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 STEVENS, dissenting.

The central question presented by this case is whether political gerrymandering claims are justiciable. Although our reasons for coming to this conclusion differ, five Members of the Court are convinced that the plurality's answer to that question is erroneous. Moreover, as is apparent from our separate writings today, we share the view that, even if these appellants are not entitled to prevail, it would be contrary to precedent and profoundly unwise to foreclose all judicial review of similar claims that might be advanced in the future. That we presently have somewhat differing views—concerning both the precedential value of some of our recent cases and the standard that should be applied in future cases—should not obscure the fact that the areas of agreement set forth in the separate opinions are of far greater significance.

The concept of equal justice under law requires the State to govern impartially. See *Romer* v. *Evans,* 517 U. S. 620, 623 (1996); *Lehr* v. *Robertson,* 463 U. S. 248, 265 (1983); *New York City Transit Authority* v. *Beazer,* 440 U. S. 568, 587 (1979). Today's plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the

first time, to partisan gerrymanders that are devoid of any rational justification. In my view, when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.

Although we reaffirm the central holding of the Court in *Davis* v. *Bandemer,* 478 U. S. 109 (1986), we have not reached agreement on the standard that should govern partisan gerrymanderying claims. I would decide this case on a narrow ground. Plaintiff-appellants urge us to craft new rules that in effect would authorize judicial review of statewide election results to protect the democratic process from a transient majority's abuse of its power to define voting districts. I agree with the Court's refusal to undertake that ambitious project. *Ante*, at 15. I am persuaded, however, that the District Court failed to apply well-settled propositions of law when it granted the defendants' motion to dismiss plaintiff-appellant Susan Furey's gerrymandering claim.

According to the complaint, Furey is a registered Democrat who resides at an address in Montgomery County, Pennsylvania, that was located under the 1992 districting plan in Congressional District 13.[1] Under the new plan adopted by the General Assembly in 2002, Furey's address now places her in the "non-compact" District 6.[2] Furey alleges that the new districting plan was created "solely" to effectuate the interests of Republicans,[3] and that the General Assembly relied "exclusively" on a principle of "maximum partisan advantage" when drawing the plan.[4]

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[1] App. to Juris. Statement 129a.
[2] *Ibid.*
[3] *Id.*, at 142a.
[4] *Id.*, at 143a.

In my judgment, Furey's allegations are plainly sufficient to establish: (1) that she has standing to challenge the constitutionality of District 6; (2) that her district-specific claim is not foreclosed by the *Bandemer* plurality's rejection of a statewide claim of political gerrymandering; and (3) that she has stated a claim that, at least with respect to District 6, Pennsylvania's redistricting plan violates the equal protection principles enunciated in our voting rights cases both before and after *Bandemer*. The District Court therefore erred when it granted the defendants' motion to dismiss Furey's claim.

I

Prior to our seminal decision in *Baker* v. *Carr,* 369 U. S. 186 (1962), a majority of this Court had heeded Justice Frankfurter's repeated warnings about the dire consequences of entering the "political thicket" of legislative districting. *Colegrove* v. *Green,* 328 U. S. 549, 556 (1946). As a result, even the most egregious gerrymanders were sheltered from judicial review.[5] It was after *Baker* that we first decided that the Constitution prohibits legislators

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[5] In *Colegrove*, for example, the Illinois Legislature had drawn the State's district lines under the 1901 State Apportionment Act and had not reapportioned in the four ensuing decades, "despite census figures indicating great changes in the distribution of the population." 328 U. S., at 569 (Black, J., dissenting). The populations of Illinois' districts in 1945 consequently ranged from 112,000 in the least populous district to 900,000 in the most. *Ibid*. Nonetheless, the Court, per Justice Frankfurter, concluded that "due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." *Id*., at 552. Fewer than 20 years later, the Court, confronted with a strikingly similar set of facts—a Tennessee apportionment plan set by a 1901 statute that had remained virtually unchanged despite dramatic population growth—held, in obvious tension with *Colegrove*, that the complaint stated a justiciable cause of action. *Baker,* 369 U. S., at 192, 197–198. The Court distinguished *Colegrove* as simply "a refusal to exercise equity's powers." 369 U. S., at 235.

from drawing district lines that diminish the value of individual votes in overpopulated districts. In reaching that conclusion, we explained that "legislatures . . . should be bodies which are collectively responsive to the popular will," *Reynolds* v. *Sims,* 377 U. S. 533, 565 (1964), and we accordingly described "the basic aim of legislative apportionment" as "achieving . . . fair and effective representation for all citizens," *id.,* at 565–566. Consistent with that goal, we also reviewed claims that the majority had discriminated against particular groups of voters by drawing multimember districts that threatened "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965). Such districts were "vulnerable" to constitutional challenge "if racial or political groups ha[d] been fenced out of the political process and their voting strength invidiously minimized." *Gaffney* v. *Cummings,* 412 U. S. 735, 754 (1973). See also *Whitcomb* v. *Chavis,* 403 U. S. 124, 143 (1971); *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966).

Our holding in *Bandemer,* 478 U. S., at 118–127, that partisan gerrymandering claims are justiciable followed ineluctably from the central reasoning in *Baker,* 369 U. S. 186. What was true in *Baker* is no less true in this context:

> "The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with [Pennsylvania] as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the

> Equal Protection Clause are well developed and familiar, 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." *Id.*, at 226 (footnote omitted).

"[T]hat the [gerrymandering] claim is submitted by a political group, rather than a racial group, does not distinguish [the cases] in terms of justiciability." *Bandemer,* 478 U. S., at 125.

