

Finding a Path Through the Political Thicket: In Defense of Partisan Gerrymandering's  
Justiciability

Author(s): Easha Anand

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# Finding a Path Through the Political Thicket: In Defense of Partisan Gerrymandering's Justiciability

Easha Anand\*

*In 1986, the U.S. Supreme Court declared partisan gerrymandering unconstitutional; in 2004, the Court declared it nonjusticiable. In between and since, scholars have debated over the precise harms of partisan gerrymandering, the wisdom of judicial intervention, and the feasibility of separating unconstitutional from legitimate redistricting schemes. This Comment adds to that literature by drawing for the first time on the forty cases decided between 1986 and 2004, when lower courts, attempting to follow the Supreme Court's direction to strike down unconstitutional gerrymanders, crafted a variety of tests to differentiate legitimate from illegitimate redistricting schemes. It excavates that case law in the service of rebutting Justice Antonin Scalia's two arguments in favor of nonjusticiability. First, this Comment argues that, far from the chaotic proliferation of standards depicted by Justice Scalia, the variety of tests put forth by scholars, Supreme Court Justices, and lower courts contain an internal analytic coherence. This Comment models the universe of possible tests along three axes: the phase of redistricting examined, the measurement used to identify excessive partisanship, and the diagnostic framework used once the first two trigger conditions are met. In so doing, this Comment attempts to identify a path through the political thicket, confining the question of partisan gerrymandering to three discrete judicial decisions. Second, this Comment responds to Justice Scalia's contention that, despite the proliferation of standards, there are no judicially manageable standards. Drawing on one possible partisan gerrymandering test*

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among many—a map-based, objective, scrutiny test in this Comment’s taxonomy—this Comment demonstrates how any criticisms leveled at the test could equally be leveled against traditional Equal Protection Clause (EPC) jurisprudence. This Comment closes with a meditation on justiciability, arguing that Justice Scalia’s treatment of partisan gerrymandering demonstrates that, in lieu of a single-variable test of manageability, justiciability is actually a balancing test between manageability and the severity of the perceived harm. Candor about this second criterion will result in a more fair and transparent justiciability jurisprudence.

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## INTRODUCTION

Two thousand twelve was the election year of the safe district. In Illinois, one Democratic district snakes around the suburbs of Chicago, squeezing out a formerly Republican congressional seat, while another pokes like three tines of a fork into presumably Republican exurbs.<sup>1</sup> Pennsylvania, which went for Obama by five points, was a sea of red congressional districts, with tiny blue specks carefully cabining the few Democratic congressional seats.<sup>2</sup> And in North Carolina, instead of carving out a Charlotte district that reflects the city's sprawl, the most recent congressional map lops off the district at straight angles, concave where the previous party's gerrymander had been convex.<sup>3</sup> Two and a half decades after *Davis v. Bandemer* found that jamming neighboring Democratic districts into a packed super-district could be unconstitutional,<sup>4</sup> state legislative majorities continue to create "uncouth" and "bizarre" districts of the sort *Bandemer* and its predecessors sought to end.<sup>5</sup>

The persistence of partisan gerrymandering is a result of the U.S. Supreme Court's much-debated pronouncement in *Vieth v. Jubelirer* that, though unconstitutional, partisan gerrymandering was beyond the Court's capacity to suss out and monitor.<sup>6</sup> This Comment—for the first time—engages the Court's decision on its own terms. Rather than assessing manageability, scholars have generally weighed in on the policy benefits of partisan gerrymandering, on whether or not the harms alleged were individual, and on the characteristics of a healthy democracy.<sup>7</sup> Some, leaning heavily on the "political thicket"

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1. See *Grand Theft Illinois*, CHI. TRIB., Sept. 30, 2012, [http://articles.chicagotribune.com/2012-09-30/opinion/ct-edit-elect-0930-bd-20120930\\_1\\_districts-legislative-races-legislative-election](http://articles.chicagotribune.com/2012-09-30/opinion/ct-edit-elect-0930-bd-20120930_1_districts-legislative-races-legislative-election).

2. See Eric Ostermeier, *The Historically Undersized Pennsylvania Democratic US House Delegation*, POLITICS PA (June 24, 2013, 10:43 AM), <http://www.politicspa.com/the-historically-undersized-pennsylvania-democratic-us-house-delegation/49007>.

3. See Ray Gronberg, *Redistricting Worked for GOP, Duke Professor Says*, THE HERALD-SUN, Nov. 8, 2012, available at 2012 WLNR 23768861.

4. 478 U.S. 109, 126–27 (1986).

5. See *id.* at 164 n.3; *Karcher v. Daggett*, 462 U.S. 725, 744, 748 (1983).

6. 541 U.S. 267, 267 (2004).

7. See, e.g., Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234 (1972) (concluding that neither malapportionment nor intentional legislative manipulation created Republican advantage in redistricting); Corbett A. Grainger, *Redistricting and Polarization: Who Draws the Lines in California?*, 53 J.L. & ECON. 545 (2010) (comparing panel-drawn redistricting and legislative redistricting); Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL'Y 653 (1988) (discussing the different policy objectives and legal limitations that the legislature and courts have in redistricting); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002) (arguing against judicial intervention in redistricting); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991) (proposing that redistricting be constrained by requiring compactness in districts to prevent gerrymandering).

metaphor, think it is just as well that the Court stay out of such mapmaking,<sup>8</sup> while others express frustration at the judiciary's refusal to intervene in the face of patent affronts to democratic values.<sup>9</sup> Some advance a theory of structural harm—all voters lose when political competition is stifled<sup>10</sup>—while others see the harm as expressive or individual.<sup>11</sup>

But what if we were to instead accept at face value the Court's contention that a lack of justiciability results from, first, a chaotic proliferation of tests for identifying overly partisan gerrymandering and, second, the absence of a single judicially manageable standard? In response to the first, the post-*Bandemer*, pre-*Vieth* cases create an analytical framework for developing such a standard. Each lower court test hinges on the answers to three analytically distinct and independent questions. First, a court must determine what inquiry to focus on. Legislative-process inquiries look to the means by which a gerrymander was passed; map-based inquiries look to features of the electoral playing field itself; and outcome-based inquiries look at election results or other post-election data. Second, a court must determine how to set the cutoff for too much partisanship. Some courts use a nonretrogression standard—a redistricting scheme cannot be worse, along whatever metric was selected in the first question, than what came before.<sup>12</sup> Others use objective or “know it when I see it” subjective cutoffs that allow for judicial discretion, and still others attempt to run a non-partisan gerrymandering counterfactual.<sup>13</sup> Finally, a court must determine what to do when a trigger condition is met—use a “hard-and-fast” rule to strike down a redistricting scheme at once, scrutinize the scheme further by asking the government to produce evidence of a compelling interest, or balance the harms and benefits of a redistricting scheme.

In response to Justice Scalia's second argument—that none of these standards are judicially manageable—a close examination of the test I dub the “EPC-style test,” for its resemblance to traditional EPC jurisprudence, serves as a rebuttal. Each of Justice Scalia's criticisms can be leveled against both the

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8. See, e.g., Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 528 (2003); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1384 (1987).

9. See, e.g., Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 233 (1985); Note, *Political Gerrymandering 2000–2008: “A Self-Limiting Enterprise”?*, 122 HARV. L. REV. 1467 (2009).

10. See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 504 (2004); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 608–09 (2002); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 553–54 (2004).

11. See, e.g., John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 616 (1998); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 255 (2006).

12. See *infra* Part II.B.1.

13. See *infra* Parts II.B.2, II.B.3, and II.B.4.

EPC-style partisan gerrymandering test and the traditional EPC jurisprudence. An EPC-style test first lists objective indicia of gerrymandering (compactness, contiguity, deviation from established political subdivisions, and the like)—the equivalent of identifying a facially discriminatory classification under traditional EPC jurisprudence. Just as a facially discriminatory classification is then subjected to a balancing test against asserted state interests, districting plans that have objective indicia of gerrymandering—plans that are “facially partisan,” so to speak—are then tested against the state’s assertion that they are administratively convenient, geographically necessary, or important for representation (what these standards call “neutral justifications”).

Justice Scalia’s criticisms in *Vieth* ring hollow when applied to the EPC-style test. The *Vieth* plurality asserts that there “always is a neutral explanation,” suggesting that at the stage of asserting a state interest, a defendant will always succeed.<sup>14</sup> However, the same prediction could be issued in the context of traditional EPC jurisprudence (there is always a “legitimate” state interest), and courts have proven adept at scrutinizing for pretext. Courts are also adept at assigning orders of magnitude to seemingly unquantifiable terms like “reasonableness,” addressing another of the *Vieth* plurality’s concerns with an “EPC model” standard.<sup>15</sup> Finally, *Vieth* suggests that since traditional districting values often work at cross purposes, a court will never be able to identify an objectively irregular district.<sup>16</sup> However, courts are capable of performing a nested balancing test: first, they will weigh objective indicia of irregularity to ascertain whether a district is irregular enough to qualify as “facially partisan”; for districts that are “facially partisan,” courts will then weigh the “neutral” or “legitimate” justifications for the irregular shapes against the harms caused by gerrymandering. Thus, “judicial manageability” is a misleading heading for the kind of justiciability Justice Scalia evaluates in *Vieth*. Given Justice Scalia’s comment that “courts might be justified in accepting a modest degree of unmanageability to enforce a [clear] constitutional command,”<sup>17</sup> *Vieth* suggests an alternative model of justiciability, one that balances manageability against the seriousness of the call for judicial intervention.

Crucially, this Comment creates a taxonomy of tests, not of harms. Most scholarly debate has muddled the two, assuming that if the harm of partisan gerrymandering is to the polity at large, then the “devices . . . [of] the individual rights toolbox” will be ill-suited to the task of cabining it.<sup>18</sup> This Comment does not weigh in on the debate between individual-rights theorists

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14. See *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004).

15. See *id.* at 284–86.

16. See *id.* at 288–90.

17. See *id.* at 286.

18. See Heather Gerken, *Lost in the Political Thicket: The Supreme Court Should Find Something New to Say About Election Law—or Start Letting Others Do the Talking*, LEGAL AFF., Nov.–Dec. 2004, at 22, 23.

and proponents of a political-competition view of partisan gerrymandering. Despite Justice Scalia's exhortation, this Comment attempts to demonstrate that such a consensus is unnecessary. Just as there is no consensus on the precise harms that traditional, race-based EPC analysis is designed to identify so, too, is it possible to develop a partisan gerrymandering test without complete agreement on the nature of the underlying harm.

This Comment proceeds in four parts. Part I summarizes *Vieth* and its antecedents, focusing on the language the Court uses to identify the boundary between valid and invalid partisan gerrymanders. It delves in some detail into *Bandemer*, the Supreme Court's only partisan gerrymandering case to date to evaluate a redistricting scheme on the merits, and it highlights the major themes in post-*Bandemer*, pre-*Vieth* jurisprudence.

Part II more extensively canvasses the post-*Bandemer*, pre-*Vieth* jurisprudence, alongside the various opinions in the two Supreme Court cases and the myriad of scholarly proposals put forth during this era. This Part establishes that the choice of a constitutional test hinges on the answers to just three questions about partisanship: where to look for it, how to measure it, and what to do once you find it. Without taking a stance on the most appropriate model, this Part attempts to bring order to the proliferation of tests that courts have used and provide some thoughts on the advantages and disadvantages of each decision at each phase.

