

WHERE DO WE DRAW THE LINE? PARTISAN GERRYMANDERING AND THE STATE OF TEXAS

"Bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression."

—Thomas Jefferson¹

"The citizen can bring our political and governmental institutions back to life, make them responsive and accountable, and keep them honest. No one else can."

—John Gardner²

I. INTRODUCTION

Gerrymandering has been around since the term was first coined in 1812 when Massachusetts Governor Elbridge Gerry created a "salamander-like" district to benefit his party, the Anti-Federalists.³ The term gerrymandering is 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."⁴ During most of the two-hundred-year history of gerrymandering, federal courts steadfastly refused to police partisan gerrymandering because drawing electoral districts was considered the province of

1. Thomas Jefferson, First Inaugural, 1801, in 3 THE WRITINGS OF THOMAS JEFFERSON 318 (Lipscomb & Bergh eds., Memorial ed. 1903–04).

2. Chellie Pingree, *Archibald Cox's Legacy Must Not Vanish, Common Cause: Holding Power Accountable*, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&B=223171> (last visited Mar. 30, 2006). John Gardner is the founder of Common Cause and the former Secretary of Health, Education and Welfare under President Lyndon B. Johnson.

3. See BLACK'S LAW DICTIONARY 708–09 (8th ed. 2004); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 785 (2005).

4. BLACK'S LAW DICTIONARY, *supra* note 3, at 708.

the legislative branch under the United States Constitution and, therefore, beyond the reach of the federal courts.⁵ Finally, in 1986, the Supreme Court of the United States entered the arena in *Davis v. Bandemer*,⁶ holding that political gerrymandering claims are justiciable.⁷ Since that decision, the Supreme Court and the federal courts have grappled with finding a judicially manageable standard to adjudicate partisan gerrymandering claims.⁸ In 2004, the Supreme Court revisited partisan gerrymandering in *Vieth v. Jubelirer*⁹ but could not agree on whether a judicially manageable standard exists to adjudicate partisan gerrymandering or whether the courts should even adjudicate partisan gerrymandering.¹⁰ Although federal courts still entertain partisan gerrymandering claims, no workable judicial standard exists to adjudicate them, complicating successful gerrymandering suits.

5. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 554 (1946) (holding that Congress has the “exclusive authority to secure fair representation by the States in the popular House” and that it was “left to that House [to determine] whether States have fulfilled their responsibility”); see also Berman, *supra* note 3, at 785. Nonetheless, remedies were still available in state courts under state constitutional rights, which tended to provide more specific protections to citizens. See James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 645 (2004).

6. 478 U.S. 109 (1986).

7. See *id.* at 123. The Supreme Court, however, did not provide a standard by which these claims could be adjudicated. See *Vieth v. Jubelirer*, 541 U.S. 267, 271–72 (2004) (plurality opinion).

8. See *Vieth*, 541 U.S. at 281 n.6 (citing *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2003)); *Smith v. Boyle*, 144 F.3d 1060 (7th Cir. 1998); *La Porte County Republican Cent. Comm. v. Bd. of Comm’rs of La Porte*, 43 F.3d 1126 (7th Cir. 1994); *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (per curiam); *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (per curiam); *O’Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002) (per curiam), *aff’d*, 537 U.S. 997 (2002); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (per curiam); *Terrazas v. Slagle*, 821 F. Supp. 1162 (W.D. Tex. 1993) (per curiam); *Holloway v. Hechler*, 817 F. Supp. 617 (S.D. W. Va. 1992), *aff’d*, 507 U.S. 956 (1993); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662 (N.D.N.Y.) (per curiam), *aff’d*, 506 U.S. 1017 (1992); *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff’d*, 506 U.S. 801 (1992); *Ill. Legislative Redistricting Comm’n v. LaPaille*, 782 F. Supp. 1272 (N.D. Ill. 1992); *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), per curiam, *aff’d*, 504 U.S. 938 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991); *Republican Party of Va. v. Wilder*, 774 F. Supp. 400 (W.D. Va. 1991); *Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff’d*, 488 U.S. 1024 (1989); *Kenai Peninsula Borough v. State*, 743 P.2d 1352 (Alaska 1987); *In re 2003 Legislative Apportionment of the House of Representatives*, 827 A.2d 810 (Me. 2003); *Legislative Redistricting Cases*, 629 A.2d 646 (Md. 1993); *McClure v. Se. of the Commonwealth*, 766 N.E.2d 847 (Mass. 2002).

9. 541 U.S. at 267 (2004) (plurality opinion).

10. See *id.* at 305.

The Supreme Court, in December 2005, decided to hear four of the eight cases revolving around the 2003 Texas congressional district map, providing the Court with another opportunity to adjudicate partisan gerrymandering.¹¹ Two of the cases (“Texas Redistricting Cases”) raise the issues of partisan gerrymandering, one-person, one-vote, and the constitutionality of mid-decade redistricting.¹² The Texas Redistricting Cases will do little to resolve the conflict of *Bandemer* and *Vieth*, but they will provide an opportunity for the Court to define “severe partisan gerrymandering” and limit how partisan a legislature can be.

This comment examines the Supreme Court’s treatment of partisan gerrymandering in the past and the important aspects of the Texas Redistricting Cases that distinguishes them from other political gerrymandering cases previously before the Court. Part II provides an overview of the Supreme Court’s jurisprudence on malapportionment and partisan gerrymandering, specifically emphasizing the twenty years of confusion created by the Court’s decisions in *Bandemer* and *Vieth*. The Supreme Court entered the congressional and state districting arena just over fifty years ago, first adjudicating malapportionment and then partisan gerrymandering. The Court has struggled in determining whether courts should entertain claims of partisan gerrymandering and how they should adjudicate these claims. Part III examines the redistricting situation in Texas as seen in the Texas legislature and the district courts, and highlights important differences between the Texas cases and prior partisan gerrymandering claims that have appeared before the Supreme Court. Finally, Part IV analyzes two partisan gerrymandering arguments presented by the appellants in the Texas Redistricting Cases and the various policy concerns. The appellants argue (1) that mid-decade redistricting for partisan gain constitutes impermissible partisan gerrymandering, and (2) the use of outdated census figures violates

11. See State Appellees’ Brief at 17, *League of United Latin Am. Citizens v. Perry*, No. 05-204 (U.S. Feb. 1, 2006) [hereinafter State Appellees’ Brief]. The four cases were consolidated for argument. See *id.* The state of Texas filed one appellees’ brief. All four appellants filed briefs, which are cited throughout this comment.

12. The two Texas cases focusing on racial gerrymandering and the rights of Latino and African-American voters are beyond the scope of this comment. This comment focuses on the partisan gerrymandering arguments presented in Brief for Appellants, *Jackson v. Perry*, No. 05-276 (U.S. Jan. 10, 2006) [hereinafter Brief for Jackson Appellants] and Brief for Appellants, *Travis County, Tex. v. Perry*, No. 05-254 (U.S. Jan. 10, 2006) [hereinafter Brief for Travis County Appellants].

the one-person, one-vote requirement of the Constitution. A Supreme Court ruling on partisan gerrymandering, either for the appellants or for the State of Texas, will determine the future of partisan gerrymandering litigation. If the Court upholds the district court's rulings and legitimizes the actions of the Texas legislature, then the Court essentially will leave the policing of partisan gerrymandering to state legislatures and the electorate. If the Court holds the 2003 Texas congressional map unconstitutional as a partisan gerrymander, then the federal courts will continue their struggle to police the politics of state legislatures in the districting process.

II. THE HISTORY OF PARTISAN GERRYMANDERING

A. *From Malapportionment to Partisan Gerrymandering*

For over 174 years the Supreme Court tenaciously refused to adjudicate districting cases involving political gerrymandering and malapportionment.¹³ This refusal culminated in 1946 in its decision in *Colegrove v. Green*,¹⁴ a malapportionment case. The *Colegrove* plaintiffs sought an injunction against holding congressional elections under an outdated Illinois districting scheme that had not been modified since 1901, thus resulting in immense population inequalities between the districts.¹⁵ Writing for a divided Court, Justice Felix Frankfurter rejected the appellant's argument for judicial intervention because Article I, Section 4 of the Constitution¹⁶ entrusted apportionment matters entirely to Congress.¹⁷ "To sustain this action would cut very deep into the

13. Malapportionment is a cousin of gerrymandering and "involves the creation and preservation of electoral districts of different population sizes, so that the ratio of representatives to voters varies across districts." Berman, *supra* note 3, at 785 n.20. Gerrymandering deals with districts of roughly equal population sizes. *See id.*

14. 328 U.S. 549 (1946) (plurality opinion).

15. *See id.* at 550–51 (plurality opinion).

16. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for . . . 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. . . .").

17. *See Colegrove*, 728 U.S. at 552–54 (plurality opinion). Two other Justices joined Justice Frankfurter's opinion for the Court, *see id.* at 550 (plurality opinion), and Justice Rutledge concurred only in the result, *see id.* at 564 (Rutledge, J., concurring). Justices Black, Douglas and Murphy dissented on Equal Protection grounds. *See id.* at 566–74 (Black, J., dissenting).

very being of Congress. Courts ought not to enter this political thicket,” wrote Justice Frankfurter.¹⁸ “The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”¹⁹

Sixteen years later, the Supreme Court reversed course and, in *Baker v. Carr*,²⁰ held that malapportionment claims are justiciable under the Equal Protection Clause.²¹ Justice William Brennan used six indicators to determine whether a claim fell within the political question doctrine and, therefore, could not be adjudicated by the federal courts:

[1] 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 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.²²

The presence of any one of these factors would render a case nonjusticiable. Justice Brennan argued that none of these factors were present in the claim before the Court and, therefore, the federal courts were not prevented from adjudicating malapportionment claims.²³ Unfortunately, the Court did not provide any guidance or standard for adjudicating malapportionment claims and offered no insight into the justiciability of partisan gerrymandering claims.²⁴

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

19. *Id.* (plurality opinion).