At issue in this case, as the plurality states, *ante*, at 8, is *Baker*'s second test—the presence or absence of judicially manageable standards. The judicial standards applicable to gerrymandering claims are deeply rooted in decisions that long preceded *Bandemer* and have been refined in later cases. Among those well-settled principles is the understanding that a district's peculiar shape might be a symptom of an illicit purpose in the line-drawing process. Most notably, in *Gomillion* v. *Lightfoot,* 364 U. S. 339, 340 (1960), the Court invalidated an Alabama statute that altered the boundaries of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure" for the sole purpose of preventing African-Americans from voting in municipal elections. The allegations of bizarre shape and improper motive, "if proven, would abundantly [have] establish[ed] that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." *Id.*, at 341. Justice Fortas' concurring opinion in *Kirkpatrick* v. *Preisler,* 394 U. S. 526, 538 (1969), which referred to gerrymandering as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes," also identified both shape and purpose as relevant standards. The maps attached as exhibits in *Gomillion*, 364 U. S., at 348 (Appendix to opinion of the Court), and in subsequent voting rights

cases demonstrate that an "uncouth" or bizarre shape can easily identify a district designed for a single-minded, non-neutral purpose.

With purpose as the ultimate inquiry, other considerations have supplied ready standards for testing the lawfulness of a gerrymander. In his dissent in *Bandemer*, Justice Powell explained that "the merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting." 478 U. S., at 165. Applying this three-part standard, Justice Powell first reviewed the procedures used in Indiana's redistricting process and noted that the party in power had excluded the opposition from its deliberations and had placed excessive weight on data concerning party voting trends. *Id.*, at 175–176. Second, Justice Powell pointed to the strange shape of districts that conspicuously ignored traditional districting principles. *Id.*, at 176–177. He noted the impact of such shapes on residents of the uncouth districts,[6] and he included in his opinion maps that illustrated the irregularity of the district shapes, *id.*, at 181, 183. Third and finally, Justice Powell reviewed other "substantial evidence," including contemporaneous statements and press accounts, demonstrating that the architects of the districts "were motivated solely by partisan considerations." *Id.*, at 177.

The Court has made use of all three parts of Justice Powell's standard in its recent racial gerrymandering jurisprudence. In those cases, the Court has examined

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[6] "'[T]he potential for voter disillusion and nonparticipation is great,' as voters are forced to focus their political activities in artificial electoral units. Intelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose." 478 U. S., at 177 (citation omitted).

claims that redistricting schemes violate the equal protection guarantee where they are "so highly irregular" on their face that they "rationally cannot be understood as anything other than an effort" to segregate voters by race, *Shaw* v. *Reno,* 509 U. S. 630, 646–647 (1993) *(Shaw I)*, or where "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *Miller* v. *Johnson,* 515 U. S. 900, 913 (1995). See also *Easley* v. *Cromartie,* 532 U. S. 234, 241 (2001); *Shaw* v. *Hunt,* 517 U. S. 899, 905 (1996) *(Shaw II).*[7] The *Shaw* line of cases has emphasized that "reapportionment is one area in which appearances do matter," *Shaw I*, 509 U. S., at 647, and has focused both on the shape of the challenged districts and the purpose behind the line-drawing in assessing the constitutionality of majority-minority districts under the Equal Protection Clause. These decisions, like Justice Powell's opinion in *Bandemer*, have also considered the process by which the districting schemes were enacted,[8] looked to other evidence demonstrating that purely improper considerations motivated the decision,[9] and included maps

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[7] The reasoning in these decisions followed not only from *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960), see *Shaw I*, 509 U. S., at 644–645 (relying on *Gomillion*), but also from Justice Powell's observation in *Davis* v. *Bandemer,* 478 U. S. 109, 173, n. 12 (1986), that "[i]n some cases, proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering."

[8] In *Miller* v. *Johnson,* 515 U. S. 900, 917–919 (1995), the Court reviewed the procedures followed by the Georgia Legislature in responding to the Justice Department's objections to its original plan, and the part that the operator of its "reapportionment computer" played in designing the districts, to support its conclusion "that the legislature subordinated traditional districting principles to race." See also *Bush* v. *Vera,* 517 U. S. 952, 961–962 (1996) (plurality opinion) (discussing use of computer program to manipulate district lines).

[9] In *Shaw II*, 517 U. S. 899, 910 (1996), for instance, the Court considered the fact that certain reports regarding the effects of past discrimina-

illustrating outlandish district shapes.[10]

Given this clear line of precedents, I should have thought the question of justiciability in cases such as this—where a set of plaintiffs argues that a single motivation resulted in a districting scheme with discriminatory effects—to be well settled. The plurality's contrary conclusion cannot be squared with our long history of voting rights decisions. Especially perplexing is the plurality's *ipse dixit* distinction of our racial gerrymandering cases. Notably, the plurality does not argue that the judicially manageable standards that have been used to adjudicate racial gerrymandering claims would not be equally manageable in political gerrymandering cases. Instead, its distinction of those cases rests on its view that race as a districting criterion is "much more rarely encountered" than partisanship, *ante*, at 16, and that determining whether race—"a rare and constitutionally suspect motive"—dominated a districting decision "is quite different from determining whether [such a decision] is so substantially affected by the excess of an ordinary and lawful motive as to [be] invali[d]," *ibid.* But those considerations are wholly irrelevant to the issue of justiciability.

To begin with, the plurality errs in assuming that politics is "an ordinary and lawful motive." We have squarely rejected the notion that "a purpose to discriminate on the basis of politics," *ante*, at 16, 24, is never subject to strict scrutiny. On the contrary, "political belief and association constitute the core of those activities protected by the First Amendment," *Elrod* v. *Burns,* 427 U. S. 347, 356 (1976) (plurality opinion), and discriminatory governmental deci-

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tion were not before the legislature and therefore could not have played a role in the districting process.