Part III then treats the "EPC-style" analytical inquiry—a map-based, objective, scrutiny test—in more detail. In addition to responding to potential criticisms of the model, this section imagines ways in which courts could draw on their experience with traditional EPC jurisprudence to modify the partisan gerrymandering "EPC test."

Ultimately, Part IV argues that the *Vieth* plurality used a new model of justiciability, one that weighs judicial manageability against the perceived harms of partisan gerrymandering. The trouble is not, then, solely the unmanageability of the proposed standard, but the absence of a sufficiently compelling countervailing interest. The use of the EPC to strike down an affirmative action regime or a school redistricting plan is no less messy and value-laden than employing the partisan gerrymandering standard outlined above to mandate redistricting. However, the harms associated with an affirmative action scheme or redistricting plan—or, to use the *Vieth* plurality's term, the clarity of the "constitutional command" against the former<sup>19</sup>—apparently outweigh the messiness of evaluating traditional EPC claims.

This Comment, in the end, aims to provide two new contributions to an already extensive body of literature. By incorporating lower court jurisprudence, rather than extrapolating solely from *Bandemer* and *Vieth*, this Comment hopes to expand courts' conception of an appropriate yardstick for

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19. See *Vieth*, 541 U.S. at 286.

partisanship. And by making explicit the comparison between traditional EPC jurisprudence and a map-based, objective, scrutiny inquiry in the partisan gerrymandering context, this Comment endeavors to show that manageability alone cannot justify the *Vieth* plurality's opinion.

## I. BACKGROUND

### *A. Partisan Gerrymandering*

Though the partisan gerrymanders of the 1980s—crafted by impossibly convoluted algorithms and hemmed in by an enormous variety of statutory dictates—bear little resemblance to the partisan gerrymanders of yore, courts and scholars routinely begin any analysis of partisan gerrymandering with its origin story. The portmanteau “gerrymander” was coined in 1812, when Massachusetts governor Elbridge Gerry’s Jeffersonian party redistricted the state to keep power.<sup>20</sup> One district, skirting the edge of Essex County, so resembled a salamander that a political cartoonist filled in the details and the term “gerrymander” was born to describe geographically bizarre districting.<sup>21</sup>

The gerrymander’s origin story, obsolete as it is, highlights a few crucial features of gerrymandering. First, gerrymandering is typically thought of as a hyper-visual endeavor. As one court noted, gerrymandering is one area of the law where “appearances do matter.”<sup>22</sup> This Comment uses the term “partisan gerrymandering” to cover all efforts to change the outcomes of elections to benefit one particular party. These efforts include drawing bizarrely shaped districts but also pairing incumbents, changing primary dates, or using perfectly sensible-looking districts that nonetheless have the effect of unduly weakening a political party. Many commentators, on the other hand, limit their discussion of gerrymandering to redistricting flaws that can be seen. This Comment also distinguishes malapportionment—a discrepancy between the voter to representative ratio across districts—from gerrymandering, as the latter has a separate line of cases governed by the “one person, one vote” principle.<sup>23</sup> The three traditional gerrymandering techniques are “cracking” (splitting a core constituency between more than one district, such that the constituency does not have enough votes to carry any single district),<sup>24</sup> “packing” (confining all the voters of a particular party to one district),<sup>25</sup> and “shacking” (pitting

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20. See *Rogers v. Lodge*, 458 U.S. 613, 649 n.36 (1982).

21. See *Vieth*, 541 U.S. at 274–75.

22. See *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 776 (4th Cir. 2003).

23. This Comment also does not cover voter identification and registration suits.

24. See *Gerken*, *supra* note 10, at 505 n.10.

25. See T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 601 (1993).

incumbents from the same party against one another in the same district, meaning that one will be forced out of office).<sup>26</sup>

Second, the term “gerrymander” was coined by the Federalists, Gerry’s opponents, who had their own, equally odd districting scheme in mind.<sup>27</sup> Partisan gerrymandering is so difficult to adjudicate because there is no way to district in a neutral fashion. Some degree of gerrymandering is necessary to ensure a semblance of proportionality: if each district is a perfect microcosm of the state, the party with slightly more voters statewide will win every district and take the entirety of each district’s allocated seats; thus, a party with a slight advantage statewide will wind up with 100 percent of the legislative seats.<sup>28</sup> Moreover, some degree of redistricting is necessary to avoid complete disproportionality: unless electoral maps are tweaked after each census, districts would rapidly become obsolete as populations shift within a state.<sup>29</sup> Drawing a line between redistricting attentive to partisanship—the only sensible kind of redistricting—and redistricting that is unconstitutionally attentive to partisan ends is a difficult undertaking.

Third, the redistricting scheme of Eldridge Gerry, with its linking up of thirteen towns around the county border, seems almost quaint today. A technological revolution has given modern gerrymanderers far more precise tools to carve up districts.<sup>30</sup> Moreover, a number of legislative and judicial constraints—including the “one person, one vote” rule that districts be equipopulous<sup>31</sup> and the Voting Rights Act’s requirement of creating majority-minority districts<sup>32</sup>—have made the straightforward districting scheme a thing of the past.

I begin by surveying some of the case law placing limits on partisan gerrymandering. This Comment will make several assumptions that should be presented before continuing. For purposes of this Comment, I treat gerrymandering done by any state or local legislative actor as equivalent to gerrymandering done for congressional races.<sup>33</sup> This Comment also takes as

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26. See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 853 (2005).

27. See *Rogers v. Lodge*, 458 U.S. 613, 649 n.36 (1982); GEORGE ATHAN BILLIAS, ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN 323 (1976).

28. See *Vieth v. Jubelirer*, 541 U.S. 267, 358–59 (2004) (Breyer, J., dissenting); *Smith v. Boyle*, 144 F.3d 1060, 1062–63 (7th Cir. 1998).

29. See *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1226 (Colo. 2003) (en banc); Adam Cox, Commentary, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 756 (2004).

30. Brief of *Amici Curiae* Professors Gary King, Bernard Grofman, & Jonathan N. Katz, in Support of Neither Party at 4, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439) [hereinafter LULAC]; SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 805 (4th ed. 2012).

31. See *Reynolds v. Sims*, 377 U.S. 533, 578–80 (1964).

32. See Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2006); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (interpreting Voting Rights Act to require creation of majority-minority districts as part of “opportunity . . . to elect representatives of . . . choice” formulation).

33. For a convincing argument that congressional and state gerrymanders should, in fact, be treated differently, see John R. Low-Ber, Note, *The Constitutional Imperative of Proportional*

axiomatic that districts will be single-member, instead of multi-member, meaning that one legislator will represent each district. Alternative forms of democracy, proportionality requirements, and structural redistricting schemes (such as citizen redistricting commissions) are beyond the scope of this Comment. Crucially, racial gerrymandering is also ignored in this Comment. Though race underlies and motivates much partisan gerrymandering, this Comment brackets racial gerrymandering's altogether separate jurisprudential provenance in deference to the Court's tendency to do so. My project is to take Justice Scalia's criticisms at face value; in so doing, I hope to excavate an until-now submerged history of lower courts' grappling, often successfully, with the Court's *Bandemer* dictates.

### B. Into the Political Thicket

This Section deals with the lead-up to *Bandemer*,<sup>34</sup> the 1986 case that found partisan gerrymandering not only unconstitutional but also justiciable. I begin by chronicling a trio of malapportionment cases: *Colegrove v. Green*, in which the Court found malapportionment nonjusticiable;<sup>35</sup> *Baker v. Carr*, in which the Court found malapportionment justiciable, but did not specify a standard for identifying unconstitutional malapportionment;<sup>36</sup> and *Gray v. Sanders*, which crafted the “one person, one vote” rule.<sup>37</sup> I then turn to two pre-*Bandemer* partisan gerrymandering cases to set the stage for the seminal *Bandemer* opinion.

In 1946, a group of Illinois voters sought relief from a congressional districting scheme that had been left untouched since the turn of the century and which had left districts with extreme population inequalities.<sup>38</sup> In *Colegrove*, Justice Frankfurter, writing for a divided court, coined the notion of the “political thicket”—a core area of congressional competence into which the Court ought not to wade.<sup>39</sup> Citing to Article I, section 4 of the Constitution, Justice Frankfurter declined to intervene—the plaintiffs’ remedy, he wrote, was to appeal to Congress or secure a state legislature that would apportion fairly.<sup>40</sup>

*Colegrove* remained good law until the 1960s when Justice William J. Brennan, Jr. declared that malapportionment claims did not have any of the hallmarks of nonjusticiability in *Baker v. Carr*.<sup>41</sup> Foreshadowing Justice Scalia’s eye-rolling at his judicial counterparts’ refusal to articulate concrete

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*Representation*, 94 YALE L.J. 163, 167 n.22 (1984) (contrasting *Abate v. Mundt*, 403 U.S. 182 (1971) and *Mahan v. Howell*, 410 U.S. 315 (1973), with *Reynolds v. Sims*, 377 U.S. 533 (1964)).

34. 478 U.S. 109 (1986).

35. 328 U.S. 549, 556 (1946).

36. 369 U.S. 186, 235 (1962).

37. 372 U.S. 368, 381 (1963).

38. See *Colegrove*, 328 U.S. at 549–51.

39. See *id.* at 556.

40. See *id.*

41. See *Baker*, 369 U.S. at 208–237.

tests in the partisan gerrymandering context, Justices Tom C. Clark and Felix Frankfurter took Justice Brennan to task in part for failing to give adequate guidance to lower courts.<sup>42</sup> Justice Brennan's opinion is also notable for giving us the first list of indicators of nonjusticiability:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving [the issue]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a political decision already made; or . . . the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>43</sup>

Despite the concerns of the *Baker* dissenters, the Court quickly established a hard-and-fast rule to guide lower courts. In *Gray v. Sanders*, a Georgia primary system that districted by county was struck down, and the Court established the "one person, one vote" rule—within reason, districts had to be equipopulous.<sup>44</sup> In *Reynolds v. Sims*, however, the Court indicated that the rule might not be quite so hard-and-fast.<sup>45</sup> Some flexibility, the Justices concluded, was necessary in order to ensure that population equality did not trump all other districting values (for example, adherence to lines of existing political subdivisions).<sup>46</sup>

In the years leading up to *Bandemer*, the Court tipped its hand in two other redistricting cases. In *Gaffney v. Cummings*, the Connecticut General Assembly map adhered to the "one person, one vote" standard but, in an effort to provide "political fairness" between the parties, constructed a bipartisan gerrymander that effectively eliminated all competition.<sup>47</sup> The Court squarely rejected the plaintiffs' complaints. In response to the plaintiffs' allegation that the districts "wiggle[d] and joggle[d]" through the state, the Court responded that compactness and attractiveness were not values of a constitutional dimension and, at any rate, the New England towns around which the districts were built "wiggle[d] and joggle[d]" as well.<sup>48</sup> The plaintiffs also argued that legislators attempting to redistrict should work with census, not political, data, to which the Court responded that no legislator could forcibly blind itself to the

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42. See *id.* at 251 (Clark, J., concurring); *id.* at 267 (Frankfurter, J., dissenting); see generally *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

43. See *Baker*, 369 U.S. at 217. Justice Scalia, in *Vieth*, found partisan gerrymandering nonjusticiable under the second indicator. See *Vieth*, 541 U.S. at 278–80.