20. 369 U.S. 186 (1962).

21. *See id.* at 237. “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.

22. *Id.* at 217.

23. *See id.* at 226.

24. Justice Clark concurred with the majority but sharply criticized the Court for failing to provide detailed standards for malapportionment claims. *See id.* at 251 (Clark, J., concurring). Justices Harlan and Frankfurter fervently dissented. Justice Frankfurter warned the Court that their

[d]isregard of inherent limits in the effective exercise of the Court’s “judicial Power” not only presages the futility of judicial intervention in the essentially

A trio of cases, *Gray v. Sanders*,²⁵ *Wesberry v. Sanders*,²⁶ and *Reynolds v. Sims*,²⁷ decided in 1963 and 1964, established the crucial one-person, one-vote rule in malapportionment cases dealing with both state and congressional districts.²⁸ The Court found the constitutional basis for the one-person, one-vote rule in both the Equal Protection Clause of the Fourteenth Amendment²⁹ and Article I, Section 2 of the Constitution.³⁰ Chief Justice Earl Warren clearly articulated this rule in *Reynolds*, writing that “an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”³¹ The Court first acknowledged the problem of partisan gerrymandering in *Reynolds* but did not determine the justiciability of a partisan gerrymandering claim because that was not an issue presented before the Court.³² Chief Justice Warren explained that “some distinctions may well be made between congressional and state legislative representation . . . [because] [i]n-discriminate districting, without any regard for political

political conflict of forces . . . [but] may well impair the Court’s position as the ultimate organ of “the supreme Law of the Land” in that vast range of legal problems.

See *id.* at 267 (Frankfurter, J., dissenting). Justice Harlan also criticized the majority, saying that unless the state legislature had acted wholly irrationally, the Court had no room to adjudicate. See *id.* at 334 (Harlan, J., dissenting).

25. 372 U.S. 368 (1963).

26. 376 U.S. 1 (1964).

27. 377 U.S. 533 (1964).

28. State districting maps were not being updated on a regular basis, resulting in districts suffering from population inequalities between rural and urban areas. See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 104–05 (2000). Districts in cities had significantly higher populations than districts in rural areas, diluting the weight of the votes in those districts. See *id.*

29. U.S. CONST. amend. XIV, § 1.

30. U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . .”) (emphasis added). The *Gray* Court held that a state violated equal protection by weighing some votes more than others after setting voter eligibility requirements for electing statewide officers. See *Gray*, 372 U.S. at 379–81. *Wesberry* dealt with congressional districts and the Court based its rule of one-person, one-vote in Article I, Section 2 instead of the Equal Protection Clause. See *Wesberry*, 376 U.S. at 7–8. *Reynolds* dealt with state legislative districts and the Equal Protection Clause, but the Court also applied the *Wesberry* rule, that a state must “make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.” *Reynolds*, 377 U.S. at 577.

31. *Reynolds*, 377 U.S. at 568.

32. *Reynolds* dealt with malapportionment, and partisan gerrymandering was not one of the complaints alleged in the suit. See *id.* at 536–37.

subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.”³³ Ten years later in *Karcher v. Daggett*,³⁴ another malapportionment case, Justice John Paul Stevens, argued in his concurring opinion, that the Equal Protection Clause also protects against partisan gerrymandering.³⁵

When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment—whether racial, ethnic, religious, economic or *political*—that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.³⁶

Justice Lewis Powell, in his dissent, also tackled the issue of gerrymandering and agreed that based upon the facts in *Karcher*, “one cannot rationally believe that the New Jersey Legislature considered factors other than the most partisan political goals and population equality” and that the plan violated equal protection.³⁷ Because the district court only considered the constitutionality of the population deviations and did not adjudicate the gerrymandering issue, Justice Powell reasoned that the gerrymandering was not at issue for the Court.³⁸

B. *The Justiciability of Partisan Gerrymandering*

1. Partisan Gerrymandering is Justiciable

It was not until *Davis v. Bandemer*,³⁹ sixteen years after *Baker* decided the justiciability of malapportionment, that the Court, in a six-to-three vote, declared that partisan gerrymandering was a

33. *Id.* at 578–79.

34. 462 U.S. 725 (1983). In *Karcher*, plaintiffs challenged a New Jersey congressional apportionment plan arguing that it allegedly diluted the voting strength of Republicans. *See id.* at 729. The Court invalidated the scheme because the population deviations between the congressional districts failed to reflect a good-faith effort to achieve population equality after analyzing the case under Article I, Section 2 and prior case law but did not broach the issue of gerrymandering in its decision. *See id.* at 730–31, 744.

35. *See id.* at 748 (Stevens, J., concurring).

36. *Id.* (Stevens, J., concurring) (internal citations omitted) (emphasis added).

37. *See id.* at 788–90 (Powell, J., dissenting).

38. *See id.* at 790 (Powell, J., dissenting).

39. 478 U.S. 109 (1986) (plurality opinion).

justiciable issue.⁴⁰ Indiana Democrats challenged the redistricting scheme adopted by the Republican-controlled state legislature, claiming that the scheme diluted the votes of that state's Democrats and violated their equal protection rights.⁴¹ Six Justices agreed that partisan gerrymandering was a justiciable issue without deciding upon a standard for adjudicating those claims, reasoning that when *Baker* decided that malapportionment was a justiciable issue, the *Baker* Court "did not rely on the potential for such a rule in finding justiciability."⁴²

The test the four-member plurality of the *Bandemer* Court set forth required proof of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" for the partisan gerrymandering suit to be successful.⁴³ The first prong of this test, intentional discrimination against an identifiable political group, would not be difficult for plaintiffs to meet, the Court reasoned, so long as the redistricting plan had been done by the state legislature.⁴⁴ To measure the second prong, the requisite discriminatory effect, there would need to be proof that the particular political group had "been unconstitutionally denied its chance to effectively influence the political process."⁴⁵ This high threshold would be satisfied "by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."⁴⁶

Justice Lewis Powell, joined by Justice John Paul Stevens, rejected this test and argued that "district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation."⁴⁷ The test proposed by Justice Powell

40. *See id.* at 113 (plurality opinion).

41. *See id.* at 115 (plurality opinion).

42. *Id.* at 123 (plurality opinion).

43. *Id.* at 127 (plurality opinion). While a majority could not agree to a specific test for adjudicating partisan gerrymandering claims, the four Justice plurality agreed to the test set forth by Justice Powell that has been the test used by the lower federal courts. *See Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

44. *See Bandemer*, 478 U.S. at 129 (plurality opinion).

45. *Id.* at 132–33 (plurality opinion).

46. *Id.* at 133 (plurality opinion). Plaintiffs have yet to succeed under this test. *See supra* note 8.

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

to determine whether a legislature resorted to unconstitutional partisan gerrymandering focused on three factors: “[1] the shapes of voting districts and adherence to established political subdivision boundaries. . . . [2] the nature of the legislative procedures by which the apportionment law was adopted and [3] legislative history reflecting contemporaneous legislative goals.”⁴⁸ Justice Sandra Day O’Connor, joined by Chief Justice Warren Burger and Justice William Rehnquist, argued that partisan gerrymandering claims are nonjusticiable because of the federal courts’ inability to find or create a judicially manageable standard.⁴⁹

[T]he Court’s holding that political gerrymandering claims are justiciable has opened the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment. There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.

. . . The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment.⁵⁰

The *Bandemer* decision confused federal courts by failing to set forth a clear standard to adjudicate partisan gerrymandering claims, leaving the federal courts to rely upon the plurality’s impossible test. The twenty partisan gerrymandering cases that followed *Bandemer* resulted in the federal courts denying relief in each and every one,⁵¹ leaving commentators to conclude that its “standards are fundamentally unworkable and incorporate such ambiguous and unclear commands as to be unfit for any manageable form of judicial application.”⁵²

Justice Powell’s argument revives the reasoning of Justice Stevens in his concurring opinion in *Karcher v. Daggett*. See 462 U.S. 725, 748 (1983) (Stevens, J., concurring).

48. *Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part).

49. See *id.* at 147 (O’Connor, J., concurring).

50. *Id.* (O’Connor, J., concurring).

51. See *supra* note 8.

52. Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1646 (1993); see also John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 621 (1997) (observing that “by its impossibly high proof requirements the Court in *Bandemer* essentially eliminated political gerrymandering as a meaningful cause of action”).