[10] *Hunt* v. *Cromartie,* 526 U. S. 541, 554 (1999); *Bush* v. *Vera,* 517 U. S., at 986 (plurality opinion); *Miller*, 515 U. S., at 928; *Shaw I*, 509 U. S., at 659.

sions that burden fundamental First Amendment interests are subject to strict scrutiny, *id.*, at 363; cf. *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 94–95 (1972). Thus, unless party affiliation is an appropriate requirement for the position in question, government officials may not base a decision to hire, promote, transfer, recall, discharge, or retaliate against an employee, or to terminate a contract, on the individual's partisan affiliation or speech. See *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr,* 518 U. S. 668, 674–675 (1996); *O'Hare Truck Service, Inc.* v. *City of Northlake,* 518 U. S. 712, 716–717 (1996); *Rutan* v. *Republican Party of Ill.,* 497 U. S. 62, 64–65 (1990); *Branti* v. *Finkel,* 445 U. S. 507, 519–520 (1980); *Elrod,* 427 U. S., at 355–363.[11] It follows that political affiliation is not an appropriate standard for excluding voters from a congressional district.

The plurality argues that our patronage cases do not support the proposition that strict scrutiny should be applied in political gerrymandering cases because "[i]t is elementary that scrutiny levels are claim specific." *Ante*, at 24–25. It is also elementary, however, that the level of scrutiny is relevant to the question whether there has been a constitutional violation, not the question of justiciability.[12] The standards outlined above are discernible

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[11] The plurality opinion seems to assume that the dissenting opinions in *Umbehr*, 518 U. S., at 686 (SCALIA, J.), and *Rutan*, 497 U. S., at 92 (SCALIA, J.), correctly state the law—namely, that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down," *id.*, at 95. Cf. *ante*, at 4 (tracing the history of political gerrymanders to the beginning of the 18th century). But "[o]ur inquiry does not begin with the judgment of history"; "[r]ather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice." *Elrod,* 427 U. S., at 354–355.

[12] It goes without saying that a claim that otherwise would trigger

and judicially manageable regardless of the number of cases in which they must be applied or the level of scrutiny at which the analysis occurs.[13] Thus, the dicta from *Shaw I* and *Bush* v. *Vera,* 517 U. S. 952 (1996), on which the plurality relies, *ante*, at 24, are beside the point, because they speak not at all to the subject of justiciability. And while of course a difference exists between the constitutional interests protected by the First and Fourteenth Amendments, see *ibid.*, the relevant lesson of the patronage cases is that partisanship is not always as benign a consideration as the plurality appears to assume. In any event, as I understand the plurality's opinion, it seems to agree that if the State goes "too far"—if it engages in "political gerrymandering for politics' sake"—it violates the Constitution in the same way as if it undertakes "racial gerrymandering for race's sake." *Ibid.* But that sort of constitutional violation cannot be touched by the courts, the plurality maintains, because the judicial obligation to intervene is "dubious." *Ante*, at 16–17.[14]

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strict scrutiny might nonetheless be nonjusticiable. See, *e.g.*, *Allen* v. *Wright,* 468 U. S. 737 (1984); *DeFunis* v. *Odegaard,* 416 U. S. 312 (1974) *(per curiam).*

[13] The plurality explains that it is willing to "accep[t] a modest degree of unmanageability" where the "constitutional command . . . is clear," but not where the "constitutional obligation . . . is both dubious and severely unmanageable." *Ante*, at 16–17. Not only does this statement cast doubt on the plurality's faith in our racial gerrymandering cases, but its reasoning is clearly tautological.

[14] The plurality's reluctance to recognize the justiciability of partisan gerrymanders seems driven in part by a fear that recognizing such claims will give rise to a flood of litigation. See *ante*, at 16. But the list of cases that it cites in its lengthy footnote 6, *ante*, at 10–11, suggests that in the two decades since *Bandemer*, there has been an average of just three or four partisan gerrymandering cases filed every year. That volume is obviously trivial when compared, for example, to the amount of litigation that followed our adoption of the "one-person, one-vote" rule. See *Reynolds* v. *Sims,* 377 U. S. 533 (1964).

State action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decisionmaker's duty to remain impartial. See, *e.g.*, *Lehr*, 463 U. S., at 265. Gerrymanders necessarily rest on legislators' predictions that "members of certain identifiable groups . . . will vote in the same way." *Mobile* v. *Bolden,* 446 U. S. 55, 87 (1980) (STEVENS, J., concurring in judgment). "In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders." *Id.*, at 88. Thus, the critical issue in both racial and political gerrymandering cases is the same: whether a single non-neutral criterion controlled the districting process to such an extent that the Constitution was offended. This Court has treated that precise question as justiciable in *Gomillion* and in the *Shaw* line of cases, and today's plurality has supplied no persuasive reason for distinguishing the justiciability of partisan gerrymanders. Those cases confirm and reinforce the holding that partisan gerrymandering claims are justiciable.[15]

II

The plurality opinion in *Bandemer* dealt with a claim that the Indiana apportionment scheme for state legislative districts discriminated against Democratic voters on a statewide basis. 478 U. S., at 127. In my judgment, the *Bandemer* Court was correct to entertain that statewide challenge, because the plaintiffs in that case alleged a group harm that affected members of their party through-

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[15] Writing for the Court in *Bandemer*, Justice White put it well: "That the characteristics of the complaining group are not immutable or that the group has not been subject to the same historical stigma 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.

out the State. In the subsequent line of racial gerrymandering cases, however, the Court shifted its focus from statewide challenges and required, as a matter of standing, that plaintiffs stating race-based equal protection claims actually reside in the districts they are challenging. See *United States* v. *Hays,* 515 U. S. 737, 745 (1995). Because *Hays* has altered the standing rules for gerrymandering claims—and because, in my view, racial and political gerrymanders are species of the same constitutional concern—the *Hays* standing rule requires dismissal of the statewide claim.[16] But that does not end the matter. Challenges to specific districts, such as those considered in the *Shaw* cases, relate to a different type of "representational" harm, and those allegations necessarily must be considered on a district-by-district basis. The complaint in this case alleges injuries of both types—a group harm to Democratic voters throughout Pennsylvania and a more individualized representational injury to Furey as a resident of District 6.