44. See 372 U.S. 368, 381 (1963).

45. 377 U.S. 533, 578 (1964).

46. See *id.*

47. See 412 U.S. 735, 736–40 (1973).

48. See *id.* at 752 n.18, 753.

political impact of a districting scheme and that such willful blindness may produce the “most grossly gerrymandered” result of all.<sup>49</sup>

*Gaffney* was thus an equivocal victory for gerrymanderers: though the Court rejected all of the plaintiffs’ claims, the Court also wrote that judicial interest was “at its lowest ebb” when a legislature purports to fairly allocate electoral power, implying that a gerrymander that favors only one party might be subjected to elevated scrutiny.<sup>50</sup> Moreover, the alternative explanation for the oddly shaped districts—the odd shapes of the political subdivisions contained within—may have rendered the Court’s statements about compactness dicta. Finally, the Court did outline a test for a hypothetically unconstitutional gerrymander. Plaintiffs must be “fenced out of the political process” and have “their voting strength invidiously minimized.”<sup>51</sup>

*Karcher v. Daggett*, the second of the pre-*Bandemer* partisan gerrymandering cases, involved a New Jersey congressional redistricting whose disparity in population size between districts was less than the margin of error in the census enumeration.<sup>52</sup> The Court nonetheless struck down the redistricting scheme, ostensibly because there were other districting maps that eliminated even the tiny disparities of the *Karcher* map, indicating that the legislators in question had not made a “good-faith effort” to eliminate all population disparities.<sup>53</sup> Justice John Paul Stevens, concurring, encouraged the Court to put away the “one person, one vote” rule as an all-purpose tool and instead be transparent about the actual ill of the New Jersey districting scheme: not the 0.6984 percent deviation between districts, but the wanton disregard of county boundaries—a political subdivision that presumably captures some similarities among voters—and geographical compactness.<sup>54</sup>

### C. Davis v. Bandemer

Finally, in 1986, the Court confronted the question of whether partisan gerrymandering, as opposed to malapportionment, was justiciable. Litigation in *Bandemer* stemmed from “the most successful Republican use of muscle and computers” to date.<sup>55</sup> Following the 1980 Census, Republican majorities in both houses of Indiana’s legislature set out to make their dominance in the state permanent.<sup>56</sup> A bare majority in the General Assembly was a plum prize that would give the controlling party influence beyond its numbers, including the

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49. See *id.* at 753.

50. See *id.* at 753–54.

51. See *id.* at 754.

52. See 462 U.S. 725, 731 (1983).

53. See *id.* at 735–38, 744.

54. See *id.* at 747, 763 (Stevens, J., concurring).

55. See Adam Clymer, *Congressional Districts, Custom-Made*, N.Y. TIMES, Aug. 9, 1981, <http://www.nytimes.com/1981/08/09/weekinreview/congressional-districts-custom-made.html>.

56. See *Bandemer v. Davis*, 603 F. Supp. 1479, 1482 (S.D. Ind. 1984), *rev’d*, 478 U.S. 109 (1986) [hereinafter *Bandemer I*].

ability to elect the Speaker and floor leaders, assign members to committees, and control “the flow of legislation.”<sup>57</sup> Indiana Republicans paid a consulting firm \$250,000 for proprietary equipment and software—not available to Democrats—to help them redraw Indiana’s state legislative districts.<sup>58</sup> As captured by several newspaper articles, Republicans were remarkably forthright about their goal of securing the General Assembly.<sup>59</sup> Republicans ultimately did so, via a plan that split the state into districts that elected between one and three members, seemingly at random, and that would have allowed citizens represented by the same Indiana House member to be represented by different senators.<sup>60</sup> As a result of this redistricting scheme, Democratic House candidates earned 51.9 percent of votes but only 43 percent of the legislative seats in 1982.<sup>61</sup>

A fractured Supreme Court upheld the districting scheme. Justice Bryan R. White authored the plurality opinion, which found the issue justiciable but the scheme constitutional. Justice Sandra Day O’Connor authored a concurrence, which found the issue nonjusticiable, while Justice Lewis F. Powell, Jr.’s dissent found both the issue justiciable *and* the scheme unconstitutional. Each of the three opinions represents a different strand of jurisprudence employed by the *Vieth* court in declaring partisan gerrymandering claims off-limits. A close reading of the *Bandemer* opinion thus yields clues as to the analytical framework courts will ultimately have to employ if they are to adjudicate claims alleging partisan gerrymandering.

### 1. Justice White’s Plurality

Justice White, writing for a four-member plurality, acknowledged that the Court had given equivocal signals about whether partisan gerrymandering presented a justiciable claim.<sup>62</sup> Justice White reasoned that because the Court had already hacked its way through the political thicket to adjudicate “one person, one vote” claims and racial gerrymandering claims, it would be unreasonable to decline to do so for partisan gerrymandering, where the right at stake was, similarly, “one of representation.”<sup>63</sup> That partisan, rather than racial, groups brought a gerrymandering challenge went to the means of adjudication,

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57. See *id.* at 1483.

58. See *id.* at 1483–84.

59. See *id.* at 1484.

60. See *id.* at 1484–85.

61. See *id.* at 1485.

62. Justice White, however, unequivocally concluded that partisan gerrymandering is unconstitutional. Responding to Justice O’Connor’s accusation that his opinion exhibited a constitutionally unsupportable preference for nonpartisanship and proportionality, Justice White designated “fair group representation” as the constitutional lodestar, arguing that any preferences that furthered that ideal were constitutionally supportable. See *Davis v. Bandemer*, 478 U.S. 109, 126 n.9 (1986).

63. *Id.* at 123–25.

not to the justiciability of the claim.<sup>64</sup> Moreover, in dicta in racial gerrymandering cases, the Court referred to constitutional questions regarding “political elements of the voting population.”<sup>65</sup> Justice White, however, also noted that the Court had summarily affirmed several lower court findings of nonjusticiability.<sup>66</sup> Justice White ultimately concluded that partisan gerrymandering was, in fact, justiciable.<sup>67</sup> When *Baker* was decided, the Court had not yet formulated *Reynolds*’s “arithmetic presumption” of “one person, one vote”; Justice White expressed optimism that over time the Court would similarly create an equivalent jurisprudential line for partisan gerrymandering.<sup>68</sup>

Justice White then put forth a two-part test to identify overly partisan districting schemes.<sup>69</sup> First, opponents of a districting scheme had to prove “intentional discrimination against an identifiable political group.”<sup>70</sup> Even though *Bandemer* followed a line of Supreme Court cases limiting discriminatory intent to instances where legislation with a disparate impact was passed because of, not in spite of, that impact,<sup>71</sup> Justice White set a low bar for intent in partisan gerrymandering cases. Justice White reasoned that, since “those responsible for the legislation will know the likely political composition of the new districts,” discriminatory intent can generally be presumed.<sup>72</sup>

Second, Justice White demanded actual discriminatory effect on the identifiable political group.<sup>73</sup> Justice White’s standard outlined for the discriminatory effects prong of his test was far more stringent: discriminatory effect existed “only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”<sup>74</sup> Justice White was clear on what did not constitute discriminatory effect. A “failure of proportional representation alone,” for example, did not suffice to establish unconstitutional discrimination.<sup>75</sup> Moreover, without sufficient evidence for discriminatory intent, the Court

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64. *Id.*

65. *Id.* at 119–20 (citing *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)) (alteration in original).

66. *Id.* at 120–21.

67. *Id.* at 123.

68. *Id.*; see also *Berman*, *supra* note 26. Note that Justice White also concluded that none of the exceptions to justiciability contemplated by *Baker v. Carr* applied in the instant case. *Davis v. Bandemer*, 478 U.S. 109, 123–25 (1986).

69. See *Bandemer*, 478 U.S. at 127.

70. *Id.*

71. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1839–47 (2012).

72. See *Bandemer*, 478 U.S. at 128.

73. Though Justice White did not take up the question of what constituted an “identifiable political group,” he approvingly cited Judge Pell’s lower court dissent, which defined the disfavored group as “those voters who could be counted on to vote Democratic from election to election, thus excluding those who vote the Republican ticket from time to time.” *See id.* at 117 n.7; *id.* at 135 n.15. Such a definition would result in near-proportionality in the election at hand. *Id.* at 117 n.7.

74. *Id.* at 132.

75. *See id.*

would not presume that the elected representatives would ignore the needs of those unrepresented in government—winner-take-all districting depended on that premise.<sup>76</sup> Justice White was less clear on what *would* constitute discriminatory effect. He merely demanded more from the plaintiffs: data from more than one election,<sup>77</sup> and more than one kind of data.<sup>78</sup>

For the purpose of bringing analytical clarity to partisan gerrymandering tests, several features of Justice White's plurality opinion are worth highlighting. First, Justice White equates knowledge with intent—because legislators presumably know the partisan composition of the districts they draw, they possess discriminatory intent.<sup>79</sup> As Justice Powell notes in his dissenting opinion, such an inference had been repeatedly rejected in race-based EPC cases.<sup>80</sup> Setting intent as a token element of a partisan gerrymandering claim, however, allowed Justice White to cabin off all of the district court's findings regarding the oddity of the shapes in the redistricting map and the suspiciously authoritarian manner in which the redistricting bill was pushed through the Indiana legislature.<sup>81</sup> That information went merely to intent, not effects, and was irrelevant to the Court.<sup>82</sup> Justice White, therefore, created a test that I would classify as focused on electoral outcomes.

Second, Justice White did not specify what level of disproportionality would be required before the Court would strike down a partisan gerrymander as unconstitutional. However, he unintentionally set an objective baseline for future cases: where election results were less disproportionate than those found constitutional in *Bandemer*, a gerrymander should stand.<sup>83</sup>

Third, Justice White did not think discriminatory intent and effect would suffice—even if both discriminatory intent and discriminatory effect were found, the legislation would still need to be “examined for valid underpinnings.”<sup>84</sup>

Finally, Justice White decoupled the plaintiffs' statewide districting challenge from the individual district vote dilution challenges that the Court had adjudicated in the past. Whereas the latter asked whether members of a group were able to participate in the nominating process, to register, and to vote, the former inquiry centered not only on voters' direct influence on the

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76. See *id.* at 132–33.

77. See *id.* at 135–36.

78. See, e.g., *id.* at 136 (finding that the district court should have inquired as to what percentage the statewide Democratic vote would have to increase to control either the House or the Senate).

79. See *id.* at 128–29.

80. See *id.* at 171 n.10 (Powell, J., dissenting).

81. See *id.* at 138–41.

82. See *id.*

83. See, e.g., *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 544–45 (M.D. Pa. 2002) [hereinafter *Vieth I*] (Since the disproportionality in the Pennsylvania case did not rise above the level found in *Davis v. Bandemer*, it could not be unconstitutional, whatever the appropriate test.).

84. See *Bandemer*, 478 U.S. at 141.

political process but also on their indirect influence.<sup>85</sup> As documented below, however, lower courts apparently misunderstood this distinction. On several occasions, these courts have incoherently ruled that a partisan gerrymander had not foreclosed a majority party's ability to, for instance, nominate candidates and was therefore constitutional.

