up to unconstitutional gerrymandering," *post*, at 12–13 (emphasis added); and for those in the third "a court *may* conclude that the map crosses the constitutional line," *post*, at 13 (emphasis added). We find none of this helpful. Each scenario suffers from at least one of the problems we have previously identified, most notably the difficulties of assessing partisan strength statewide and of ascertaining whether an entire statewide plan is motivated by political or neutral justifications, see *supra*, at 15–16, 19–20. And even at that, the last two scenarios *do not even purport to provide an answer*, presumably leaving it to each district court to determine whether, under those circumstances, "*unjustified* entrenchment" has occurred. In sum, we neither know precisely what JUSTICE BREYER is testing for, nor precisely what fails the test.

But perhaps the most surprising omission from JUSTICE BREYER's dissent, given his views on other matters, is the absence of any cost-benefit analysis. JUSTICE BREYER acknowledges that "a majority normally can work its political will," *post*, at 8, and well describes the number of actors, from statewide executive officers, to redistricting commissions, to Congress, to the People in ballot initiatives and referenda, that stand ready to make that happen. See *post*, at 8–9. He gives no instance (and we know

none) of permanent frustration of majority will. But where the majority has failed to assert itself for some indeterminate period (two successive elections, if we are to believe his first scenario), JUSTICE BREYER simply assumes that "court action may prove necessary," *post*, at 10. Why so? In the real world, of course, 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. Is 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, worth the benefit to be achieved—an accelerated (by some unknown degree) effectuation of the majority will? We think not.

V

JUSTICE KENNEDY recognizes that we have "demonstrat[ed] the shortcomings of the other standards that have been considered to date," *post*, at 3 (opinion concurring in judgment). He acknowledges, moreover, that we "lack . . . comprehensive and neutral principles for drawing electoral boundaries," *post*, at 1; and that there is an "absence of rules to limit and confine judicial intervention," *ibid*. From these premises, one might think that JUSTICE KENNEDY would reach the conclusion that political gerrymandering claims are nonjusticiable. Instead, however, he concludes that courts should continue to adjudicate such claims because a standard *may* one day be discovered.

The first thing to be said about JUSTICE KENNEDY's disposition is that it is not legally available. The District Court in this case considered the plaintiffs' claims *justiciable* but dismissed them because the standard for unconstitutionality had not been met. It is logically impossible

to affirm that 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. JUSTICE KENNEDY seeks to affirm "[b]ecause, in the case before us, we have no standard." *Post*, at 8. But it is *our* job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim. We cannot nonsuit *them* for our failure to do so.

JUSTICE KENNEDY asserts that to declare nonjusticiability would be incautious. *Post*, at 6. Our rush to such a holding after a mere 18 years of fruitless litigation "contrasts starkly" he says, "with the more patient approach" that this Court has taken in the past. *Post*, at 5. We think not. When it has come to determining what areas fall beyond our Article III authority to adjudicate, this Court's practice, from the earliest days of the Republic to the present, has been more reminiscent of Hannibal than of Hamlet. On July 18, 1793, Secretary of State Thomas Jefferson wrote the Justices at the direction of President Washington, asking whether they might answer "questions [that] depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land," but that arise "under circumstances *which do not give a cognisance of them to the tribunals of the country*." 3 Correspondence and Public Papers of John Jay 486–487 (H. Johnston ed. 1891) (emphasis in original). The letter specifically invited the Justices to give less than a categorical yes-or-no answer, offering to present the particular questions "from which [the Justices] will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on." *Id.*, at 487. On August 8, 1793, the Justices responded in a categorical and decidedly "impatient" manner, saying that the giving of advisory opinions—not just advisory opinions on par-

ticular questions but *all* advisory opinions, presumably even those concerning legislation affecting the Judiciary—was beyond their power. "[T]he lines of separation drawn by the Constitution between the three departments of the government" prevented it. *Id.*, at 488. The Court rejected the more "cautious" course of not "deny[ing] all hopes of intervention," *post*, at 5, but leaving the door open to the possibility that at least *some* advisory opinions (on a theory we could not yet imagine) would not violate the separation of powers. In *Gilligan* v. *Morgan,* 413 U. S. 1, 7 (1973), a case filed after the Ohio National Guard's shooting of students at Kent State University, the plaintiffs sought "initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard." The Court held the suit nonjusticiable; the matter was committed to the political branches because, *inter alia*, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Id.*, at 10. The Court did not adopt the more "cautious" course of letting the lower courts try their hand at regulating the military before we declared it impossible. Most recently, in *Nixon* v. *United States*, the Court, *joined* by JUSTICE KENNEDY, held that a claim that the Senate had employed certain impermissible procedures in trying an impeachment was a nonjusticiable political question. Our decision was not limited to the particular procedures under challenge, and did not reserve the possibility that sometime, somewhere, technology or the wisdom derived from experience might make a court challenge to Senate impeachment all right.