In a challenge to a statewide districting plan, the plaintiff-appellants complain that they have been injured because of their membership in a particular, identifiable group. The plaintiff-appellees in *Bandemer*, for example,

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[16]The cases that the plurality cites today, *ante*, at 10–12, n. 6, support the conclusion that it would have been wise to endorse the views expressed in Justice Powell's dissent in *Bandemer*, 478 U. S., at 161, and my concurrence in *Karcher* v. *Daggett,* 462 U. S. 725, 744 (1983). I remain convinced that our opinions correctly interpreted the law. If that standard were applied to the statewide challenge in this case, a trial of the entire case would be required. For the purpose of deciding this case, even though I dissented from our decision in *Shaw I* and remain convinced that it was incorrectly decided, I would give the *Shaw* cases *stare decisis* effect in the political gerrymandering context. Given the Court's illogical disposition of this case, however, in future cases I would feel free to reexamine the standing issue. I surely would not suggest that a plaintiff would never have standing to litigate a statewide claim.

alleged "that Democratic voters over the State as a whole, not Democratic voters in particular districts, ha[d] been subjected to unconstitutional discrimination." 478 U. S., at 127 (citing complaint). They specifically claimed that they were injured as members of a group because the number of Democratic representatives was not commensurate with the number of Democratic voters throughout Indiana. Much like the plaintiff-appellees in *Bandemer,* the plaintiff-appellants in this case allege that the statewide plan will enable Republicans, who constitute about half of Pennsylvania's voters, to elect 13 or 14 members of the State's 19-person congressional delegation.[17] Under *Hays*, however, the plaintiff-appellants lack standing to challenge the districting plan on a statewide basis. 515 U. S., at 744–745.[18]

A challenge to a specific district or districts, on the other hand, alleges a different type of injury entirely—one that our recent racial gerrymandering cases have recognized as cognizable.[19] In *Shaw I* we held that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." 509 U. S., at 649. After describing the pernicious consequences of race-conscious districting—even when

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[17] App. to Juris. Statement 138a.

[18] As the Court explained in *Hays*, "[v]oters in [gerrymandered] districts may suffer the special representational harms [that constitutionally suspect] classifications can cause in the voting context. On the other hand, where a plaintiff does not live in such a district, he or she does not suffer those special harms . . . ." 515 U. S., at 745.

[19] The plurality in *Bandemer,* 478 U. S., at 127, itself acknowledged that "the focus of the equal protection inquiry" in a statewide challenge "is necessarily somewhat different from that involved in the review of individual districts."

designed to enhance the representation of the minority—and after explaining why dramatically irregular shapes "'have sufficient probative force to call for an explanation,'" *id.,* at 647 (quoting *Karcher* v. *Daggett,* 462 U. S. 725, 755 (1983) (STEVENS, J., concurring)), we described the message a misshapen district sends to elected officials:

> "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Shaw I*, 509 U. S., at 648.

Undergirding the *Shaw* cases is the premise that racial gerrymanders effect a constitutional wrong when they disrupt the representational norms that ordinarily tether elected officials to their constituencies as a whole.

"[L]egislatures," we have explained, "should be bodies which are collectively responsive to the popular will," *Reynolds*, 377 U. S., at 565, for "[l]egislators are elected by voters, not farms or cities or economic interests," *id.*, at 562.[20] Gerrymanders subvert that representative norm because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles. The *Shaw* cases hold that this disruption of the representative process imposes a cognizable "representational har[m]." *Hays,*

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[20] Cf. *McConnell* v. *Federal Election Comm'n*, 540 U. S. __, __ (2003) (slip op., at 43–44) ("Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder").

515 U. S., at 745. Because that harm falls squarely on the voters in the district whose representative might or does misperceive the object of her fealty, the injury is cognizable only when stated by voters who reside in that particular district, see *Shaw II*, 517 U. S., at 904; otherwise the "plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve," *Hays*, 515 U. S., at 745. See also *Bush* v. *Vera,* 517 U. S., at 957–958 (plurality opinion).

Although the complaint in this case includes a statewide challenge, plaintiff-appellant Furey states a stronger claim as a resident of the misshapen District 6.[21] She complains not merely about the injury resulting from the probable election of a congressional delegation that does not fairly represent the entire State, or about the harm flowing from the probable election of a Republican to represent District 6.[22] She also alleges that the grotesque configuration of that district itself imposes a special harm on the members of the political minority residing in District 6 that directly parallels the harm recognized in *Shaw I*. Officials elected by the majority party in such a district, she claims, "are more likely to believe that their primary obligation is to represent only the members of that group, rather than the constituency as a whole."[23] This is precisely the harm that the *Shaw* cases treat as cognizable in

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[21] Plaintiff-appellants Richard and Norma Jean Vieth are registered Democrats who reside in District 16. App. to Juris. Statement 129a. The complaint does not claim that they resided in a different district under the old districting scheme, nor does it anywhere allege, as it does on Furey's behalf, that District 16 in particular is irregularly shaped. A glance at the appended map, *infra*, at 27, reveals that District 16 is not especially unusual in its contours. Without more specific allegations regarding District 16, I would limit the analysis to District 6.