## 2. Justice O'Connor's Concurrence

Justice O'Connor—the only member of the Court to have run in an election—concurred in the result but argued that partisan gerrymandering claims were nonjusticiable. Foreshadowing later cases' concerns about the arbitrariness of any test designed to separate legitimately partisan redistricting schemes from unconstitutionally partisan gerrymanders, Justice O'Connor cautioned that reading the Court's policy concerns into the "broad provisions of the Constitution" would result in "political instability and judicial malaise."<sup>86</sup> Justice O'Connor's opinion mixes concerns about justiciability with an underlying worry that the Constitution does not prohibit partisan gerrymanders after all.<sup>87</sup>

Justice O'Connor thus mixes three lines of argument. The first is practical. Partisan gerrymandering is self-limiting; the more precise a gerrymander, the less likely it is to be effective.<sup>88</sup> As Republicans in Indiana attempt to "waste" fewer and fewer votes, they also win elections by smaller and smaller margins. Justice O'Connor reasoned that it reduces manageability to demand that a legislature district not only with an eye toward racial proportionality but also partisan proportionality, particularly because partisan affiliation, unlike race, is mutable.<sup>89</sup> Justice O'Connor also noted that courts are ill-equipped to "recreate the complex process of legislative apportionment in the context of adversary litigation."<sup>90</sup>

Second, Justice O'Connor presents a constitutional argument. For Justice O'Connor, Republicans and Democrats are not "discrete and insular minorities" and are thus beyond the reach of the EPC's command of judicial interference.<sup>91</sup>

Justice O'Connor's third line of argumentation is analytical: she lambasts Justice White's opinion for being muddled. Justice O'Connor notes that, though

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85. See *id.* at 132–33.

86. See *id.* at 145–47 (O'Connor, J., concurring).

87. See, e.g., *id.* at 151–53 (O'Connor, J., concurring) (noting that Republicans and Democrats "cannot claim they are [...] discrete and insular group[s]"). For a reading of Justice O'Connor's opinion as concerned with constitutionality, rather than justiciability, see Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 284 n.176.

88. See *Bandemer*, 478 U.S. at 152; cf. Brief of Samuel Issacharoff, Burt Neuborne, & Richard H. Pildes as Amici Curiae in Support of Appellants at 23–27, LULAC, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439).

89. See *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring).

90. *Id.* at 147.

91. See *id.* at 151–53.

Justice White repeatedly protests that adjudicating partisan gerrymandering claims will not result in a requirement of proportionality, he nonetheless suggests that suitable disproportionality will result in a finding of unconstitutionality.<sup>92</sup> Justice O'Connor also points out that Justice White asserts that election results alone will not establish a claim of discriminatory effect but goes on to imply that enough election results might well do so.<sup>93</sup> She notes that the plurality's concern with statewide diminution of political influence pairs poorly with an electoral system that proceeds district by district—it is difficult to apply a test that measures an entire state's political landscape when only one of many districts is allegedly gerrymandered.<sup>94</sup>

### *3. Justice Powell's Dissent*

Justice Powell declared the Indiana gerrymander not only justiciable but also unconstitutional. Characterizing the majority opinion as placing undue emphasis on the "one person, one vote" rule and in the process betraying the promise of fair representation in other ways,<sup>95</sup> Justice Powell suggested that the distinction between Democratic voters statewide and individual Democratic voters was a false one.<sup>96</sup> Perhaps anticipating attacks on facial partisanship as unsupported by the Constitution, Justice Powell also provided the first principled justification for striking down a redistricting scheme solely on the basis of "appearance": democracy can "work well and fairly" only when it is evident to citizens to which political community they belong.<sup>97</sup> Thus, a district's bizarre shape in and of itself interferes with fair representation.

Justice Powell went on to consider five factors in assessing the constitutionality of Indiana's districting scheme. First, he looked to the process by which the district scheme was passed. Despite Republicans' repeated promises, no public hearings were held; the districting scheme passed through a procedural loophole known as a "vehicle bill," meaning all of its conferees were Republicans.<sup>98</sup> Second, Justice Powell noted that the district court had found that the maps deviated from established political subdivisions, in one instance going so far as placing the seat of one county in a district consisting entirely of another county.<sup>99</sup> Third, Justice Powell also looked to the various injudicious statements given by Republican lawmakers to the media to establish illicit motivation behind the redistricting scheme.<sup>100</sup> Fourth, Justice Powell

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92. *See id.* at 158–59.

93. *See id.* at 159–60.

94. *See id.* at 153.

95. *See id.* at 165, 169 (Powell, J., dissenting).

96. *See id.* at 169 (Powell, J., dissenting).

97. *See id.* at 173 n.13.

98. *See id.* at 175–76 (Powell, J., dissenting).

99. *See id.* at 176–77.

100. *See id.* at 177–78 (quoting Republican House member telling a newspaper, "[t]he name of the game is to keep us in power.").

considered the shapes of the districts. In particular, his opinion seized on one district that looked like it was consuming the city of Fort Wayne, so Pacman-esque was it in shape.<sup>101</sup> Finally, Justice Powell looked to the results of the 1982 election. Though Republicans received less than half of the votes for House seats, fifty-seven out of the one hundred House members were Republicans.<sup>102</sup>

Perhaps the most prescient portion of Justice Powell's opinion, however, was his characterization of the "final and most basic flaw" in Justice White's opinion: "[I]ts failure to enunciate any standard."<sup>103</sup> Justice Powell predicted that the plurality had given the "'constitutional green light' to would-be gerrymanderers."<sup>104</sup> As the aftermath of *Bandemer* demonstrated, Justice Powell was correct. The subsequent two decades saw a spate of partisan gerrymandering litigation, virtually none of it successful in striking down districting schemes, in which district courts chose from the grab-bag of constitutional tests offered up by Justice White's opinion.

#### 4. Bandemer's Fallout

Given that the Supreme Court found even the egregious *Bandemer* gerrymander constitutional, it is perhaps unsurprising that, of the thirty-nine decisions surveyed for this Comment, only one found a gerrymander unconstitutional, and that one decision was subsequently dismissed as moot.<sup>105</sup> The *Bandemer* decision contained something for everyone—between the plurality and the two concurrences, just about every metric for assessing partisanship in a districting scheme made an appearance. To make matters worse, various lower court decisions appeared to ignore or take out of context portions of Justice White's plurality.

For example, in *Badham v. Eu*, the Northern District of California sanctioned a redistricting plan whose Democratic architect called it "my contribution to modern art."<sup>106</sup> The plan, which ensured a Democratic congressional majority in California, included a 385-sided district and a "Jesus district," so called because a voter would have to walk across water to get from

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101. See *id.* at 178–80; cf. *Bandemer I*, 603 F. Supp. 1479, 1487 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986) (reiterating the comparison).

102. See *Bandemer*, 478 U.S. at 182.

103. See *id.* at 171.

104. See *id.* at 173 (quoting James M. Edwards, *The Gerrymander and "One Man, One Vote"* 46 N.Y.U. L. REV. 879, 880 (1971)).

105. *Republican Party of North Carolina v. Martin*, 980 F.2d 943 (4th Cir. 1992) found a constitutional challenge to a gerrymander justiciable. On remand, the district court issued a preliminary injunction modifying certain state election practices. *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722 (E.D.N.C. 1994). However, the Fourth Circuit subsequently dismissed the case as moot. *Ragan v. Vosburgh*, Nos. 96-2621, 96-2687, 96-2739, 1997 WL 168292 (4th Cir. Apr. 10, 1997).

106. Robert Reinhold, *Surgery on G.O.P. Was Deft, Not Painless*, N.Y. TIMES, Mar. 3, 1991, <http://www.nytimes.com/1991/03/03/us/surgery-on-gop-was-deft-not-painless.html>.

one side to another.<sup>107</sup> The *Badham* court divided *Bandemer*'s "discriminatory effects" test into two prongs: a "history (actual or projected) of disproportionate [election] results," and "strong indicia of lack of political power and the denial of fair representation."<sup>108</sup> Under the second prong, the court identified no evidence that the plan had interfered with Republicans' fundraising or organizing and no evidence that elected representatives had ignored the needs of their Republican constituents.<sup>109</sup> *Bandemer*, however, never mentioned evidence other than election results, actual or projected. *Bandemer* treated the "strong indicia of lack of political power" formulation as synonymous with the "history (actual or projected) of disproportionate [election] results."<sup>110</sup> In so doing, the *Bandemer* court wanted to specify that the plaintiffs had not proven a sufficient magnitude of electoral disproportion, not to argue that the plaintiffs were arguing on the wrong terms altogether.<sup>111</sup> Leaving aside exactly how a gerrymander, no matter how egregious, could interfere with a party's ability to fundraise or freedom to "speak out on issues of public concern,"<sup>112</sup> the *Badham* court summarily raised the standard by reading a conjunct into the *Bandemer* Court's discriminatory effects test—requiring both disproportionate results and interference with a party's political machinery.<sup>113</sup>

Lower courts also misconstrued *Bandemer*'s discriminatory intent prong by treating it as a token requirement,<sup>114</sup> even though in *Smith v. Boyle*, the Seventh Circuit rejected a plaintiff's claim of discriminatory intent.<sup>115</sup> Specifically, the circuit court empathized with legislators' difficulties in creating judicial districts. Were the legislators to divvy the entire county into seven districts, Cook County—entitled to three and a half justices on the basis of population—would be split several ways, in violation of the districting principle of respecting political subdivisions.<sup>116</sup> The Seventh Circuit hypothesized that legislators might have selected the bizarre districting scheme

107. STEVEN HILL, FIXING ELECTIONS: THE FAILURE OF AMERICA'S WINNER TAKE ALL POLITICS 80 (2002).

108. See *Badham v. Eu*, 694 F. Supp. 664, 699–71 (N.D. Cal. 1988) (citation omitted).

109. See *id.* at 670–71.

110. See *Davis v. Bandemer*, 478 U.S. 109, 139 (1986).

111. See *id.*

112. *Badham*, 694 F. Supp. at 670.

113. See *Terrazas v. Slagle*, 821 F. Supp. 1162, 1172 (W.D. Tex. 1993). This mistaken reading of *Bandemer* is picked up by several other district courts. See, e.g., *O'Lear v. Miller*, 222 F. Supp. 2d 850, 858 (E.D. Mich. 2002); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1040 (D. Md. 1994); *Fund for Accurate & Informed Representation v. Weprin*, 796 F. Supp. 662, 669 (N.D.N.Y. 1992), aff'd, 506 U.S. 1017 (1992); *Pope v. Blue*, 809 F. Supp. 392, 396 (W.D.N.C. 1992), aff'd, 506 U.S. 801 (1992). The *Badham* court also incorporated Justice O'Connor's concern that the Republican Party did not constitute a minority that needed protection. See *Badham*, 694 F. Supp. at 672.

114. See, e.g., *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1337 (S.D. Fla. 2002); *Pope*, 809 F. Supp. at 396.

115. See 144 F.3d 1060, 1066–67 (7th Cir. 1998) (Flaum, J., dissenting in part) (majority is asking for "the proverbial 'smoking gun'").