2. No Standard Exists for the Courts to Adjudicate Partisan Gerrymandering

After eighteen years, the Supreme Court returned to confront partisan gerrymandering in *Vieth v. Jubelirer*.⁵³ The 2000 Census reduced the number of congressional seats in Pennsylvania from twenty-one to nineteen and the state legislature assumed the task of drawing a new districting map.⁵⁴ The Republican Party controlled a majority of both state houses and the Governor's office and adopted a partisan redistricting map, known as Act 1, designed to punish Democrats for enacting pro-Democrat redistricting plans elsewhere.⁵⁵ The plan was designed to give Republicans at least thirteen congressional seats, even though the political parties shared almost equal support among the Pennsylvania electorate.⁵⁶

Registered Democrats in Pennsylvania brought suit against Act 1, seeking to enjoin its implementation and alleging "malapportioned districts, in violation of the one-person, one-vote requirement of Article I, [Section] 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."⁵⁷ The complaint alleged that districts were drawn in a "meandering and irregular" way and that "all traditional redistricting criteria, including the preservation of local government boundaries," had been ignored for the purpose of partisan advantage.⁵⁸ The district court granted the defendant's motion to dismiss all the claims against Pennsylvania except the apportionment claim,⁵⁹ over which the court retained jurisdiction to review and approve the remedial plan, enacted on April 18, 2002, known as Act 34.⁶⁰ The plaintiffs moved to impose the remedial districts, arguing that Act 34 should not be considered a proper remedial scheme because it was malapportioned and constituted an unconstitutional political gerrymander for the same reasons as

53. 541 U.S. 267 (plurality opinion).

54. *See id.* at 272 (plurality opinion).

55. *See id.* (plurality opinion).

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

57. *Vieth*, 541 U.S. at 272 (plurality opinion).

58. *Id.* at 272-73 (plurality opinion).

59. *See id.* at 273 (plurality opinion).

60. *See id.* (plurality opinion).

Act 1.⁶¹ The district court denied the motion and concluded that the new districts were not malapportioned and did not constitute a partisan gerrymander.⁶² The court reasoned that Act 1 simply made it more difficult for the plaintiffs to elect Democratic candidates, and that alone was not enough to prevail.⁶³

[T]he mere fact that a particular appointment scheme makes it more difficult for a particular group in a particular district to elect representatives of its choice does not render that scheme constitutionally infirm. . . . [A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause.⁶⁴

The Supreme Court heard the case on December 10, 2003, and in a four-four-one vote, upheld the ruling of the district court.⁶⁵

The Supreme Court, as it did in *Bandemer*, disagreed on how partisan gerrymandering claims should be adjudicated in *Vieth*. The plurality, written by Justice Antonin Scalia and joined by Chief Justice Rehnquist and Justices O'Connor and Clarence Thomas, held that partisan gerrymandering claims are nonjusticiable.⁶⁶ Justice Anthony Kennedy agreed that no justiciable standard existed and affirmed the district court's opinion joined in dismissing the claim but would not go so far as to say all partisan gerrymandering claims are nonjusticiable.⁶⁷ Justices Stephen Breyer, Ruth Bader Ginsberg, David Souter (joined by Ruth Bader Ginsberg), and John Paul Stevens dissented from the plurality, with each dissent proposing a new test for federal courts to adjudicate partisan gerrymandering.⁶⁸

The plurality opinion recognized that even though the judiciary is responsible for declaring what the law is, there are cases in which the judiciary "has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the po-

61. *Id.* (plurality opinion).

62. *See id.* (plurality opinion).

63. *See Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 546 (M.D. Pa. 2002).

64. *Id.* at 546–47 (citing *Davis v. Bandemer*, 478 U.S. 109, 131–32 (1986)).

65. *See Veith*, 541 U.S. at 306 (plurality opinion).

66. *See id.* at 281 (plurality opinion).

67. *See id.* at 306 (Kennedy, J., concurring).

68. *See id.* at 317 (Stevens, J., dissenting).

litical branches or involves no judicially enforceable rights.”⁶⁹ Looking back to the six independent tests of *Baker v. Carr*, Justice Scalia concluded that partisan gerrymandering claims are nonjusticiable because they lack judicially discoverable and manageable standards, one of the factors listed in *Baker*.⁷⁰ Reasoning that because the federal courts had failed to succeed in shaping the standard from *Bandemer* and because the four dissenters enunciated three different standards, each one different from the two standards proposed in *Bandemer* and the one proposed by the appellants, Justice Scalia concluded that “there is no constitutionally discernable standard” for partisan gerrymandering cases.⁷¹

In examining the six tests put forth to adjudicate partisan gerrymandering claims, Justice Scalia began with the test proposed by the plurality in *Bandemer* because it had been the standard used by the federal courts.⁷² Justice Scalia rejected this test because it “was misguided when proposed, has not been improved in subsequent application, and is not even defended . . . by the appellants.”⁷³ The appellants proposed a test similar to *Bandemer* but modified the level of intent to predominant intent.⁷⁴ Under this test, “a plaintiff must ‘show that the mapmakers acted with a *predominant intent* to achieve partisan advantage,’ [supported] ‘by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage.’”⁷⁵ Justice Scalia discarded this test because the second part of the test would require that a redistricting plan be invalidated only if a majority of the electorate is prevented from electing a majority of the representatives, and this is constitutionally unjustifiable because there is no constitutional requirement of proportional representation.⁷⁶ The appellants’ test employed the reasoning used in racial gerrymandering cases that applied section 2 of the Voting Rights Act of 1965,⁷⁷

69. *Id.* at 277 (plurality opinion).

70. *See id.* at 277–81 (plurality opinion).

71. *See id.* at 292 (plurality opinion).

72. *See id.* at 281 (plurality opinion).

73. *Id.* at 283–84 (plurality opinion).

74. *See id.* at 284 (plurality opinion).

75. *Id.* (plurality opinion) (quoting Brief for Appellants at 19, *Vieth*, 541 U.S. 267 (No. 02-1580)).

76. *See id.* at 287–88 (plurality opinion).

77. 42 U.S.C. § 1973 (2000).

and Justice Scalia argued that because “a person’s politics is rarely as readily discernible—and *never* as permanently discernable—as a person’s race,”⁷⁸ it is impossible to ascertain which party holds the majority in a state.⁷⁹ Justice Scalia discarded the three-factor test proposed by Justice Powell in *Bandemer*⁸⁰ because it rests upon the idea of fairness, and “[f]airness’ does not seem to us a judicially manageable standard.”⁸¹

The plurality then examined the tests proposed by the dissenters, Justices Stevens, Souter and Breyer. Justice Stevens argued that political affiliations are an inappropriate factor to consider when constructing district lines,⁸² and that by looking at the appearance of the districts and procedures used to create them, courts can effectively identify unconstitutional partisan gerrymandering.⁸³ Applying the analysis of racial gerrymandering, Justice Stevens proposed to examine whether partisan considerations dominate over neutral considerations and control the redistricting scheme.⁸⁴ If there is no identifiable neutral criterion used that can justify the district lines, and if the only possible explanation for the district’s bizarre shape is a desire to increase party strength, there is a valid partisan gerrymandering claim under the Equal Protection Clause.⁸⁵ Justice Scalia criticized Justice Stevens’s test for the same reasons the appellants’ standard failed to pass muster; the criterion used for racial gerrymandering cases cannot be applied to partisan gerrymandering claims.⁸⁶

Justice Souter proposed a test that would require plaintiffs “to satisfy elements of a *prima facie* cause of action, at which point the State would have the opportunity not only to rebut the evidence supporting plaintiff’s case, but to offer an affirmative justification for the districting choices, even assuming the proof of the

78. *Vieth*, 541 U.S. at 287 (plurality opinion).

79. *See id.* at 286–87 (plurality opinion).

80. The three factors, none of which are dispositive, include (1) the shapes of voting districts and adherence to established political subdivision boundaries, (2) the nature of the legislative procedures by which the apportionment law was adopted, and (3) legislative history reflecting contemporaneous legislative goals. *See Davis v. Bandemer*, 478 U.S. 109, 173 (1986) (Powell, J., concurring in part and dissenting in part).

81. *Vieth*, 541 U.S. at 291 (plurality opinion).

82. *See id.* at 320 (Stevens, J., dissenting).

83. *See id.* at 321–23 (Stevens, J., dissenting).

84. *See id.* at 339 (Stevens, J., dissenting).

85. *See id.* (Stevens, J., dissenting).

86. *See id.* at 293 (plurality opinion).

plaintiff's allegations."⁸⁷ The plaintiff would have to establish five required elements: (1) the plaintiff belongs to a "cohesive political group" such as a major political party;⁸⁸ (2) the district in which the plaintiff resides "paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features;"⁸⁹ (3) "specific correlations between the district's deviations from traditional districting principles and the distribution of the population of [the plaintiff's] group" are sufficient to support "an inference that the district took the shape it did because of the distribution of plaintiff's group;"⁹⁰ (4) presentation of a hypothetical district that includes the plaintiff's residence "in which the proportion of the plaintiff's group was lower (in a packing claim) or higher (in a cracking one) and which at the same time deviated less from traditional districting principles than the actual district;"⁹¹ and (5) evidence "that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack [the plaintiff's] group."⁹² Justice Scalia criticized this test for two main reasons. First, the test would fail because it is unclear what constitutional deprivation Justice Souter is attempting to identify and prevent, except for a vague notion of "extremity of unfairness."⁹³ The second shortcoming of this test, according to Justice Scalia, is the amount of quantifying judgment needed for the last four elements:

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 . . . a *sine qua non* cause of the districting, or a *predominant* cause)?⁹⁴

87. *Id.* at 346 (Souter, J., dissenting).

88. *See id.* at 347 (Souter, J., dissenting).

89. *Id.* at 347–48 (Souter, J., dissenting).

90. *Id.* at 349 (Souter, J., dissenting).