[22] When her residence was located in District 13, Furey was represented by a Democrat. App. 261.

[23] App. to Juris. Statement 142a.

the context of racial gerrymandering. The same treatment is warranted in this case.

The risk of representational harms identified in the *Shaw* cases is equally great, if not greater, in the context of partisan gerrymanders. *Shaw I* was borne of the concern that an official elected from a racially gerrymandered district will feel beholden only to a portion of her constituents, and that those constituents will be defined by race. 509 U. S., at 648. The parallel danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all.[24] The problem, simply put, is that the will of the cartographers rather than the will of the people will govern.[25] As Judge Ward recently wrote, "ex-

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[24] "[A]mple evidence demonstrates that many of today's congressional representatives owe their allegiance not to 'the People of the several states' but to the mercy of state legislatures." Note, 117 Harv. L. Rev. 1196, 1202 (2004) (footnote omitted).

[25] In this sense the partisan gerrymander is the American cousin of the English "rotten borough." In the English system, Members of Parliament were elected from geographic units that remained unchanged despite population changes wrought by the Industrial Revolution. "Because representation was not based on population, vast inequities developed over time in the form of the so-called rotten boroughs. Old Sarum, for instance, had no human residents—only a few sheep—yet sent the same number of representatives to Parliament as Yorkshire, with nearly a million inhabitants." R. Zagarri, The Politics of Size: Representation in the United States, 1776–1850, p. 37 (1987) (footnote omitted). As a result of this system, "many insignificant places returned members, while many important towns did not," and "even in large towns the members were often elected by a tiny fraction of the population." J. Butler, The Passing of the Great Reform Bill 176 (1914). Meanwhile, "[t]he Government bribed the patron or member or both by means of distinctions and offices or by actual cash," and "[t]he patron and member bribed the electors in the same way." *Ibid.* The rotten boroughs clearly would violate our familiar one-person, one-vote rule, but they were also troubling because

treme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa." *Session* v. *Perry,* 298 F. Supp. 2d 451, 516 (ED Tex. 2004) (concurring in part and dissenting in part).

III

Elected officials in some sense serve two masters: the constituents who elected them and the political sponsors who support them. Their primary obligations are, of course, to the public in general, but it is neither realistic nor fair to expect them wholly to ignore the political consequences of their decisions. "It would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney,* 412 U. S., at 752. Political factors are common and permissible elements of the art of governing a democratic society.

But while political considerations may properly influence the decisions of our elected officials, when such decisions disadvantage members of a minority group—whether the minority is defined by its members' race, religion, or political affiliation—they must rest on a neutral predicate. See *Hampton* v. *Mow Sun Wong,* 426 U. S. 88, 100 (1976) ("The federal sovereign, like the States, must govern impartially"); *Bandemer*, 478 U. S., at 166 (Powell, J., dissenting). The Constitution enforces "a commitment to the law's neutrality where the rights of persons are at stake." *Romer*, 517 U. S., at 623. See also *Board of Trustees of Univ. of Ala.* v. *Garrett,* 531 U. S. 356, 375 (2001) (KENNEDY, J., concurring) ("States act as neutral entities,

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the representative of such a borough owed his primary loyalty to his patron and the government rather than to his constituents (if he had any). Similarly, in gerrymandered districts, instead of local groups defined by neutral criteria selecting their representatives, it is the architects of the districts who select the constituencies and, in effect, the representatives.

ready to take instruction and to enact laws when their citizens so demand"). Thus, the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose.[26]

In evaluating a claim that a governmental decision violates the Equal Protection Clause, we have long required a showing of discriminatory purpose. See *Washington* v. *Davis,* 426 U. S. 229 (1976).[27] That requirement applies with full force to districting decisions. The line that divides a racial or ethnic minority unevenly between

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[26] In the realm of federal elections, the requirement of governmental neutrality is buttressed by this Court's recognition that the Elections Clause is not "'a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" *Cook* v. *Gralike,* 531 U. S. 510, 523 (2001) (citing *U. S. Term Limits, Inc.* v. *Thornton,* 514 U. S. 779, 833–834 (1995)). And this duty to govern impartially extends to executive and legislative officials alike. Beginning as early as its first session in 1789, Congress has passed a number of statutes designed to guarantee that Executive Branch employees neutrally carry out their duties. See *Ex parte Curtis,* 106 U. S. 371, 372–373 (1882). Some of those laws avoided the danger that "the government itself may be made to furnish indirectly the money to defray the expenses of keeping the political party in power that happens to have for the time being the control of the public patronage." *Id.*, at 375. It is "fundamental" that federal employees "are expected to enforce the law and execute programs of the Government without bias or favoritism for or against any political party or group or the members thereof." *Civil Service Comm'n* v. *Letter Carriers,* 413 U. S. 548, 564–565 (1973). That expectation reflects the principle that "the impartial execution of the laws" is a "great end of Government." *Id.*, at 565.