116. See *id.* at 1064.

for a benign reason; for example, they may have thought justices from Cook County would be “too parochial” if they were elected mainly by Chicagoans.<sup>117</sup> Whether or not legislators made such a calculation, the Seventh Circuit concluded that it was impossible to infer discriminatory intent from the system itself.<sup>118</sup>

The only successful partisan gerrymandering challenge during this era, *Republican Party of North Carolina*, was, in some ways, a request for a gerrymander.<sup>119</sup> The Republican Party of North Carolina challenged the at-large system for electing superior court judges, arguing that the statewide election system produced disproportionate results and consistently degraded the influence of Republican voters.<sup>120</sup> The Fourth Circuit noted that a Republican had been elected to the superior court only once in 220 elections, even though 27 percent of North Carolina’s population reliably voted Republican, and that the trend was going to continue, given the geographical distribution of voters and the fact that judicial elections encourage party-line voting.<sup>121</sup> Notably, in contrast to *Badham* and its follow-on cases, the Fourth Circuit declined to require proof that a gerrymander interfered with registration or organizing—were it so, political parties would find it impossible to bring partisan gerrymandering cases.<sup>122</sup> Thus, the plaintiffs successfully alleged an unconstitutional failure to district in the first place (in lieu of at-large elections).

The proliferation of possible tests for partisan gerrymandering, the failure of the ostensible *Bandemer* standard to capture even the egregious California gerrymander in *Badham*, and the questions left unanswered by Justice White’s opinion set the stage for *Vieth*, in which the Court retreated from its foray into the political thicket.

#### D. Vieth v. Jubelirer

This Section chronicles Justice Scalia’s plurality opinion in *Vieth*, which declared judicial intervention in partisan gerrymanders off limits.<sup>123</sup> By documenting Justice Scalia’s objections to each of the partisan gerrymandering standards put forth in *Vieth*, this Section establishes a basis for the two main points in Parts II and III of this Comment. First, though Justice Scalia treats the standards put forth by appellants, lower courts, and other Justices as a disparate array of arbitrarily chosen metrics, this Comment seeks to demonstrate that

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117. See *id.*

118. See *id.* at 1064–65. Ironically, given the *Bandemer* court’s reluctance to find unconstitutionality on the basis of just one election cycle, the *Smith* court concluded that because *too many* election cycles had passed, it was too late to conduct discovery into the motives of the redistricting proponents. See *id.* at 1065.

119. See *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992).

120. See *id.* at 956–57.

121. See *id.*

122. See *id.* at 958.

123. See *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004).

partisan gerrymandering interventionists are operating within a coherent set of analytical parameters—that the various standards Justice Scalia discarded center on the same set of questions. Second, this Comment seeks to show that Justice Scalia's criticisms could be as easily applied to many other jurisprudential arenas that the Court has never treated as nonjusticiable. This Comment thus focuses on Justice Scalia's criticisms of standards put forth by proponents of justiciability and attempts to respond to possible counterarguments. Many of the proposed tests Justice Scalia critiqued are treated in some depth later in this Comment.

In *Vieth*, Justice Scalia opens by declaring, first, that political gerrymanders are not new, and second, that Congress has the tools to regulate such redistricting schemes.<sup>124</sup> Justice Scalia then places the burden of proof on proponents of judicial intervention in partisan gerrymandering, proclaiming that *Bandemer*—which assumed justiciability—wrongly located the onus of proving justiciability.<sup>125</sup> Crucially, Justice Scalia declares that partisan gerrymandering lacks “judicially discoverable and manageable standards.”<sup>126</sup> As this Comment argues, however, courts have identified a variety of perfectly manageable standards, and Justice Scalia’s attempt to dismiss the “proliferation” of standards misses that the various standards are really variations on three core themes.

Justice Scalia critiques each of the standards set forth in *Vieth* and *Bandemer*. He discards Justice White’s *Bandemer* plurality as unworkable, based on the experiences of the lower courts.<sup>127</sup> Justice Scalia notes that the appellants in *Vieth* put forth a standard modeled on *Bandemer*’s intent plus effects standard.<sup>128</sup> To ascertain intent, the *Vieth* appellants would allow direct or circumstantial evidence.<sup>129</sup> They would also require the “predominant intent” to be discriminatory, adding teeth to what had been a token standard.<sup>130</sup> Justice Scalia finds the “predominant intent” test too indeterminate for three reasons.<sup>131</sup> First, though a similar test exists in the racial gerrymandering context, Justice Scalia finds that such a test is used to distinguish unconstitutionality on a district-by-district basis.<sup>132</sup> To Justice Scalia, an already “vague” test “evaporates” when broadened to an entire statewide redistricting plan.<sup>133</sup> Second, Justice Scalia finds that the plaintiffs give no guidance on what constitutes “predominant”—is it slightly greater than 50

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124. See *id.* at 274–76.

125. See *id.* at 278–81.

126. See *id.* at 277–78.

127. See *id.* at 281–84.

128. See *id.* at 284.

129. See *id.*

130. See *id.*

131. See *id.* at 284–85.

132. See *id.* at 285.

133. See *id.*

percent? A vast majority?<sup>134</sup> Finally, Justice Scalia argues that identifying where a “rare and constitutionally suspect motive” predominates—as in the racial gerrymandering context—is far easier than identifying the far more common slightly more partisan than necessary motive in the partisan gerrymandering context.<sup>135</sup>

Justice Scalia similarly guts appellants’ “effects” test. Under this test, the plaintiffs would require (1) evidence of systematic “pack[ing]” and “crack[ing],” and (2) that the totality of the circumstances “confirms that the map can thwart the plaintiffs’ ability to translate a majority of votes into a majority of seats.”<sup>136</sup> Justice Scalia’s difficulties with the effects test are both practical and theoretical. Practically, he finds the standard difficult to implement for three reasons: (1) politics are mutable and harder to discern than race; (2) given the variations within and among political contests, majority status is unidentifiable; and (3) an ostensibly neutral baseline, even one driven entirely by the compactness, might still result in a majority of votes failing to translate into a majority of seats.<sup>137</sup> Theoretically, Justice Scalia finds that the Constitution and the United States’ winner-take-all system do not create guarantees of proportionality.<sup>138</sup>

Justice Scalia then moves on to challenge Justice Stevens’s dissent. Justice Stevens argues that racial gerrymandering is not unconstitutional per se; in fact, the Voting Rights Act requires race-conscious redistricting.<sup>139</sup> Justice Stevens reasons that if courts are able to police the line between “too much” and “just enough” race-consciousness in redistricting, they are able to do the same for partisan gerrymandering. Justice Scalia disagrees with Justice Stevens’s premise. Justice Scalia argues that the history of the Fourteenth Amendment shows that race is different. Although racial gerrymandering for race’s sake is, indeed, unlawful, Justice Scalia reasons that partisan gerrymandering for politics’ sake may well be lawful.<sup>140</sup>

Justice Scalia also critiques Justice Souter’s dissent. Here, too, Justice Scalia dismisses Justice Souter’s test as too fuzzy, finding that each step in the five-part test requires qualitative judgment.<sup>141</sup> For example, the second step of Justice Souter’s analysis asks courts to look at “deviation[] from traditional districting principles.”<sup>142</sup> Because traditional districting principles sometimes work at cross purposes—creating a district that follows existing political subdivisions may not be compatible with creating equipopulous districts—

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134. *See id.*

135. *See id.* at 285–86.

136. *See id.* at 286–87.

137. *See id.* at 286–90.

138. *See id.* at 287–89.

139. *See id.* at 292–95.

140. *See id.*

141. *See id.* at 295–98.

142. *See id.* at 295–97.

Justice Scalia claims that Justice Souter's step two is unmanageable. More broadly, Justice David H. Souter has not, to Justice Scalia's mind, been clear on exactly what he is testing for.<sup>143</sup>

Finally, Justice Scalia critiques Justice Stephen G. Breyer's dissent, which tries to identify instances of the "unjustified" use of political factors to entrench a minority in power.<sup>144</sup> Justice Scalia would find it impossible to assess whether a group has achieved political power commensurate with that to which they would be entitled absent "unjustified" political machinations.<sup>145</sup>

Ultimately, Justice Scalia concludes that all of the purported standards are nonjusticiable in part because they suffer from an absence of cost-benefit analysis.<sup>146</sup> In other words, Justice Scalia believes that there are more effective ways to look at concerns about partisanship in redistricting. He believes Congress, redistricting commissions, the voters themselves via ballot initiatives, and a variety of other actors can work to reshape electoral maps.<sup>147</sup> According to Justice Scalia, the Court has no business intervening until those mechanisms have failed.<sup>148</sup>

## II. TOWARD A COHERENT FRAMEWORK

Rather than searching for such a standard, this Section attempts to create a more robust notion of judicial discoverability by reducing the complex problem of partisan gerrymandering to three independent and exhaustive inquiries. In one sense, Justice Scalia is almost certainly correct—no standard for adjudicating partisan gerrymanders is "discoverable" in the Constitution. But then, neither is the rule that a suspect must be Mirandized, nor the rule that the right to a jury trial is triggered by six months of imprisonment, nor even the "one person, one vote rule."<sup>149</sup> This Comment does not choose among the possible answers to each of the three independent questions; instead, it lays out a roadmap by which a court could do so and thus hopes to challenge Justice Scalia's notion of a chaotic and seemingly random proliferation of standards by

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143. See *id.*

144. See *id.* at 299–301, 355–57.

145. See *id.*

146. See *id.* at 300–01.

147. See *id.*

148. See *id.*

149. Justice Scalia also appears to argue that it is not worth searching for an intelligible standard because partisan gerrymandering does no harm of a constitutional dimension. See *id.* at 287–88 ("Before considering whether this particular standard is judicially manageable we question whether it is judicially discernible in the sense of being relevant to some constitutional violation."). However, *Bandemer* established that excessive partisan gerrymandering is a constitutionally cognizable harm, and *Vieth* does not overrule *Bandemer*, but instead finds the decision impossible to implement. See *Davis v. Bandemer*, 478 U.S. 109, 125–27 (1986); *Vieth*, 541 U.S. at 306 (Justice Scalia, in the plurality opinion, wishing to overrule *Bandemer*), 307 (Justice Anthony M. Kennedy concurring separately to avoid that result).

illuminating the underlying analytical structure of the proposed gerrymandering tests.

Note that the appendix is a companion to this Section. The appendix tracks all cases mentioned in this portion and situates them along all three axes discussed in the taxonomy below.

#### *A. Question 1: Which Phase?*

Turning to the first question of where to look to identify unconstitutional gerrymandering, a partisan gerrymander's unconstitutionality might manifest at any of three different phases. Below, I canvass the existing case law and find that cases might focus on one or more phases of redistricting. First, some cases examine the legislative process leading up to the enactment of a redistricting scheme. These cases concern themselves with questions about the minority party's ability to participate in the very process of crafting a redistricting map. Second, other cases focus on the map itself. Here, I use the term "map" to mean the electoral process broadly. In a partisan gerrymandering case that alleges that a legislative majority rammed through a change in voter identification laws, the "ramming" would be a first-phase process offense and the legal change a second-phase, map-based offense. Finally, still other cases look at the aftermath of the plan, to the distribution of power post-election.

This Section examines each of these three phases in turn, attempting to link the decision about which phase of redistricting to examine to broader constitutional or procedural values. It documents instances of courts focusing on each of the three phases in this Comment's taxonomy, and weighs the gains and losses of inquiring into each phase of the redistricting process.