91. *Id.* at 349 (Souter, J., dissenting). "Cracking" and "packing" are two of the most common tools used by gerrymanderers. *See* Berman, *supra* note 3, at 800–01 n.136. In packing, opposition voters are "packed" into the smallest number of districts where they already constitute a majority. *Id.* In cracking, small groups of opposition voters are split into a large number of districts where they are the minority. *Id.*

92. *Vieth*, 541 U.S. at 350 (Souter, J., dissenting).

93. *Id.* at 297 (plurality opinion) ("[N]o 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's group.").

94. *Id.* at 296 (plurality opinion).

Justice Scalia pointed out that while the test proposed by Justice Souter might be judicially manageable, it fails to relate to any constitutional harms.⁹⁵

Justice Breyer proposed the sixth and final test and was the only dissenter in *Vieth* to agree that the use of political considerations in redistricting is not a fatal flaw but can actually be a valuable tool in situations such as single-member districts.⁹⁶ Justice Breyer argued that a system of redistricting that does not take into account partisan considerations could convert “a small shift in political sentiment . . . into a seismic shift in the make-up of the legislative delegation.”⁹⁷

[T]raditional or historically based boundaries are not, and should not be, “politics free.” Rather, those boundaries represent a series of compromises of principle—among the virtues of, for example, close representation of voter views, ease of identifying “government” and “opposition” parties, and stability in government. They also represent an uneasy truce, sanctioned by tradition, among different parties seeking political advantage.⁹⁸

Justice Breyer argued that partisan redistricting is unconstitutional when it involves “*unjustified* entrenchment.”⁹⁹ He defined entrenchment as a situation in which “a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power” and unjustified entrenchment as a situation in which “the minority’s hold on power is purely the result of partisan manipulation and not other factors.”¹⁰⁰ While Justice Breyer failed to give specific examples of unjustified entrenchment, he did illustrate the concept with several sets of circumstances; in each, he evaluated four factors, including (1) when the districts were redrawn, (2) how the districts compare to traditional districting criteria, (3) how the majority party fares in the recent elections, and (4) possible explanations for election results other than efforts to obtain partisan political advantage.¹⁰¹ The plurality approved of Justice Breyer’s acknowledgement that the pursuit of partisan advantage can be constitu-

95. See *id.* at 294–95 (plurality opinion).

96. See *id.* at 357–58 (Breyer, J., dissenting).

97. See *id.* at 359 (Breyer, J., dissenting).

98. *Id.* at 360 (Breyer, J., dissenting).

99. *Id.* (Breyer, J., dissenting) (emphasis in original).

100. *Id.* (Breyer, J., dissenting).

101. See *id.* at 365–67 (Breyer, J., dissenting).

tional, but they criticized his concept of unjustified entrenchment as a standard because of the uncertainty in its application.¹⁰²

Justice Kennedy, in his concurring opinion, agreed with both the plurality and the dissenters. He concurred with the plurality in their assertion that a judicially manageable standard to adjudicate partisan gerrymandering claims has yet to be presented, but he refrained from going so far as to say that partisan gerrymandering claims are categorically nonjusticiable.¹⁰³ Two main obstacles exist when courts are presented with partisan gerrymandering claims according to Justice Kennedy. "First is the lack of comprehensive and neutral principles for drawing electoral boundaries."¹⁰⁴ He argued that the conclusion that partisan gerrymandering violates the law must be "more than the conclusion that political classifications were applied," it must be "that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."¹⁰⁵ Second, there is an "absence of rules to limit and confine judicial intervention."¹⁰⁶ Justice Kennedy argued that before we can define a clear and manageable standard, there must be an agreement on the substantive principles of districting's fairness.¹⁰⁷ Rather than reach the conclusion of the plurality, that no judicially manageable standard has yet to emerge and, therefore, partisan gerrymandering claims should be outside the province of the judiciary, Justice Kennedy would have dismissed the case for failure to state a claim and would have held out hope for crafting a workable standard.¹⁰⁸

Vieth accomplished very little in the wake of *Bandemer*. The Court did set aside *Bandemer* because of its vague ruling and the difficulty in applying the high standard set by the *Bandemer* Court, but it did very little to resolve the justiciability of partisan gerrymandering claims. The plurality opinion held that partisan gerrymandering cases are nonjusticiable; however, the lack of a clear consensus by the Court and the arrival of two new Justices,

102. See *id.* at 299–300 (plurality opinion) ("In sum, we neither know precisely what Justice Breyer is testing for, nor precisely what fails the test.").

103. See *id.* at 306 (Kennedy, J., concurring).

104. *Id.* at 306–07 (Kennedy, J., concurring).

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

106. *Id.* (Kennedy, J., concurring).

107. See *id.* at 307–08 (Kennedy, J., concurring).

108. See *id.* at 306 (Kennedy, J., concurring).

Chief Justice John Roberts and Justice Samuel Alito,¹⁰⁹ leaves open the possibility that future partisan gerrymandering claims may succeed in the judicial system.

III. THE SITUATION IN TEXAS

A. *The Political History of Texas*

"[T]he Democratic Party dominated the political landscape in Texas" from Reconstruction until the early 1960s.¹¹⁰ In 1961, the first Republican since 1875 was elected to the Senate; in the 1960s and 1970s, the Republican Party never held more than four congressional seats, and their statewide voting strength hovered around thirty-five percent.¹¹¹ In 1978, even though the Republican Party reclaimed the Governor's Mansion for the first time in over one hundred years and had statewide voting strength at forty-three percent, Democrats won twenty of the twenty-four congressional seats.¹¹² In the 1980s, the Republican Party's strength grew, and by 1990 the Republican Party's statewide voting strength sat at forty-seven percent, merely four points lower than the Democratic Party's statewide voting strength.¹¹³ The Democrats, however, still controlled nineteen congressional districts, compared to the Republicans' eight districts.¹¹⁴

In 1991, the Democratically controlled Texas legislature enacted a new congressional district map resulting in the Democratic Party winning twenty-one congressional seats to the Republican Party's nine.¹¹⁵ The Republicans continued to gain control over the statewide races, with their statewide voting strength even with that of the Democratic Party.¹¹⁶ Several Republicans

109. Chief Justice John Roberts was confirmed on September 29, 2005. Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1. Justice Samuel Alito was confirmed on January 31, 2006. Charles Babington, *Alito Is Sworn in on High Court*, WASH. POST, Feb. 1, 2006, at A1.

110. *Henderson v. Perry*, 399 F. Supp. 2d 756, 763 (E.D. Tex. 2005); cf. Mike Kingston, *John Tower: The GOP's Godfather*, in 1992-93 TEXAS ALMANAC AND STATE INDUSTRIAL GUIDE 438, 438 (1991).

111. See *Henderson*, 399 F. Supp. 2d at 763.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*

challenged the 1991 congressional district map as an unconstitutional partisan gerrymander under *Bandemer*, but the district court denied relief and upheld the 1991 map.¹¹⁷ In the 1992 elections, the Democratic Party won twenty-one congressional seats, and the Republican Party won nine.¹¹⁸ In the 1990s, the Republicans continued to dominate the statewide elections and won every one of Texas's elected statewide offices since 1994.¹¹⁹ In 1997, the Republican Party took control of the Texas Senate, but it would be another six years before the Republican Party controlled both state legislatures and the Governor's mansion.¹²⁰

B. *The 2001 Congressional Districting Process*

After the 2000 federal decennial census, Texas received two additional seats in Congress, giving the state a total of thirty-two.¹²¹ The Texas legislature, in 2001, received the task of replacing the previous thirty districts with thirty-two new, equipopulous districts.¹²² At that time, Democrats and Republicans shared political power in Texas, with "Republicans controlling the State Senate and the Governor's mansion and Democrats controlling the State House."¹²³ The Texas legislature failed to agree to a new congressional districting map, and Governor Rick Perry refused to call a special session to resolve the issue, so the burden shifted to a three-judge panel in the United States District Court for the Eastern District of Texas to create a new congressional districting map.¹²⁴ On November 14, 2001, in *Balderas v. Texas*,¹²⁵ the district court unanimously imposed a new thirty-two district congressional map upon Texas, named Plan 1151C.¹²⁶