[27] In *Washington* v. *Davis,* we referred to an earlier challenge to a New York reapportionment statute that had failed because the plaintiffs had not shown that the statute was "'the product of a state contrivance to segregate on the basis of race or place of origin.'" 426 U. S., at 240 (quoting *Wright* v. *Rockefeller,* 376 U. S. 52, 58 (1964)). We emphasized that the Court in *Wright* had been unanimous in identifying the issue as "whether the 'boundaries . . . were purposefully drawn on racial lines.'" 426 U. S., at 240 (quoting *Wright,* 376 U. S., at 67).

school districts can be entirely legitimate if chosen on the basis of neutral factors—county lines, for example, or a natural boundary such as a river or major thoroughfare. But if the district lines were chosen for the purpose of limiting the number of minority students in the school, or the number of families holding unpopular religious or political views, that invidious purpose surely would invalidate the district. See *Gomillion* v. *Lightfoot,* 364 U. S., at 344–345; cf. *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet,* 512 U. S. 687, 699–700 (1994).

Consistent with that principle, our recent racial gerrymandering cases have examined the shape of the district and the purpose of the districting body to determine whether race, above all other criteria, predominated in the line-drawing process. We began by holding in *Shaw I* that a districting scheme could be "so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race." 509 U. S., at 658. Then, in *Miller*, we explained that *Shaw I*'s irrational-shape test did not treat the bizarreness of a district's lines itself as a constitutional violation; rather, the irregularity of the district's contours in *Shaw I* was "persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." 515 U. S., at 913. Under the *Shaw* cases, then, the use of race as a criterion in redistricting is not *per se* impermissible, see *Shaw I*, 509 U. S., at 642; *Shaw II*, 517 U. S. 899, but when race is elevated to paramount status—when it is the be-all and end-all of the redistricting process—the legislature has gone too far. "Race must not simply have been *a* motivation . . . but the *predominant* factor motivating the legislature's districting decision." *Easley*, 532 U. S., at 241 (internal quotation marks and citations omitted).

Just as irrational shape can serve as an objective indica-

tor of an impermissible legislative purpose, other objective features of a districting map can save the plan from invalidation. We have explained that "traditional districting principles," which include "compactness, contiguity, and respect for political subdivisions," are "important not because they are constitutionally required . . . but because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw I*, 509 U. S., at 647 (citing *Gaffney*, 412 U. S., at 752, n. 18; *Karcher*, 462 U. S., at 755 (STEVENS, J., concurring)). "Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines.'" *Miller*, 515 U. S., at 916 (quoting *Shaw I*, 509 U. S., at 647).

In my view, the same standards should apply to claims of political gerrymandering, for the essence of a gerrymander is the same regardless of whether the group is identified as political or racial. Gerrymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents. *Mobile*, 446 U. S., at 87 (STEVENS, J., concurring in judgment). In seeking the desired result, legislators necessarily make judgments about the probability that the members of identifiable groups—whether economic, religious, ethnic, or racial—will vote in a certain way. The overriding purpose of those predictions is political. See *Karcher,* 462 U. S., at 749–750 (STEVENS, J., concurring); *Mobile,* 446 U. S., at 88 (STEVENS, J., concurring in judgment).[28]

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[28] I have elsewhere explained my view that race as a factor in the districting process is no different from any other political consideration. Creating a majority-minority district is no better and no worse than creating an Irish-American, or Polish-American, or Italian-American district. In all events the relevant question is whether the sovereign

It follows that the standards that enable courts to identify and redress a racial gerrymander could also perform the same function for other species of gerrymanders. See *Bandemer*, 478 U. S., at 125; *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 853 (CA7 1972) (Stevens, J., dissenting).

The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process. Just as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate. If, as plaintiff-appellant Furey has alleged, the predominant motive of the legislators who designed District 6, and the sole justification for its bizarre shape, was a purpose to discriminate against a political minority, that invidious purpose should invalidate the district.

The plurality reasons that the standards for evaluating racial gerrymanders are not workable in cases such as this because partisan considerations, unlike racial ones, are perfectly legitimate. *Ante*, at 16–17. Until today, however, there has not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line.[29] On the contrary,

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abrogated its obligation to govern neutrally. See *Karcher,* 462 U. S., at 753–754 (STEVENS, J., concurring); *Mobile,* 446 U. S., at 88 (STEVENS, J., concurring in judgment); *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 850–853 (CA7 1972) (Stevens, J., dissenting).

[29] The plurality's long discussion of the history of political gerrymanders is interesting, *ante*, at 4–7, but it surely is not intended to suggest that the vintage of an invidious practice—even "an American political tradition as old as the Republic," *Board of Comm'rs, Wabaunsee Cty.* v. *Umbehr,* 518 U. S. 668, 688 (1996) (SCALIA, J., dissenting)—should insulate it from constitutional review. Compare, *e.g.*, *Bradwell* v. *State,*

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.[30] Purely partisan motives are "rational" in a literal sense, but there must be a limiting principle. "[T]he word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially." *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 452 (1985) (STEVENS, J., concurring). A legislature controlled by one party could not, for instance, impose special taxes on members of the minority party, or use tax revenues to pay the majority party's campaign expenses. The rational basis for government decisions must satisfy a standard of legitimacy and neutrality; an acceptable rational basis can be neither purely personal nor purely partisan. See *id.*, at 452–453.

The Constitution does not, of course, require proportional representation of racial, ethnic, or political groups. In that I agree with the plurality. *Ante*, at 18. We have

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16 Wall. 130 (1873), with *Nevada Dept. of Human Resources* v. *Hibbs,* 538 U. S. 721, 729 (2003). The historical discussion might be relevant if it attempted to justify political gerrymandering as an acceptable use of governmental power. In the end, however, the plurality's defense of its position comes down to the unconvincing assertion that it lacks the juridical capacity to administer the standards the Court fashioned in its recent racial gerrymandering jurisprudence.