##### *1. Legislative Process*

One way to think about partisan gerrymandering is as a failure of democratic process. That is, we intervene to prevent partisan gerrymanders because a truly partisan gerrymander is one in which duly elected representatives have somehow been fenced out of the redistricting process. On such a reading, a court should focus its inquiry on what happened before the map was drawn—on the "vehicle bills" in *Bandemer*,<sup>150</sup> or on the late-night passage of the *Badham* plan by a speaker who compared himself to the Ayatollah.<sup>151</sup> Factors to consider might include the extent to which the redistricting process was open to the public and to the minority party, the composition of the various institutions (executive, legislative, and judicial) that created a redistricting plan, and whether the processes or programs used to redistrict considered factors other than voter affiliation.

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150. See *Bandemer*, 478 U.S. at 175.

151. See Dan Walters, *Should Legislative Terms Be Modified to Buy Redistricting Reform?*, SACRAMENTO BEE, July 15, 2005, at A3.

Before assessing the utility of tests focusing on legislative process, two notes are in order. First, the focus of a partisan gerrymandering test that polices the lead-up to a districting plan should be the actual legislative record surrounding the redistricting plan. By contrast, inquiries that many legal theorists describe as “process-oriented” are, in fact, “imaginary process-oriented.”<sup>152</sup> That is, many inquiries into the legislative process only hypothesize conceivable rationales that might lead to the passage of a particular bill instead of examining the actual rationales.<sup>153</sup> In inquiries traditionally described as process-oriented, the actual legislative process is constitutionally irrelevant.<sup>154</sup> By contrast, the legislative process inquiry identified in this Comment looks to evidence of lawmakers’ actual deliberations.

Second, the *Bandemer* plurality equated legislative process with intent. However, a legislative process focus is neither necessary nor sufficient to establish intent. That is, one could imagine an inquiry focused on a different phase of the redistricting process that seeks to identify underlying intent. For example, a court might scrutinize the shapes on a map to see whether they were explicable by any motive other than discriminatory intent.<sup>155</sup> The focus of this Section is thus on the phase of the redistricting process on which the inquiry focuses, not on whether the inquiry is designed to determine intent, effect, or another mens rea.

*Hulme v. Madison County* is an example of an analysis focused on legislative process.<sup>156</sup> In that case, the plaintiffs argued that, though the ultimate districting scheme fell within the 10 percent margin of error for the “one person, one vote” principle, its passage was so tainted by arbitrariness and discrimination as to render the scheme unconstitutional.<sup>157</sup> Examining a legislative record replete with foul language and threats, the district court concluded that legislators’ behavior was “not only boorish, but it clearly demonstrates the bad faith under which the Madison County Board districts were apportioned.”<sup>158</sup> When the defendants failed in briefing or oral argument to put forth a neutral justification for the plan, the district court concluded that

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152. But see Gerken, *supra* note 10, at 504 (characterizing *Georgia v. Ashcroft*, 539 U.S. 461 (2003), as “process-oriented” because it evaluates whether the bill passed had the support of African American legislators).

153. Most famously, John Hart Ely described EPC jurisprudence as “process-oriented.” See generally JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). Adam Cox divides redistricting regulations into process-based, outcome-based, and institution-selecting regulations. See Cox, *supra* note 29, at 756. His process-based regulations, however, impose constraints not on the process by which a redistricting plan is passed but on what the plan itself looks like. Thus, in my taxonomy, Professor Cox’s process-based regulations are map-based inquiries. *See id.*

154. See, e.g., U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980) (performing a process-based inquiry by imagining the motivations of legislators rather than relying on the legislative record).

155. The *Bandemer* majority did just that, dismissing the dissent’s focus on map shapes as an effort to suss out intent. *See Bandemer*, 478 U.S. at 138–40.

156. 188 F. Supp. 2d 1041 (S.D. Ill. 2001).

157. *See id.* at 1047–48.

158. *See id.* at 1051–52.

the plan violated the EPC.<sup>159</sup> Again, the Court relied for its reasoning not on the plan itself, as the districts were relatively equal in population. Nor did the Court rely on any electoral outcomes, because there had been none. Rather, the Court relied on the legislative record surrounding passage of the bill.<sup>160</sup>

An inquiry focused on legislative process has several virtues. First, courts know how to scrutinize legislative processes. In administrative law, for instance, courts routinely police agencies for valid reasoning, thoroughness in promulgating regulations, and bias or impropriety.<sup>161</sup> Second, inquiring into legislative processes protects both against redistricting plans passed with improper goals and, by proxy, redistricting plans that fail to adhere to “good governance” redistricting principles. For example, one researcher found that where control of the legislature was divided—indicating that legislative processes were more likely to be fair, as neither side wielded a supermajority cudgel—population deviations among districts were generally lower.<sup>162</sup>

However, an exclusive focus on legislative process is likely to be ineffective. For one thing, it is unlikely that such an inquiry will capture the ill-effects of a bipartisan “sweetheart” gerrymander, a districting scheme in which no districts are competitive but that benefits both majority parties equally. For such a redistricting plan to take effect, lawmakers from both sides of the aisle must come together. From a court’s perspective, then, the legislative process will be working as it should.<sup>163</sup> More broadly, a focus on legislative process “only invites political actors to disguise their purposes better next time.”<sup>164</sup> Some legislative processes, of course, cannot be disguised. For example, a decision to perform a mid-decade redistricting, without the benefit of a revised census—a decision that would be caught under a legislative process inquiry because it precedes the creation of an electoral map—is difficult to disguise.<sup>165</sup> But, in general, legislators will quickly grow adept at holding more public hearings, keeping declarations of intent more private, and learning what “magic

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159. See *id.* at 1052.

160. See *id.* For another example, look to Justice Stevens’s concurrence in *Karcher v. Daggett*, 462 U.S. 725, 763 (1983). He notes that the plan was sponsored by Democrats, who controlled both houses, signed into law the day before a Republican replaced a Democrat as governor, and accompanied by no formal explanation. See *id.*

161. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Verizon Commc’ns. Inc. v. FCC*, 535 U.S. 467 (2002); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

162. See Thomas L. Brunell, The One Person One Vote Standard in Redistricting: The Uses and Abuses of Population Deviations in Legislative Redistricting (Aug. 1, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1900877](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900877).

163. See generally Issacharoff, *supra* note 10, at 598–601 (querying why our judicial focus is on single-party gerrymanders and analogizing to antitrust context, where bi-company cartel is policed as heavily as single-company cartel).

164. Brief of Samuel Issacharoff, Burt Neuborne, & Richard H. Pildes as Amici Curiae in Support of Appellants at 23–24, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439).

165. See generally *id.*

words” to avoid saying to prevent a partisan gerrymandering claim. As we have seen in the context of classical equal protection jurisprudence, by coupling antipathy with harm, the court system blinds itself to harms effectuated *sub silentio*.<sup>166</sup>

## 2. The Map Itself

A second option is to focus on the map or electoral process itself. On such an inquiry, legislators’ motivations and electoral outcomes are irrelevant; instead, a court examines the redistricting plan for evidence of unfairness.<sup>167</sup> A map-based inquiry focuses on any decisions made via the legislative process examined in Section 1, *supra*.

Traditional indices of map-based fairness are compactness, contiguity, and adherence to existing political subdivisions. Compactness is measured in a variety of ways but generally refers to the difference between a squiggled, stretched, or inexplicably contoured district and the simplest district imaginable—say, a square or a circle.<sup>168</sup> A district is contiguous if each part of it is reachable without crossing a district boundary.<sup>169</sup> Contiguity prevents pockets of voters, scattered throughout a state, from having their votes counted together. Professor Richard Pildes’s “postcard districts”—in which each voter in a state is mailed a postcard that randomly assigns them to a district—are an example of extremely noncontiguous districts.<sup>170</sup> Finally, redistricting is traditionally measured by adherence to existing political boundaries, such as county and municipality lines, on the assumption that respecting existing subdivisions keeps communities of citizens together.<sup>171</sup>

A map-based inquiry need not be limited to these traditional criteria, however. For example, a court could examine whether a map pits two incumbents against one another (known as “pairing”).<sup>172</sup> Such a map indicates

166. See Haney-López, *supra* note 71, at 1850 (“By separating harm from the question of antipathy, malicious intent rendered the actual injury imposed upon vulnerable social groups extraneous to constitutional analysis.”).

167. But see, e.g., *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 775 (4th Cir. 2003) (dismissing as conclusory allegations related merely to the shape of the district at issue without allegations relating to electoral outcomes).

168. See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 85 n.41 (1985) [hereinafter Grofman, *Criteria*] (surveying various state statutes’ measures of compactness). Cf. *Reapportionment Act of 1911*, ch. 5, §§ 2–4, 37 Stat. 13–14 (codified as amended at 2 U.S.C. § 2 (2006)) (requiring compactness in federal redistricting); *Reapportionment Act of 1929*, 2 U.S.C. § 2a (2006) (same).

169. See Grofman, *Criteria*, *supra* note 168, at 84.

170. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2535 (1997).

171. *Anne Arundel Cnty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 406–07 (D. Md. 1991); Brief for Appellee Charles Soechting in Support of Appellants at 14–15, *LULAC*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439), 2006 WL 53998, at \*14–15.

172. See Appellant’s Brief on the Merits at 23–24, *LULAC*, 548 U.S. 399 (2006) (No. 05-

an upheaval in how voters are paired. A map-based inquiry may even look to factors not evident on the face of the map, so long as those factors are the result of a legislative decision-making process and will have an effect on electoral outcomes. For example, shifting the date of a primary—a decision made by the districting body that will affect voting patterns—would be captured by a map-based inquiry.<sup>173</sup>

Justice Stevens's concurrence in *Karcher v. Daggett* provides an example of a map-focused test.<sup>174</sup> Justice Stevens would have challengers to redistricting schemes prove (1) that they belong to a politically salient class, whose geography is ascertainable, and (2) that their proportionate voting influence has been adversely affected.<sup>175</sup> Acknowledging the difficulty of demonstrating the second prong—voters might be cracked or packed, and baseline party strength is difficult to measure—Justice Stevens suggests that “objective indicia of irregularity” might suffice.<sup>176</sup> He first considers mathematical measures of compactness, such as elongation (the ratio of the area of the district to the area of the smallest circumscribing circle), indentation (the ratio of the perimeter of the district to the circumference of the smallest circumscribing circle), the aggregate of the distances from the geometric or population center, the aggregate length of the boundaries, and the ratio of the minimum to the maximum diameters of the district.<sup>177</sup> He then suggests examining deviation from established political boundaries.<sup>178</sup> Though Justice Stevens does not perform a mathematical analysis, he assumes that a map which wantonly disregards county boundaries in the service of districts nicknamed “the Swan” and “the Fishhook” would fail his test.<sup>179</sup>

Justice Stevens's opinion suggests the versatility of a map-based inquiry. We might examine district shapes for three reasons. First, we might think values such as compactness and adherence to existing political boundaries matter in and of themselves. As Justice Stevens explains, compactness has been enshrined in twenty-one state constitutions because it facilitates organizing, campaigning, and representation of constituents.<sup>180</sup> Because political subdivision boundaries define communities of interest and remain stable over time, district lines that adhere to these boundaries are administratively

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204), 2006 WL 53996 at \*23–24; Republican Party of Va. v. Wilder, 774 F. Supp. 400, 405 (W.D. Va. 1991); Radogno v. Ill. State Bd. of Elections, No. 1:11-cv-04884, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011), *aff'd*, Radogno v. Ill. State Bd. of Elections, 133 S. Ct. 103 (2012).