117. See *Terrazas v. Slagle*, 789 F. Supp. 828, 844 (W.D. Tex. 1992).

118. See State Appellees' Brief, *supra* note 11, at 2.

119. See *id.* at 4.

120. See *id.* at 5.

121. See Brief for Jackson Appellants, *supra* note 12, at 3.

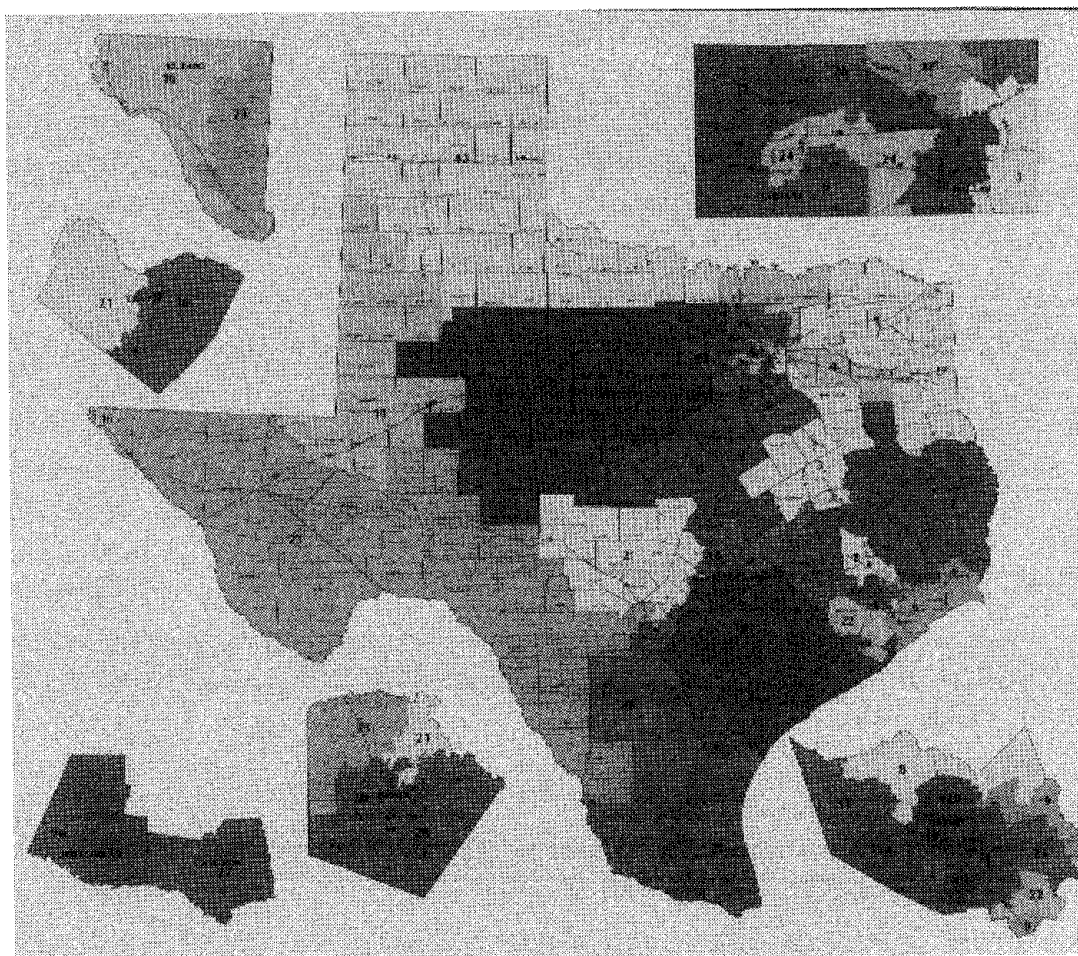
122. See *id.*

123. *Id.*

124. See *id.* at 3-4.

125. *Balderas v. Texas*, No. 6:01CV158, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex. Nov. 14, 2001) (per curiam).

126. See Brief for Jackson Appellants, *supra* note 12, at 4.



2001 Texas Congressional District Map—Plan 1151C¹²⁷

The *Balderas* court realized that federal courts have a limited role in creating a congressional redistricting and that “a court must defer to legislative judgments on reapportionment as much as possible;”¹²⁸ however, in the given situation, the court “is forbidden to [defer] when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans.”¹²⁹ In drawing the map, the district court started with a blank map and applied “neutral districting factors” that include compactness, contiguity, and respect for county and municipal boundaries.¹³⁰ Following the process of

127. Jurisdictional Statement app. at 218a, *Jackson v. Perry*, No. 05-276 (U.S. Aug. 31, 2005) [hereinafter *Jackson Jurisdictional Statement*].

128. *Balderas*, 2001 U.S. Dist. LEXIS 25740, at *11 (quoting *Upham v. Seamon*, 456 U.S. 37, 39 (1982) (per curiam)).

129. *Id.* (quoting *Upham*, 456 U.S. at 39).

130. *See id.* at *11, *13.

neutral redistricting outlined by Dr. John Alford, Rice University professor of political science,¹³¹ the court “checked [its] plan against the test . . . of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races”¹³² and found that the plan was “likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state.”¹³³ The new congressional district map went into effect November 14, 2001, and neither the State nor any other defendant appealed the district court’s decision.¹³⁴

The court-drawn plan was utilized in the 2002 congressional elections in Texas and resulted in a congressional delegation with fifteen Republicans and seventeen Democrats.¹³⁵ The two new districts elected Republicans, twenty-eight other districts reelected incumbents, and one new freshman from each party was elected.¹³⁶ In the Texas state races, the Republicans took control of the state legislature for the first time in decades.¹³⁷

C. *The 2003 Redistricting Process*

In 2003, the newly elected seventy-eighth legislature of Texas convened and decided to voluntarily reconsider redistricting the congressional districts.¹³⁸ This unprecedented act of reconsidering the congressional districts in the middle of the decade ignited a controversy in the Texas legislature. The critical deadline for passing the legislation for a new congressional district plan in the regular session lapsed when a group of Democratic state repre-

131. John R. Alford served as the State’s expert witness in the *Balderas* trial. *See id.* at *12.

132. *Id.* at *17–18.

133. *Id.* at *18.

134. *See* Brief for Jackson Appellants, *supra* note 12, at 4–5. Several Latino plaintiffs, however, appealed to the Supreme Court, arguing that an additional Hispanic district should be drawn in the Southwest region of the state. *Balderas v. Texas*, No. 6:01CV158, 2001 WL 34104836 (E.D. Tex. Nov. 28, 2001) (per curiam), *aff’d.*, 536 U.S. 919 (2002). The Supreme Court affirmed the decision of the district court and upheld the 2001 congressional district map. *Balderas v. Texas*, 536 U.S. 919 (2002).

135. *See* Brief for Jackson Appellants, *supra* note 12, at 5. Representative Ralph Hall, however, switched parties in January 2004, resulting in sixteen Democrat and sixteen Republican Representatives. *See* Jackson Jurisdictional Statement, *supra* note 127, at 5 n.1.

136. *See* Jackson Jurisdictional Statement, *supra* note 127, at 5.

137. *See* Brief for Jackson Appellants, *supra* note 12, at 6.

138. *See id.*

sentatives left the state and broke quorum for a week and quashed any hope of passing a new district scheme.¹³⁹ Governor Rick Perry called the Texas legislature into special session in order to resume the congressional redistricting.¹⁴⁰ The first two special sessions failed to pass a new district scheme because eleven members of the Texas Senate steadfastly refused to pass any new plan.¹⁴¹ The long-standing tradition of the Texas Senate required support from a two-thirds supermajority of the Senate Jurisprudence Committee (comprised of thirty-one members) before the full Senate would consider the measure.¹⁴² Because the eleven Senators refused to approve the plan, Lieutenant Governor David Dewhurst announced plans to abandon the two-thirds rule in any future special session.¹⁴³ The eleven Texas Senators then fled the state to deprive the Senate of a quorum.¹⁴⁴ When one state senator returned to the state a month later, the third special session was called into action.¹⁴⁵

In the third special session, each house passed a map preserving all eleven minority districts. The conferees, however, produced a new map that dismantled two minority districts, District 24 in the Dallas-Fort Worth area and District 23 in south Texas, and added another minority district that stretched three hundred miles from McAllen to Austin.¹⁴⁶ This new map, known as Plan 1374C, passed both state Senate and House on October 10 and 12, 2002, with every Latino and African-American State Senator and all but two of the minority State Representatives voting against Plan 1374C.¹⁴⁷

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.* at 6–7.

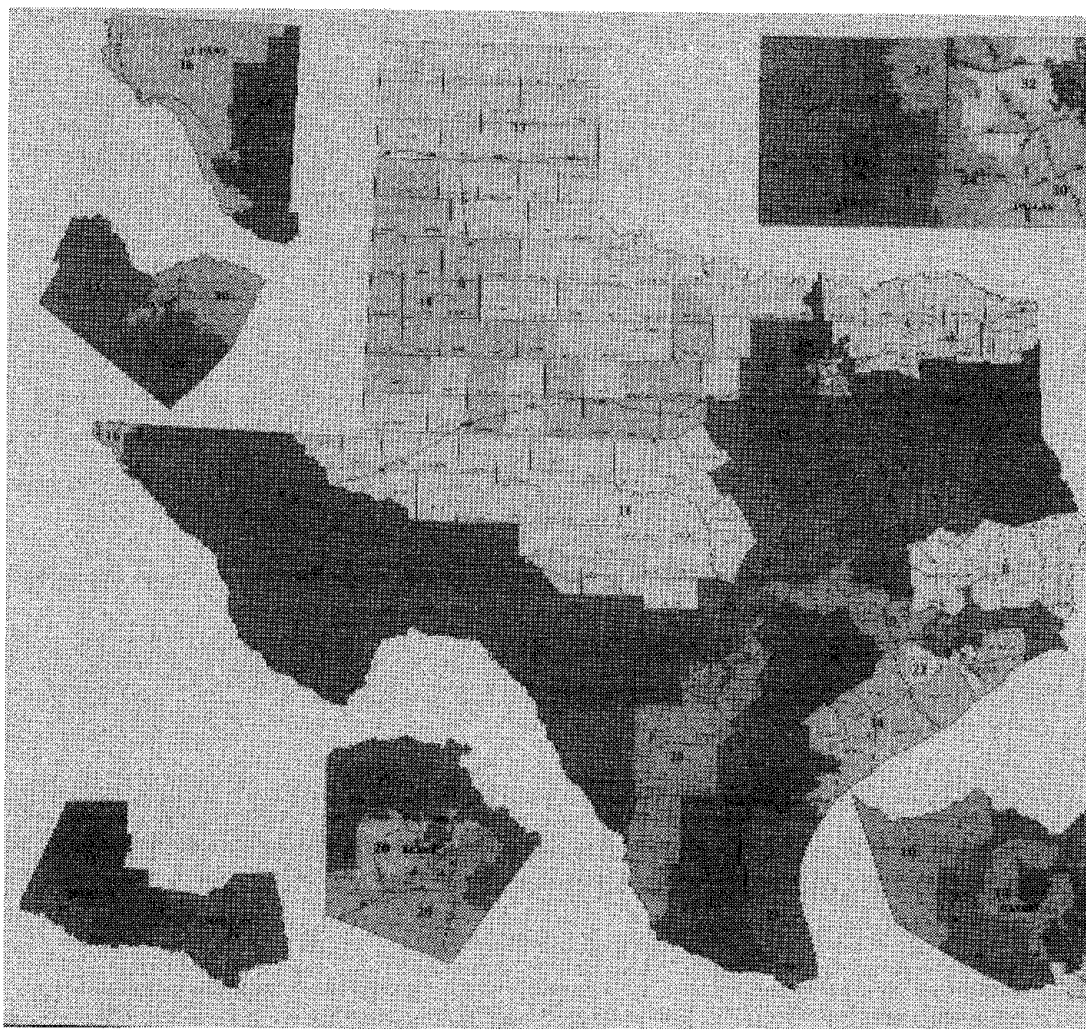
143. *See id.* at 7.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See Jackson Jurisdictional Statement, supra* note 127, at 7.