[30] *Bandemer,* 478 U. S. 109 (plurality opinion); *Gaffney* v. *Cummings,* 412 U. S. 735, 754 (1973); *Whitcomb* v. *Chavis,* 403 U. S. 124, 143 (1971); *Burns* v. *Richardson,* 384 U. S. 73, 88 (1966); *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965). Consistent with these statements, the District Court in a recent case correctly described political gerrymandering as "a purely partisan exercise" and "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." App. to Juris. Statement in *Balderas* v. *Texas,* O. T. 2001, No. 01–1196, p. 10.

held, however, that proportional representation of political groups is a permissible objective, *Gaffney,* 412 U. S., at 754, and some of us have expressed the opinion that a majority's decision to enhance the representation of a racial minority is equally permissible, particularly when the decision is designed to comply with the Voting Rights Act of 1965.[31] Thus, the view that the plurality implicitly embraces today—that a gerrymander contrived for the sole purpose of disadvantaging a political minority is less objectionable than one seeking to benefit a racial minority—is doubly flawed. It disregards the obvious distinction between an invidious and a benign purpose, and it mistakenly assumes that race cannot provide a legitimate basis for making political judgments.[32]

In sum, in evaluating a challenge to a specific district, I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considera-

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[31] See *Shaw II,* 517 U. S., at 918 (STEVENS, J., dissenting); *Bush* v. *Vera,* 517 U. S., at 1033–1034 (STEVENS, J., dissenting); *Miller,* 515 U. S., at 947–948 (GINSBURG, J., dissenting).

[32] Because race so seldom provides a rational basis for a governmental decision, racial classifications almost always fail to survive "rational basis" scrutiny. But "[n]ot every decision influenced by race is equally objectionable." *Grutter* v. *Bollinger,* 539 U. S. 306, 327 (2003). When race is used as the basis for making predictive political judgments, it may be as reliable (or unreliable) as other group characteristics, such as political affiliation, economic status, or national origin. The fact that race is an immutable characteristic does not mean that there is anything immutable or certain about the political behavior of the members of any racial class. See *Mobile* v. *Bolden*, 446 U. S. 55, 88 (1980) (STEVENS, J., concurring in judgment). Registered Republicans of all races sometimes vote for Democratic candidates, and vice versa.

The plurality asserts that a person's politics, unlike her race, is not readily "discernible." *Ante*, at 17. But that assertion is belied by the evidence that the architects of political gerrymanders seem to have no difficulty in discerning the voters' political affiliation. After all, eligibility to vote in primary elections often requires the citizen to register her party affiliation, but it never requires her to register her race.

tions to dominate and control the lines drawn, forsaking all neutral principles.[33] 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. Such a narrow test would cover only a few meritorious claims, but it would preclude extreme abuses, such as those disclosed by the record in *Badham* v. *Eu*, 694 F. Supp. 664 (ND Cal. 1988), summarily aff'd, 488 U. S. 1024 (1989),[34] and it would perhaps shorten the time period in which the pernicious effects of such a gerrymander are felt. This test would mitigate the current trend under which partisan considerations are becoming the be-all and end-all in apportioning representatives.

IV

Plaintiff-appellant Furey plainly has stated a claim that District 6 constitutes an unconstitutional partisan gerrymander. According to the complaint, Pennsylvania's 2002 redistricting plan splits "Montgomery County alone . . .

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[33] The one-person, one-vote rule obviously constitutes a neutral districting criterion, but our gerrymandering cases have never cited that principle as one of the traditional criteria "that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw I*, 509 U. S., at 647. Thus, I would require that a district be justified with reference to both the one-person, one-vote rule and some other neutral criterion. See *Bandemer*, 478 U. S., at 162, 168 (Powell, J., concurring in part and dissenting in part).

[34] The California districting scheme at issue in *Badham* featured a large number of districts with highly irregular shapes, all designed, the plaintiff-appellants alleged, to dilute Republican voting strength throughout the State. See Juris. Statement in *Badham* v. *Eu*, O. T. 1987, No. 87–1818, Exh. D, p. 77a. Three Members of this Court dissented from the summary affirmance in *Badham* and would have noted probable jurisdiction. 488 U. S. 1024 (1989).

into six different congressional districts."[35] The new District 6 "looms like a dragon descending on Philadelphia from the west, splitting up towns and communities throughout Montgomery and Berks Counties."[36] Furey alleges that the districting plan was created "solely to effectuate the interests" of Republicans,[37] and that the General Assembly relied "exclusively on a principle of maximum partisan advantage" when drawing the plan,[38] "to the exclusion of all other criteria."[39] The 2002 plan "is so irregular on its face that it rationally can be viewed only as an effort . . . to advance the interests of one political party, without regard for traditional redistricting principles and without any legitimate or compelling justification."[40] "The problem," Furey claims, is that the legislature "subordinated—indeed ignored—all traditional redistricting principles and all legitimate bases for governmental decisionmaking, in order to favor those with one political viewpoint over another."[41] The plan "ignores all other traditional redistricting criteria," she alleges, "thus demonstrating that partisanship—and nothing else—was the rationale behind the plan."[42] Because this complaint states a claim under a judicially manageable standard for adjudicating partisan gerrymandering cases, I would reverse the judgment of the District Court and remand for further proceedings consistent with this opinion.