173. See *Shapiro v. Berger*, 328 F. Supp. 2d 496, 504 (S.D.N.Y. 2004) (assessing a claim of “temporal gerrymandering”).

174. See 462 U.S. 725, 744–65 (1983).

175. *Id.* at 754–55.

176. *Id.* at 751.

177. *Id.* at 756 n.19.

178. *Id.* at 758–59.

179. See *id.* at 762–63.

180. See *id.* at 756 n.18.

convenient and less likely to confuse voters.<sup>181</sup> Thus, policing district shapes facilitates several civic values.

Second, we might consider values such as compactness and contiguity proxies for other political harms. On such a reading, a mathematical analysis of a district's shape is designed to smoke out an underlying harm. For example, in *Larios v. Cox*, the lower court found that the shapes of newly created districts supplied evidence of partisan intent.<sup>182</sup> Though it is possible for, say, a legislative process inquiry to serve as a proxy for a map-based inquiry—as noted above, redistricting plans passed by two parties are more likely to adhere to population deviation—a map-based inquiry is easier to perform. Thus, a map-based inquiry has the virtue of serving as a conduit to other inquiries.

Finally, we might think that grossly misshaped districts undermine governmental legitimacy. That is, the shapes themselves constitute an “expressive harm,” in Professor Pildes’s terminology,<sup>183</sup> by compromising public perceptions of the government. On this reading, we police districts in the service of perceptions of legitimacy; that the populace thinks there has been gerrymandering is as much a harm as gerrymandering itself.<sup>184</sup> A map-based inquiry is thus a versatile way to address a variety of harms done by partisan gerrymandering.

### 3. Electoral Outcomes

Finally, courts attempting to identify examples of unconstitutional partisan gerrymanders might look to electoral outcomes. If the Court’s primary concern, as articulated in *Bandemer*,<sup>185</sup> is fair representation, both the map used to determine representation and the process by which that map is passed are at best proxies for the real question. As Justice Kennedy notes, a test that polices electoral outcomes is the only kind that would ensure that a highly effective partisan gerrymander done during a decennial districting process receives the same level of scrutiny as a “bumbling, yet solely partisan, mid-decade redistricting.”<sup>186</sup>

A test focused on electoral outcomes might adopt one of two tactics. First, such a test might look to numerical outcomes, such as the percentage of seats each party received, the percentage of votes each party received, and the

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181. See *id.* at 758–59.

182. 300 F. Supp. 2d 1320, 1330 (N.D. Ga. 2004), aff’d, 542 U.S. 947 (2004).

183. See generally Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 507 (1993); see also *Bush v. Vera*, 517 U.S. 952, 960 (1996) (adopting Pildes’s methodology to assess gerrymandered districts).

184. In campaign finance and voter identification cases, the Supreme Court has held that avoiding the perception of corruption is an important government interest. See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000).

185. See *Davis v. Bandemer*, 478 U.S. 109, 123, 139–40 (1986).

186. *LULAC v. Perry*, 548 U.S. 399, 419 (2006).

number of safe seats.<sup>187</sup> The most widely accepted metric for assessing deviant numerical electoral outcomes is partisan symmetry, a standard that scholars Bernard Grofman and Gary King urged in law review articles and amicus briefs and Justice Stevens endorsed as “widely accepted by scholars as providing a measure of partisan fairness.”<sup>188</sup> The symmetry standard demands that the two parties be situated similarly with regard to electoral responsiveness. That is, if  $x$  votes for the Democrats results in  $y$  seats, the same number of votes for Republicans—were the roles reversed—should result in the same number of seats for Republicans.<sup>189</sup>

The symmetry standard has many benefits in addition to its intuitive appeal. First, though the standard relies on hypotheticals and counterfactuals, its predictive power appears to be great.<sup>190</sup> Second, relying on the symmetry standard creates congruence among experts.<sup>191</sup> And finally, the Grofman and King standard addresses itself to prospective, rather than retrospective, harms, making it easier to “undo the damage” of a partisan gerrymander.<sup>192</sup>

However, the problems with the symmetry standard indicate the larger problems with policing numerical electoral outcomes. Electoral outcomes are difficult to calculate since voter affiliation is highly mutable and strongly influenced by particular elections and candidates.<sup>193</sup> And modeling symmetry is difficult given the limited data (there are five or fewer elections between redistrictings) and may require unrealistic assumptions (such as uniformity in partisan swing).<sup>194</sup> Moreover, courts are uncomfortable with simulated results. As Justice Kennedy noted in *LULAC*, courts prefer that litigation commence “if and when the feared inequity ar[ises],” characterizing the partisan symmetry test as documenting only “unfair results that would occur in a hypothetical state

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187. *LULAC* provides a window into the various Justices’ conceptions of fair electoral outcomes. For example, Justice Breyer focuses on the number of seats each party would likely obtain under a particular plan, see *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004) (Breyer, J., dissenting), while Justice Stevens would focus on the number of safe seats, see *LULAC*, 547 U.S. at 473 n.11 (Stevens, J., dissenting in part). Cf. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 265 (2009).

188. See generally *LULAC*, 548 U.S. at 466; Brief of *Amici Curiae* Professors Gary King, Bernard Grofman, & Jonathan N. Katz, in Support of Neither Party, *LULAC*, 548 U.S. 399 (2006) (Nos. 05-204, 05-254, 05-276, 05-439); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2, 6 (2007).

189. See *LULAC*, 548 U.S. at 419–20.

190. See Grofman & King, *supra* note 188, at 15.

191. See *id.* at 15–16.

192. See *id.*

193. See *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004); Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, 835 F. Supp. 2d 563, 578–79 (N.D. Ill. 2011).

194. For an example of a model requiring such dubious assumptions, see Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. POL. SCI. 514 (1994).

of affairs.”<sup>195</sup> If Justice Kennedy is to be taken at his word, the symmetry standard may not be an option for policing electoral outcomes. Instead, a standard that takes into account only actual election results—say, a standard that specifies a maximum possible deviation between the percentage of votes received and the percentage of seats received—may be necessary.<sup>196</sup>

Finally, the symmetry standard does *not* police for representation,<sup>197</sup> but only for partisan bias. To see the point, imagine a hypothetical state in which Republicans receive 51 percent of the vote but 100 percent of the seats. The districting scheme that made Republicans the reigning party does not seem to accord with *Bandemer*’s (admittedly fuzzy) conception of fair representation. However, if a defendant could demonstrate that the Democratic Party, too, would receive 100 percent of the seats with only 51 percent of the vote, the symmetry standard would detect no trouble with the redistricting scheme at issue. Without knowing the voter distribution over the next decade, a *party* might feasibly accept a gerrymander that passed the symmetry test. But the symmetry test does not guarantee *voters* any particular voice in the legislature.

An electoral outcomes test might alternatively look to actual representation. That is, rather than looking to the number of seats and the number of votes, a court might qualitatively evaluate the degree to which a redistricting system appears to represent different players—*Badham*’s “shut out of the political process” test.<sup>198</sup>

Crucially, such a test differs from the legislative process inquiry outlined above. There, a court would scrutinize the process by which a redistricting scheme was passed. Here, a court would take as given a redistricting scheme and analyze the political processes that play out in its aftermath. A post-*Badham* opinion illuminates the difference. *Marylanders for Fair Representation v. Schaefer* breaks the post-redistricting inquiry into two parts: (1) whether the minority party is foreclosed from participating in the electoral process (i.e., running for office), and (2) whether the minority party is represented in the legislative process.<sup>199</sup> The first inquiry focuses on whether the redistricting plan hampers minority party members’ ability to register or field candidates.<sup>200</sup> The second inquiry focuses on the post-election legislature and whether the majority party is able to effectively ignore the needs of the

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195. See *LULAC v. Perry*, 548 U.S. 399, 420 (2006).

196. As Justice O’Connor notes in *Bandemer*, the White plurality essentially suggests that gross disproportionality ought to be unconstitutional, though it expressly declines to adopt a proportionality requirement. See *Davis v. Bandemer*, 478 U.S. 109, 156–59 (1986).

However, by noting with dismay the difference between the percentage of votes received and the percentage of seats won and suggesting that several election cycles of the same might be cause for concern, the plurality implicitly adopts proportionality in elections as a constitutional value. See *id.*

197. Or, for that matter, the symmetry standard does not police for bipartisan or “sweetheart” gerrymanders.

198. See *Badham v. Eu*, 694 F. Supp. 644, 670 (N.D. Cal. 1988).

199. See 849 F. Supp. 1022, 1041–44 (D. Md. 1994).

200. See *id.*

minority party.<sup>201</sup> It appears to be more difficult to police these post-redistricting legislative processes qua electoral outcomes (that is, to examine how majority-party officials treat members of the minority party after a redistricted election). As the *Schaefer* court notes, much of the testimony advanced in the second inquiry proves merely that “Republicans are indeed a minority party in the legislature of a predominantly Democratic State.”<sup>202</sup>

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In constructing a judicially manageable gerrymandering standard, then, a court begins by asking which portion or portions of the redistricting process to focus on. A court largely concerned with procedural fairness—with ensuring that the fox is not guarding the henhouse—might choose to scrutinize the process before the map is even promulgated, hearing evidence about the legislative rough-and-tumble engaged in by the majority party out of concern that the party is using present majority status to permanently entrench legislative dominance.<sup>203</sup> A court concerned with perceptions of legitimacy might examine the map itself, striking down the “splitting amoebas”<sup>204</sup> and “salamander-shaped districts”<sup>205</sup> that cause voter skepticism and other harms. Within each phase of the redistricting process, a court can measure partisan gerrymandering using a number of different metrics—compactness, symmetry, and so on. I turn next to how to measure gerrymandering, once we know where to look for it.

### B. Question 2: How to Measure?

This Section examines four possible ways of measuring partisanship in a redistricting scheme. Crucially, the answer to this question is completely independent of the answer to Question 1, because any of the four metrics discussed below could be applied at any of the three phases of the redistricting process.

#### 1. Nonretrogression

One option is to flag partisan gerrymandering based on a nonretrogression standard: Is the gerrymander worse than the redistricting plan that preceded it? The court in *Baldus*,<sup>206</sup> for example, employed such a test and sanctioned the

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201. See *id.* at 1040–43.

202. See *id.* at 1042.

203. Though note that no legislature has ever attempted to lock in a gerrymander by requiring a supermajority of votes to initiate redistricting. See Schuck, *supra* note 8, at 1356.

204. See Anne Arundel Cnty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F. Supp. 394, 408 (D. Md. 1991).

205. See Sam Wang, *The Great Gerrymander of 2012*, N.Y. TIMES, Feb. 2, 2013, [http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/02/03/opinion/sunday/the-great-gerrymander-of-2012.html?pagewanted=all&_r=0).

206. See *infra* note 252 and accompanying text.

redistricting scheme in question because it was passed in a significantly more bipartisan manner than its predecessor.