2003 Texas Congressional District Map—Plan 1374C¹⁴⁸

The new map shifted over eight million Texans into new districts and split up more counties than the prior, valid 2001 map; and the new thirty-two districts were less compact than before.¹⁴⁹ The 2003 plan endeavored “to protect all [fifteen] Republican Members of Congress and to defeat at least [seven] of the [seventeen] Democratic Members.”¹⁵⁰ Six of the Democrats were “paired” with another incumbent, placed in Republican-heavy districts, or placed in completely new districts where they were unknown to constituents.¹⁵¹ The seventh Democrat was the representative of District 24—a district dominated by minority populations—where

148. *Id.*, app. at 219a.

149. *See* Brief for Jackson Appellants, *supra* note 12, at 8.

150. *Id.*

151. *See id.*

the constituents were split up and placed into five different, predominantly non-Latino, white districts.¹⁵² The Republican incumbent, Representative Henry Bonilla in District 23, narrowly won the 2002 election, and the new 2003 map ensured his safety in being re-elected by moving 100,000 Latino voters and replacing them with non-Latino, white and Republican voters.¹⁵³ To change the voter make-up of District 23, the legislature drew a new district that stretched from the Mexican border to Austin, called District 25.¹⁵⁴ Stretching three hundred miles long, it joined two densely populated areas, one in Austin and one in the Rio Grande Valley, by a narrow stretch of land that is only ten miles wide in some areas.¹⁵⁵ The new map was predicted to give Republicans at least twenty-one solid congressional districts out of thirty-two districts, and that prediction came true in the 2004 elections when Republicans won twenty-one seats with very few close competitions in the districts.¹⁵⁶

152. *See id.* at 8–9.

153. *See id.* at 9.

154. *See id.* at 9–10.

155. *See id.* at 10.

156. *See id.*

D. *The Procedural History*

Plan 1374C was challenged by Texas voters of various races and ethnicities in over seventeen congressional districts. They alleged that the new plan was an unconstitutional partisan gerrymander—a violation of both the racial gerrymandering doctrine of *Shaw v. Reno*¹⁵⁸ and section 2 of the Voting Rights Act.¹⁵⁹ The district court upheld the 2003 map, and the Supreme Court denied a stay¹⁶⁰ but later vacated the district court's ruling and remanded the case back to the district court to consider in light of the Court's ruling in *Vieth*.¹⁶¹ Following the remand, the district court reheard arguments and again upheld the 2003 plan.¹⁶²

In the cases before the remand to the district court, the State of Texas admitted, and the three-judge court found as fact, that the sole motivation for changing the court-drawn map in 2003 was to increase the number of seats held by Republicans and diminish the number of seats held by Democrats.¹⁶³ On remand, the district court did not retract its previous finding of partisan motivation but instead concluded that it is a constitutionally permissible exercise of government power to create a redistricting map that appeals solely to partisan motivations.¹⁶⁴ The Supreme Court, on December 13, 2005, granted certiorari to hear four of the Texas Redistricting Cases.¹⁶⁵

158. 509 U.S. 630 (1993).

159. See Brief for Jackson Appellants, *supra* note 12, at 10–11.

160. See *Jackson v. Perry*, 540 U.S. 1147 (2004).

161. *Jackson v. Perry*, 543 U.S. 941 (2004).

162. See *Henderson v. Perry*, 399 F. Supp. 2d 756, 778 (E.D. Tex. 2005).

163. See *Session v. Perry*, 298 F. Supp. 2d 451, 470–71 (E.D. Tex. 2004) (per curiam). “There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage.” *Id.* at 470. “[T]he newly dominant Republicans . . . decided to redraw the state’s congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents.” *Id.* at 472 (citation omitted). “Former Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for the Republicans was 110% of the motivation for the Plan, that it was ‘the entire motivation.’” *Id.* at 472–73. *But see* State Appellees’ Brief, *supra* note 11, at 28–29 (arguing that while partisan gain was a motivating factor, it was only one of many factors influencing the 2002 redistricting process).

164. *Henderson*, 399 F. Supp. 2d at 765–67.

165. The court noted probable jurisdiction in the following cases: *GI Forum of Tex. v. Perry*, 126 S. Ct. 829 (2005); *Jackson v. Perry*, 126 S. Ct. 827 (2005); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 827 (2005); *Travis County, Tex. v. Perry*, 126 S. Ct. 827 (2005). The Supreme Court set aside two hours of oral arguments to be heard on Mar.

IV. ANALYSIS AND PREDICTIONS

The Texas Redistricting Cases introduce several new issues not previously presented to the Court. Unlike *Vieth* and *Bandemer*, the redistricting of Texas took place mid-decade and not as the result of the decennial census and the constitutional need to reapportion the congressional districts.¹⁶⁶ The State of Texas had a valid and workable congressional district map in place that would have sufficed until the next decennial census in 2010; the state had no constitutional obligation to reapportion their districts in 2003.¹⁶⁷ It is also established that the redistricting took place for no other reason than to secure a greater partisan advantage in upcoming elections.¹⁶⁸ The 2001 congressional district map, however, was created by the federal court¹⁶⁹ and not by the state legislature, to whom the Constitution vests the power to determine district boundaries.¹⁷⁰ The inability of the state legislature to alter the judicially created map until 2010 infringes upon that power. Additionally, none of the appellants propose a new test or standard for the courts to implement when adjudicating partisan gerrymandering.¹⁷¹ Without a way to measure future partisan gerrymandering, the Court will remain in the quagmire surrounding *Bandemer* and *Vieth*. Finally, there is the concern that, if the Court upholds Plan 1374C, then voters will lose their power to determine their representatives to political parties.

A. *One-Person, One-Vote Requirement of the Constitution*

Under the one-person, one-vote rule established by Article I, Section 2 of the Constitution, the Court has consistently held that congressional districts must have equal populations; otherwise, they are unconstitutional.¹⁷² Realizing that population shifts oc-

1, 2006 based only on the appellants' briefs; the state of Texas and the other defendants did not submit briefs prior to the Supreme Court's decision to review the case.

166. See Brief for Jackson Appellants, *supra* note 12, at 6.

167. See Brief for Travis County Appellants, *supra* note 12, at 19.

168. See *Session*, 298 F. Supp. 2d at 471.

169. See *Balderas v. Texas*, No. 6:01CV158, 2001 U.S. Dist. LEXIS 25740, at *11 (E.D. Tex. Nov. 14, 2001) (per curiam).

170. See U.S. CONST. amend. XIV, § 2.

171. See State Appellees' Brief, *supra* note 11, at 36–38.

172. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003); *Karcher v. Daggett*, 462 U.S. 725, 732 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 741 (1973); *Reynolds v.*

cur often and are almost impossible to track,¹⁷³ the Court has established the legal fiction, for apportionment purposes, that populations do not shift between districts between the decennial censuses.¹⁷⁴ The Court maintains that once a state has completed a new district map after the decennial census, that state may “operate under the legal fiction that even [ten] years later, the plans are constitutionally apportioned.”¹⁷⁵ This legal fiction satisfies the practical concern that constant redistricting would be an impossible task for the state to manage and simultaneously creates a workable time frame for the states to readjust their districts.¹⁷⁶ The constitutional equal population standard tolerates only “population variances which are unavoidable despite a good-faith effort to achieve absolute equality.”¹⁷⁷

Between the 2000 census and 2003, the population in Texas increased from 20,851,820 to 22,118,509, an increase of almost 1.5 million.¹⁷⁸ When the Texas legislature enacted Plan 1374C, it used the outdated census data from 2000 in violation of *Karcher v. Daggett*.¹⁷⁹ The rule in *Karcher* permits only limited departures from inequality in congressional redistricting maps and only if those departures are unavoidable after a good faith effort to achieve absolute equality.¹⁸⁰ The state made no effort, much less the good faith effort required by *Karcher*, to achieve equality, and the appellants argue that absolute equality was achievable because the state already had a constitutionally legitimate plan in effect until 2010.¹⁸¹ The state had two options to satisfy the one-person, one-vote rule: the state could have used updated census numbers that had been collected with substantial technical precision,¹⁸² or the state could have demonstrated that the deviations

Sims, 377 U.S. 533, 568 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 8–9 (1964).