The plurality candidly acknowledges that legislatures

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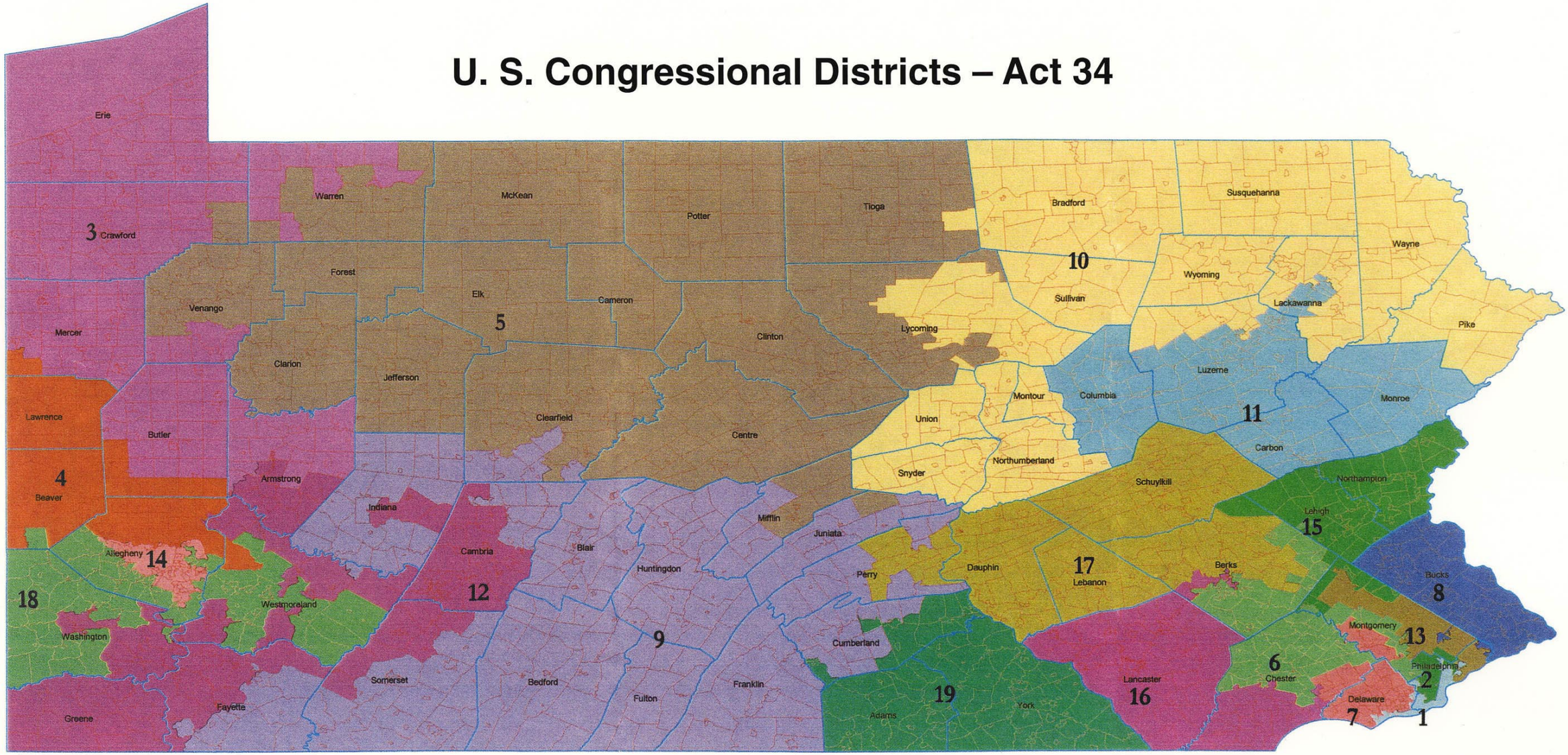
[35] App. to Juris. Statement 135a.
[36] *Id.*, at 136a.
[37] *Id.*, at 142a.
[38] *Id.*, at 143a.
[39] *Id.*, at 140a.
[40] *Id.*, at 143a.
[41] *Ibid.*
[42] *Id.*, at 135a.

can fashion standards to remedy political gerrymandering that are perfectly manageable and, indeed, that the legislatures in Iowa and elsewhere have done so. *Ante*, at 7, n. 4. If a violation of the Constitution is found, a court could impose a remedy patterned after such a statute. Thus, the problem, in the plurality's view, is not that there is no judicially manageable standard to fix an unconstitutional partisan gerrymander, but rather that the Judiciary lacks the ability to determine when a state legislature has violated its duty to govern impartially.

Quite obviously, however, several standards for identifying impermissible partisan influence are available to judges who have the will to enforce them. We could hold that every district boundary must have a neutral justification; we could apply Justice Powell's three-factor approach in *Bandemer;* we could apply the predominant motivation standard fashioned by the Court in its racial gerrymandering cases; or we could endorse either of the approaches advocated today by JUSTICE SOUTER and JUSTICE BREYER. What is clear is that it is not the unavailability of judicially manageable standards that drives today's decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially.

Accordingly, I respectfully dissent.


U. S. Congressional Districts – Act 34
Erie
3
Crawford
Warren
McKean
Potter
Tioga
Bradford
Susquehanna
Wayne
10
Wyoming
Sullivan
Lackawanna
Pike
Forest
Elk
Cameron
5
Venango
Mercer
Clinton
Lycoming
Clarion
Jefferson
Luzerne
Monroe
Montour
Columbia
11
Lawrence
Clearfield
Union
Butler
Centre
Carbon
Northumberland
Snyder
4
Beaver
Armstrong
Schuylkill
Northampton
Indiana
Lehigh
15
Mifflin
Juniata
Allegheny
14
Cambria
Blair
Huntingdon
Perry
Dauphin
17
Lebanon
Berks
Bucks
8
18
12
Westmoreland
Washington
9
Cumberland
Montgomery
13
6
Chester
Philadelphia
2
Somerset
Bedford
Franklin
Lancaster
16
Fulton
19
Delaware
7
1
Fayette
Greene
Adams
York