The only cases JUSTICE KENNEDY cites in defense of his never-say-never approach are *Baker* v. *Carr* and *Bandemer*. See *post*, at 5–6. *Bandemer* provides no cover. There, all of the Justices who concluded that political gerrymandering claims are justiciable proceeded to describe what they regarded as the discernible and manageable standard that rendered it so. The lower courts were

set wandering in the wilderness for 18 years not because the *Bandemer* majority thought it a good idea, but because five Justices could not agree upon a single standard, and because the standard the plurality proposed turned out not to work.

As for *Baker* v. *Carr:* It is true enough that, having had no experience *whatever* in apportionment matters of any sort, the Court there refrained from spelling out the equal-protection standard. (It did so a mere two years later in *Reynolds* v. *Sims*.) But the judgment under review in *Baker*, unlike the one under review here, did not *demand* the determination of a standard. The lower court in *Baker* had held the apportionment claim of the plaintiffs *nonjusticiable*, and so it was logically possible to dispose of the appeal by simply disagreeing with the nonjusticiability determination. As we observed earlier, that is not possible here, where the lower court has held the claim *justiciable* but unsupported by the facts. We must either enunciate the standard that causes us to agree or disagree with that merits judgment, or else affirm that the claim is beyond our competence to adjudicate.

JUSTICE KENNEDY worries that "[a] determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene." *Post*, at 5. But it is the function of the courts to provide relief, not hope. What we think would erode confidence is the Court's refusal to do its job—announcing that there may well be a valid claim here, but we are not yet prepared to figure it out. Moreover, that course does more than erode confidence; by placing the district courts back in the business of pretending to afford help when they in fact can give none, it deters the political process from affording genuine relief. As was noted by a lower court confronted with a political gerrymandering claim:

> "When the Supreme Court resolves *Vieth*, it may choose to retreat from its decision that the question is justiciable, or it may offer more guidance on the nature of the required effect. . . . We have learned firsthand what will result if the Court chooses to do neither. Throughout this case we have borne witness to the powerful, conflicting forces nurtured by *Bandemer*'s holding that the judiciary is to address 'excessive' partisan line-drawing, while leaving the issue virtually unenforceable. Inevitably, as the political party in power uses district lines to lock in its present advantage, the party out of power attempts to stretch the protective cover of the Voting Rights Act, urging dilution of critical standards that may, if accepted, aid their party in the short-run but work to the detriment of persons now protected by the Act in the long-run. Casting the appearance both that there is a wrong and that the judiciary stands ready with a remedy, *Bandemer* as applied steps on legislative incentives for self-correction." *Session*, 298 F. Supp. 2d, at 474.

But the conclusive refutation of JUSTICE KENNEDY's position is the point we first made: it is not an available disposition. We can affirm because political districting presents a nonjusticiable question; or we can affirm because we believe the correct standard which identifies unconstitutional political districting has not been met; we cannot affirm because we do not know what the correct standard is. Reduced to its essence, JUSTICE KENNEDY's opinion boils down to this: "As presently advised, I know of no discernible and manageable standard that can render this claim justiciable. I am unhappy about that, and hope that I will be able to change my opinion in the future." What are the lower courts to make of this pronouncement? We suggest that they must treat it as a reluctant fifth vote against justiciability at district and statewide levels—a

vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable.

VI

We conclude that neither Article I, §2, nor the Equal Protection Clause, nor (what appellants only fleetingly invoke) Article I, §4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.

Considerations of *stare decisis* do not compel us to allow *Bandemer* to stand. That case involved an interpretation of the Constitution, and the claims of *stare decisis* are at their weakest in that field, where our mistakes cannot be corrected by Congress. See *Payne* v. *Tennessee,* 501 U. S. 808, 828 (1991). They are doubly weak in *Bandemer* because the majority's inability to enunciate the judicially discernible and manageable standard that it thought existed (or did not think did not exist) presaged the need for reconsideration in light of subsequent experience. And they are triply weak because it is hard to imagine how any action taken in reliance upon *Bandemer* could conceivably be frustrated—except the bringing of lawsuits, which is not the sort of primary conduct that is relevant.

While we do not lightly overturn one of our own holdings, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Id.,* at 827 (quoting *Smith* v. *Allwright,* 321 U. S. 649, 665 (1944)). Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims.

The judgment of the District Court is affirmed.

It is so ordered.