173. See *Gaffney*, 412 U.S. at 746.

174. See *Ashcroft*, 539 U.S. at 488 n.2.

175. *Id.*

176. See, e.g., *Reynolds*, 377 U.S. at 583 (stating that the equal population rule is not intended to require “daily, monthly, annual, or biennial” redistricting).

177. *Karcher*, 462 U.S. at 730 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)).

178. See Appellant’s Brief on the Merits at 18, *League of United Latin Am. Citizens v. Perry*, No. 05-204 (U.S. Jan. 10, 2006).

179. See Brief for Travis County Appellants, *supra* note 12, at 19.

180. See *Karcher*, 462 U.S. at 730, (quoting *Kirkpatrick*, 394 U.S. at 531).

181. See Brief for Travis County Appellants, *supra* note 12, at 19; see also 13 U.S.C. § 196 (2000).

182. See *id.* at 18–19.

from the equality requirement were for a legitimate goal.¹⁸³ These limitations effectively prevent a state from using outdated numbers without offering a reason or justification for their use.¹⁸⁴ The appellants in *Travis County* argued that the use of the 2000 census is not a constitutional defense to the strict one-person, one-vote requirement and to allow the state to apply the inter-censal legal fiction in this manner “would be a perversion of the very reason the fiction was created.”¹⁸⁵

The state defended its use of the outdated numbers, arguing that under the inter-censal legal fiction, the 2000 census numbers were still valid.¹⁸⁶ Additionally, the *Travis County* appellants did not provide an alternative district map based upon the current population data that would satisfy *Karcher*.¹⁸⁷ Arguing that a limited time frame prevented such a study from being done,¹⁸⁸ they relied upon the 2001 map as being a constitutionally sufficient map under the *Karcher* standards rather than providing an updated map.¹⁸⁹ The federal government, however, provides a mid-decade census mechanism for state governments under 13 U.S.C. § 196.¹⁹⁰ This statute allows for states to commission the Secretary of Commerce to conduct a mid-decade census, and the results of that census will be designated as “Official Census Statistics” and used in “the manner provided by applicable law.”¹⁹¹ This provides the State of Texas with the ability to obtain accurate population data from an official census conducted by the Census Bureau, and that information can be used to create a new, accurate congressional district map; the state is not forced to rely upon state population figures. The Texas legislature, therefore, had the opportunity and ability to create an accurate mid-decade district map in compliance with *Karcher*.

183. See *id.* at 19.

184. See Jurisdictional Statement at 15, *Travis County, Tex. v. Perry*, No. 05-254 (U.S. Aug. 24, 2005) [hereinafter *Travis County Jurisdictional Statement*].

185. See Brief for Travis County Appellants, *supra* note 12, at 13.

186. See State Appellees’ Brief, *supra* note 11, at 58–60.

187. See Brief for Travis County Appellants, *supra* note 12, at 18 & n.18 (arguing that there was no time to commission a statewide census because of the limited two-month, time frame between the passage of Plan 1374C and the candidate file period for congressional seats).

188. See *id.* at 18–19 & n.18.

189. See State Appellees’ Brief, *supra* note 11, at 58.

190. 13 U.S.C. § 196 (2000).

191. *Id.* The Secretary of Commerce conducts a mid-decade census but that data cannot be used for redistricting purposes. See 13 U.S.C. § 141(d), (e)(2) (2000).

The appellants maintain that permitting the state to use the legal fiction to uphold a factually malapportioned plan diminishes the goal of the one-person, one-vote requirement.¹⁹² As argued in their jurisdictional statement,

It is one thing to indulge a legal fiction such as the one in question here when it is necessary to *force* legislative action, while still giving a solid reference point to meet the constitutional rule and minimize partisan manipulation. It is quite another thing to indulge the fiction to *permit* legislative action to meet the constitutional rule when the overweening aim of the action is partisan manipulation.¹⁹³

The one-person, one-vote requirement is a check upon a redistricting plan to limit partisan motivations.¹⁹⁴ To permit a state legislature, when creating a district map, to use inaccurate census numbers allows the state legislature to bypass the one-person, one-vote requirement.¹⁹⁵ State legislatures could ignore significant population shifts that might be detrimental to their political party.¹⁹⁶

This legal fiction is further perverted by the state's use of the 2002 election results and its political trends together with the outdated census data. The state used the 2002 election results to spot political trends and to redraw the district lines in 2003.¹⁹⁷ District 23 provides the best example of this inconsistency. Based upon the election results of the 2002 election in which Representative Bonilla won a close race and only garnered eight percent of the Latino vote in the majority-Latino district, the mapmakers decided to redraw the district, using the 2000 census numbers, and remove a significant portion of the Latino community to ensure his re-election.¹⁹⁸ Although it is understood that election trends from previous elections may be used in the redrawing of a decennial congressional district map, those election trends are as up-to-date as the decennial census numbers being used. For example, when a state redraws its map after the 2000 election, it is

192. See Brief for Travis County Appellants, *supra* note 12, at 13.

193. Travis County Jurisdictional Statement, *supra* note 184, at 17.

194. See *id.* at 10.

195. See Brief for Travis County Appellants, *supra* note 12, at 18–19.

196. See Brief for Appellants, at 30, *GI Forum of Tex. v. Perry*, No. 05-439 (U.S. Jan. 10, 2006) (examining the population shifts of Latinos in Texas and how the Texas Legislature manipulated the districts in Plan 1374C to dilute their voting strength).

197. See Brief for Travis County Appellants, *supra* note 12, at 9.

198. See *id.* at 8–9; Jackson Jurisdictional Statement, *supra* note 127, app. at 119a.

conceivable that the state would use the information from that election as well as the information from the 2000 census to draw the map. The *Travis County* appellants argue in their jurisdictional statement,

When new lines are drawn after the census but before the first election following it, all the many factors impinging on where lines should be drawn—equal population, avoiding racial gerrymanders, Voting Rights Act requirements, and above all, politics—must be considered at the same time. . . . In this way, there is an interlocking web of checks on unbridled partisanship.¹⁹⁹

Allowing a state to use outdated census data but current political trend information from a recent election undermines the intent of the one-person, one vote requirement.

B. *Pure Partisan Motivation*

The Supreme Court in *Vieth* struggled with a case of partisan gerrymandering in Pennsylvania that occurred when there was a need for a new district map after the 2000 census.²⁰⁰ The state of Pennsylvania lost two congressional seats and had to reapportion the districts to comply with the one-person, one-vote requirement.²⁰¹ Although partisan motivations played a significant role in how the districts were carved up,²⁰² the new map served a legitimate government purpose: to ensure that the districts adhered to the strict one-person, one-vote requirement in Article I, Section 2. This is not true in Texas, where the mid-decade redistricting map served no purpose other than partisan manipulation. While the State argues other factors were considered in creating the 2003 map, the underlying motivation was to increase the number of Republican congressional districts within the state.²⁰³

199. Travis County Jurisdictional Statement, *supra* note 184, at 18–19 (internal citation omitted).

200. See *Vieth v. Jubelirer*, 541 U.S. 267, 271–72 (2004) (plurality opinion).

201. See *id.* at 272 (plurality opinion).

202. See *id.* (plurality opinion).

203. See State Appellees' Brief, *supra* note 11, at 28–29, 107–09 (arguing that while the state legislature decided to create a new district map to diminish the power of the Democratic Party in Texas, the state legislature, when creating the map, considered factors such as physical geography, concerns by representatives, and municipal boundaries); see also Brief of Appellees Tina Beakiser, Chairman, Republican Party of Tex., and John DeNoyelles, at 23, *League of United Latin Am. Citizens v. Perry*, No. 05-204 (U.S. Feb. 1, 2006).

Much of the Court's struggle in *Vieth* rose from the complication of the constitutional requirement that Pennsylvania needed a new congressional district map. The Texas Redistricting Cases lack that additional factor and present the Court with a unique situation in which a state, with a valid, constitutionally-sufficient district map in place, decided to create a new map solely to bolster partisan control over the state.

The district court, in deciding the Texas Redistricting Cases, interpreted *Vieth* as rejecting the argument that proof of political motivations as the sole reason behind the new map is insufficient to invalidate a district or district map.²⁰⁴ The complaint in *Vieth* alleged that some of the district lines drawn in Pennsylvania were the result of pure partisan motivation in their argument before the Supreme Court, however, appellants advocated for that map to be invalidated because it was drawn with a *predominantly* partisan intent that would create a Republican bias in future elections.²⁰⁵ The test proposed by appellants in *Vieth* would determine unconstitutional partisan gerrymandering based upon whether "the mapmakers acted with a *predominant intent* to achieve partisan advantage."²⁰⁶ The plurality, joined by Justice Kennedy, rejected this test based upon predominant intent, because it would be too difficult for a court to effectively execute.²⁰⁷ *Vieth* did not offer any clear guidance for a map drawn solely for political reasons that does not serve any legitimate government purpose.²⁰⁸

The Equal Protection Clause, under the rational-basis standard, prohibits government use of power "solely to augment the influence of those with a favored political agenda at the expense of those who disagree with them."²⁰⁹ The Supreme Court has consistently held that "the concept of equal justice under the law requires the State to govern impartially" and has forbid states from "draw[ing] distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective."²¹⁰ In his concurring opinion in *Vieth*, Justice Kennedy re-

204. See Brief for Jackson Appellants, *supra* note 12, at 25.

205. See *Vieth*, 541 U.S. at 272–73, 284 (plurality opinion).

206. *Id.* at 284 (plurality opinion).

207. See *id.* at 287–88.

208. See *id.* at 284–90 (plurality opinion), 308–09 (Kennedy, J., concurring).

209. Brief for Jackson Appellants, *supra* note 12, at 18 n.17.

210. *Id.* at 18 (quoting *Lehr v. Robertson*, 463 U.S. 248, 265 (1983)).

turned to the equal protection rationale stated in *Baker v. Carr*: “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 . . . that a discrimination reflects *no* policy, but simply arbitrary and capricious action.”²¹¹ It is understandable that Justice Kennedy found no equal protection violation in *Vieth* because under the rational-basis standard, the district map was not solely arbitrary and capricious because it served the legitimate function of reapportioning the malapportioned districts. Under the equal protection rational-basis standard, however, Plan 1374C is arbitrary and capricious because it reflects no policy or legitimate governmental purpose, only partisan motivations.

The Supreme Court can nullify Plan 1374C under the Equal Protection Clause in *Jackson v. Perry* without detracting from its holding that decennial census maps drawn with partisan motivations are not invalid. The concern expressed in *Vieth* about the lack of a judicially manageable standard is valid, but the Texas Redistricting Cases are limited to mid-decade redistricting for the sole purpose of partisan manipulation when a constitutionally legitimate map is in place. These cases may be the starting point for developing a judicially manageable standard under the Equal Protection Clause for treating partisan gerrymandering by preventing states from redistricting mid-decade purely for partisan gain.

States should be prevented from creating new districting maps mid-decade when they have a legal plan in place and their only goal and intent is partisan. District maps that are created as a result of the decennial census would not be affected by this ruling, and preventing mid-decade redistricting would not create a flood of partisan gerrymandering cases for courts to adjudicate. The new standard would be a bright-line rule for lower courts to follow, simply having to ask two questions: (1) was there already a constitutionally valid district map in place, and if so, (2) is there some legitimate, governmental purpose other than partisan motivation for the creation of this mid-decade plan? If the answer is no to the second question, the district map should be nullified.

211. *Vieth*, 541 U.S. at 310 (Kennedy, J., concurring) (quoting *Baker v. Carr*, 369 U.S. 186, 226 (1962)).

It may be difficult in future cases to determine whether the motivation behind the map was “solely partisan,” and without a clear standard, courts would be forced to determine the legislative intent behind the redistricting process. The appellants did not offer a new test for courts to utilize in adjudicating partisan gerrymandering and instead relied upon the idea of pure partisan intent.²¹² Without a clear understanding of what constitutes a legitimate government purpose, what constitutes partisan motivation beyond the situation in Texas, and how to evaluate the two concepts, the federal courts will be no better off than before when it comes to adjudicating partisan gerrymandering. The partisan gerrymandering may seem unfair, but as Justice Scalia noted in *Vieth*, fairness is not a judicially manageable standard.²¹³

C. Public Policy Concerns

There are serious policy concerns if the Court fails to limit certain types of partisan gerrymandering. In *Vieth*, Justice Kennedy noted that “one has the sense that legislative restraint was abandoned.”²¹⁴ In the redistricting in Texas, however, it is clear that legislative restraint was abandoned, and if the Court approves of the actions of the Texas legislature, all legislative restraint may be abandoned in the future when states have to create new district maps. States would create maps after the decennial census, and, if unsatisfied with their political gain, they would be able to redistrict to improve their chances in the next election. Mid-decade redistricting would also occur every time a new political party secures majority power in a state and wants to retain that power as long as possible. Representatives and Senators would no longer be beholden to their constituents, but rather to their political parties to ensure their re-election. The most noticeable example of this situation occurred in District 23 when Representative Bonilla had a tight race in 2002.²¹⁵ To ensure his re-election, the state manipulated the district, removing 100,000 Latino voters and replacing them with Republican voters.²¹⁶ When a representative starts losing support in his district, he will turn to his po-

212. See State Appellees’ Brief, *supra* note 11, at 36.

213. See *Vieth*, 541 U.S. at 291 (plurality opinion).

214. *Id.* at 316 (Kennedy, J., concurring).

215. See Brief for Travis County Appellants, *supra* note 12, at 8.

216. See *id.* at 8–9.

litical party to assist him in getting re-elected, rather than listening to the voice of the people who originally elected him.

There is also the risk of voting dilution where the weight of the voter who votes for the majority party has more stability and power than the voter who votes against the majority party. If voters in a district start to become disenchanted with their elected representative, the state, in an effort to ensure the incumbent's re-election, can shift the voters around to cure this problem. The votes of an electorate suddenly take on different weight, with those voting for the incumbent suddenly becoming more powerful than those voting against the incumbent.

In a nation where voter disenfranchisement is a growing concern and forty percent of the voting electorate failed to turn out for the 2004 presidential election,²¹⁷ judicial support of mid-decade partisan redistricting would do little to cure that dilemma. This problem will only increase once voters realize that voting against the majority party's power is futile because the state will simply reapportion the population to suit the majority party's needs. A Supreme Court ruling condoning this type of behavior cripples the democratic process and pushes partisan concerns above those of the electorate.

There are also serious implications if the Court finds that mid-decade redistricting for partisan gain is unconstitutional. States could be trapped within a constitutionally legitimate but politically unfair district map for ten years without any recourse. In a situation such as the Texas Redistricting Cases, where the 2001 map was created by the judiciary and not by the state legislatures, states would be prevented from curing any possible defects for ten years. The Constitution clearly makes congressional districting the province of the state legislatures,²¹⁸ and the judiciary only receives the task in extreme situations such as in Texas,

217. See United States Election Project, Voter Turnout, 2004 Election Data, http://elections.gmu.edu/voter_turnout.htm (last visited Mar. 30, 2006).

218. See U.S. CONST. art. I, § 4, cl. 1; see also *Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature. . . ."); *Grove v. Emison*, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional . . . districts."); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."); *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, Section 4); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916).

when the legislature fails to update their congressional map. When federal courts create district maps, they are performing the duty of the state legislature, and the results may not always coincide with the legislature's goals, partisan or not.²¹⁹ It is always dangerous when a political branch ventures into another's territory, and failing to provide the state legislatures with a remedy from that intrusion could be perilous. If a state legislature does not have the ability to change a district map created by a court until the end of the decade, then that distorts the intent of the Framers in enacting Article I, Section 4 of the Constitution.

V. CONCLUSION

The struggle in adjudicating partisan gerrymandering cases is most palpable in the Court's decisions in *Bandemer* and *Vieth*.²²⁰ Finding a judicially manageable standard for courts to adjudicate partisan gerrymandering cases is a daunting task that many think is not possible,²²¹ and there is ample evidence to support that claim.²²² The Court, however, has yet to decide clearly that partisan gerrymandering claims fall within the political question doctrine and are, therefore, nonjusticiable. Recognizing the problems in adjudicating partisan gerrymandering cases, Justice Kennedy "would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."²²³ The Texas Redistricting Cases might be one situation in which judicial relief is possible, particularly because of its limited effect on partisan gerrymandering.

Granting judicial relief in the partisan claims brought forth by appellants in the Texas Redistricting Cases would create a definitive line separating blatant and flagrant partisan gerrymandering that serves no legitimate governmental purpose from partisan gerrymandering that is intertwined with a legitimate governmen-

219. See *Upham v. Seamon*, 456 U.S. 37, 41–42 (1982) (quoting *White*, 412 U.S. at 794–95).

220. See *supra* Part II.B.

221. See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) ("Lacking [judicially manageable standards], we must conclude that political gerrymandering claims are nonjusticiable. . . .").

222. See *supra* Part II.B.2.

223. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

tal purpose. Failing to provide judicial relief to the partisan claims would permit egregious partisan manipulation of district lines and further alienate voters from their representatives. It is precisely the narrow circumstances of this case that show that partisan gerrymandering claims can be adjudicated, albeit only in certain, confined circumstances. But these cases may not necessarily provide a workable solution for the future and only solve the case at hand. The lack of a workable test to adjudicate future partisan gerrymandering could leave the Court with the only option of finding partisan gerrymandering nonjusticiable. If the Court were to simply dismiss the claim as they did in *Vieth*, it would effectively render partisan gerrymandering nonjusticiable, and it is unlikely that the Court would entertain future cases involving partisan gerrymandering.

Redistricting will always be influenced by politics, but it should not be allowed to be totally controlled by them. As Justice Breyer stated in his dissenting opinion in *Vieth*,

The use of purely political considerations in drawing district boundaries is not a "necessary evil" that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political "gerrymandering" will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm.²²⁴

Democracy is founded upon the belief that the people should elect their representatives. In a country so large and complicated, the election process subsequently becomes complicated. While political parties dominate elections, they do serve valuable purposes, and politics should be a factor to consider when drawing district maps. Politics, however, should not control that process. The fear that the people will lose power to the political parties is palpable in this day and age; the issue the Supreme Court needs to decide is whether the courts should police politics or leave it to the legislatures.

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224. *Id.* at 355 (Breyer, J., dissenting).