The plaintiffs in *Radogno v. Illinois State Board of Elections*,<sup>207</sup> a post-*Vieth* case, attempted to construct a judicially manageable standard using a nonretrogression test. The plaintiffs argued for six requirements, each pegged to the redistricting scheme being replaced: the new redistricting scheme at issue is less compact than the old, splits more traditional political boundaries than the old, etc. The court ultimately dismissed the plaintiffs' argument but, importantly, did not do so on manageability grounds. Instead, the Northern District of Illinois deemed the plaintiffs' test "essentially and fatally arbitrary."<sup>208</sup>

Other courts have considered nonretrogression evidence as part of a multi-prong analysis. For example, in *White v. State of Alabama*,<sup>209</sup> the court dismissed the plaintiffs' claim in part because there was evidence that Republicans were "making inroads at many levels into what has historically been a one-party state."<sup>210</sup> The court found that though the districting scheme at issue had not created any semblance of proportionality, the state of affairs was an improvement over the last round of redistricting and thus this immunized the new map to constitutional challenge.

The primary virtue of nonretrogression is, of course, ease of administration. Rather than speculate about future voter behavior, plaintiffs need only draw a comparison to a prior scheme. However, the era when nonretrogression may have been appropriate seems to have passed. Given how badly gerrymandered most states in the country are, it would seem a long road to fix the electoral map if the baseline is set by what exists today.

## 2. Objective

A second option is to set an objective cutoff at the first stage of the test. This is easiest with a map-based test, e.g., the region in question shall have no more than five non-compact districts, shall have an average non-contiguity of less than 10 percent, or shall adhere to at least 80 percent of existing political boundaries. An objective test might also be easily applied to numerical electoral outcomes—the minority party won a majority of seats in no more than one of the past three elections, the difference between the percentage of votes and the percentage of seats is no more than 25 percent. The objective test is perhaps even simpler to administer than the nonretrogression analysis, though it, too, likely suffers from the *Radogno* worry of arbitrariness—it is unclear

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207. No. 1:11-cv-4884, 2011 WL 5868225, at \*2–3 (N.D. Ill. Nov. 22, 2011).

208. *See id.* at \*4.

209. 867 F. Supp. 1571 (M.D. Ala. 1994).

210. *See id.* at 1577.

what constitutional or policy grounding the court relies on to select a particular threshold.<sup>211</sup>

The *Vieth* lower court, in its search for guidance after *Bandemer*, crafted another example of an objective test.<sup>212</sup> Reasoning backward from *Bandemer*, the court concluded that if *Bandemer*, in which Democrats received more than 51 percent of the vote but won only 43 out of 100 seats in the House, did not violate the Constitution, neither could the Pennsylvania gerrymander at issue, since it was even less disproportionate.<sup>213</sup> An objective standard might therefore set an inner or outer boundary, rather than mark off the precise line between constitutionally acceptable and unacceptable redistricting schemes.

### 3. Know It When I See It

Drawing from Justice Stewart's famously candid definition of obscenity,<sup>214</sup> a third category of cases do not specify an objective benchmark but instead rely on judges' intuitions about what constitutes gerrymandering. Some tests explicitly draw on the "know it when I see it" standard. In *Perez v. Texas*,<sup>215</sup> for example, plaintiffs proposed using Justice Stewart's obscenity standard to adjudicate partisan gerrymandering cases.<sup>216</sup> The Western District of Texas rejected the standard as nonjusticiable because it was not "clear, manageable, and politically neutral."<sup>217</sup> Of course, neither are the "reasonable person" or "narrow tailoring" standards that courts routinely adjudicate.

Other courts are less candid about their "know it when I see it" standard but essentially hold that sufficiently egregious gerrymanders will be policed in some way. For example, the dissenting judge in *Anne Arundel County Republican Central Committee* finds that, at the very least, where the final plan "includes shapes that look more like characters on a Saturday morning television program than compact voting districts," the plan should be struck down.<sup>218</sup> Though more subjective and exposed to the vagaries of individual judges' experiences and preferences, the "know it when I see it" analysis has a rich pedigree in existing case law,<sup>219</sup> and cannot be dismissed as nonjusticiable *per se*.

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211. See, e.g., *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at \*4 (N.D. Ill. Oct. 21, 2011), *aff'd*, *Radogno v. Ill. State Bd. of Elections*, 133 S. Ct. 103 (2012).

212. *Vieth I*, 188 F. Supp. 2d 532 (M.D. Pa. 2002).

213. *Id.* at 544.

214. *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Stewart, J., concurring).

215. No. 11-CA-360-OLG-JES-XR, 2011 WL 9160142 (W.D. Tex. Sept. 2, 2011).

216. *Id.* at \*11.

217. *Id.*

218. See *Anne Arundel Cnty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 408 (D. Md. 1991).

219. See Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023 (1996).

#### 4. Counterfactual

The appellants in *Vieth* proposed a test that is a prototypical example of a counterfactual inquiry. *Vieth*'s appellants would ask a court to inquire into whether a districting plan prevents the majority party from achieving a legislative majority.<sup>220</sup> The use of the word "prevents" suggests that plaintiffs must demonstrate that, in an alternate realm where the region was districted without excessive partisan motivation, the plaintiffs' party would achieve a majority.

A counterfactual analysis runs into several of the problems Justice Scalia identified in *Vieth*: split-ticket voting,<sup>221</sup> the mutability of political allegiances,<sup>222</sup> and a lack of available data<sup>223</sup> all make the baseline calculation necessitated by a counterfactual analysis difficult as an empirical matter. That the United States has no guarantee of proportional representation (and that proportional representation might be measured by an infinite number of characteristics other than one's political party) make the calculation difficult as a theoretical matter.

#### C. Question 3: What Now?

Assume, finally, that a court has found some reason for suspicion—that the districting scheme in question met the "trigger condition" established by Questions 1 and 2. For example, the district in question is less compact than the district that preceded it (a map-based nonretrogression test), or the percentage of seats taken by a party with a bare majority of votes seems suspicious (an electoral outcomes "know it when I see it" test). What ought a court to do?

Turning, again, to the dozens of post-*Bandemer*, pre-*Vieth* cases, this Section details the three categories of responses by courts to plaintiffs who are able to make out a *prima facie* case of partisan gerrymandering. Some courts find the *prima facie* case sufficient; others find an EPC search into the ostensible state justifications for such a gerrymander sufficient; and still others find a balancing test between the harm of the redistricting scheme against any compelling governmental interest sufficient. By examining examples of each analytical framework as deployed by the Supreme Court, lower courts, and scholars, this taxonomy aims to bring clarity to the various multi-part tests mocked by Justice Scalia.<sup>224</sup>

This Section is, out of necessity, the least descriptive. Out of respect for canons precluding undue judicial interference, courts only explain what

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220. Brief for Appellants at \*21–22, *Vieth v. Jubelirer*, 541 U.S. 267 (2003) (No. 02-1580), 2003 WL 22070244.

221. See, e.g., Issacharoff, *supra* note 10, at 603.

222. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) ("[A] person's politics is rarely as readily discernible—and never as permanently discernible—as a person's race.")

223. See, e.g., Issacharoff, *supra* note 10, at 603.

224. See *Vieth*, 541 U.S. at 295–97.

happens after a trigger condition is met if, indeed, the trigger condition is met. In other words, courts must resolve the first two parts of the three-part analysis in the plaintiffs' favor. As such, there is a less-than-robust set of data points from which to explore courts' options with regard to Question 3.

### 1. Hard-and-Fast Rule

The first response is simple: stop. When faced with a partisan gerrymandering claim where the plaintiff has proven deviance in the appropriate phase (legislative process, map, or electoral outcomes) and to the appropriate degree (based on nonretrogression, an objective threshold, "know it when I see it," or a counterfactual), a court might then choose to strike down the gerrymander as unconstitutionally partisan. It might set a hard-and-fast rule that, for instance, any redistricting scheme less contiguous than its predecessor is constitutionally infirm.

The primary benefit of a hard-and-fast rule—that is, a rule that finds redistricting schemes unconstitutional when a set of preconditions are met without further inquiry—is predictability. Rather than forecasting how a court will respond to a legislature's proffered justifications, hard-and-fast rules provide safe havens for legislatures: go this far and no further. Perhaps the most important example in redistricting case law is the "one person, one vote" standard.<sup>225</sup> As discussed in Part I.B, *supra*, over the course of three decades, the Supreme Court created the standard to adjudicate malapportionment claims and gradually developed a rule that any deviations in population between districts were to be less than 10 percent.<sup>226</sup> While *Larios* makes it clear that redistricting schemes with population deviations of less than 10 percent are not necessarily safe if the scheme does not make an "honest and good faith effort" to reduce those deviations, legislators at least know that a deviation of more than 10 percent will cause a scheme to be struck down as unconstitutional.<sup>227</sup>

However, a hard-and-fast rule leaves a court little room for error in defining a trigger condition. For example, consider the district that was Massachusetts's 10th congressional district until the post-2010 census redistricting. The district was routinely ranked as one of the most bizarre in the nation by measures of contiguity and compactness. Its bizarre shape was due to its geography: the 10th district encompassed Cape Cod and several outlying islands.<sup>228</sup> A hard-and-fast rule that constitutionalized requirements of compactness and contiguity might have left legislators with few options for enfranchising the citizens of Nantucket.

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225. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

226. See *Berman*, *supra* note 266, at 838–39.

227. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1339–41 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004).

228. See *Pildes*, *supra* note 170, at 2515–16.

The post-*Bandemer*, pre-*Vieth* cases that use a hard-and-fast rule adopt a number of strategies to avoid this concern. First, many cases use a hard-and-fast rule only to mark outer or inner boundaries. For example, Justice Stevens's dissent in *Vieth* establishes an outer boundary beyond which a gerrymander is unconstitutional and within which some are unconstitutional.<sup>229</sup> Similarly, *Vieth I*—the lower court predecessor to the Supreme Court case—establishes an inner boundary within which a gerrymander is constitutional and beyond which some are unconstitutional.<sup>230</sup> By setting a broad threshold for hard-and-fast rules, courts reserve a more fine-grained, fact-specific inquiry for borderline cases.

Second, many of the cases that use an ostensible “hard-and-fast rule” pair such a rule with a “know it when I see it” trigger measurement. In doing so, courts create leeway. Though the trigger preconditions automatically result in a finding of unconstitutionality, courts can consider context in measuring the trigger conditions. For example, in *Terrazas v. Slagle*, the Western District of Texas ruled that courts can find a discriminatory effect if a plaintiff “presents evidence of a group perpetuating its power through gerrymandering in one political structure and that the wronged partisan group cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures.”<sup>231</sup> The test is a hard-and-fast rule—once a plaintiff has satisfied the preconditions, the *Terrazas* court would leave no room for balancing. The court chose a trigger condition so closely tied to political legitimacy that it is difficult to see what compelling interest might be advanced by the government. Additionally, it set a measurement scheme that allowed for judicial discretion. For these reasons, the *Terrazas* court avoided the possibility of unnecessarily striking down a legitimate redistricting scheme.

Finally, courts have opted for overinclusiveness. That is, courts default to legislative deference on the issue of redistricting. By setting hard-and-fast rules to capture only truly egregious gerrymanders, courts allow state legislators flexibility and create predictability, lessening the risk of striking down a fair redistricting scheme.<sup>232</sup>

## 2. Scrutinize

A second set of courts finds that once a plaintiff meets the trigger conditions, the burden shifts to the defendant. In these cases, defendants have an opportunity to prove a government interest and explain how the oddities in

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229. See *Vieth*, 541 U.S. at 339–41 (Stevens, J., dissenting).

230. See *Vieth I*, 188 F. Supp. 2d 532, 538 (M.D. Pa. 2002).

231. See 821 F. Supp. 1162, 1174 (W.D. Tex. 1993).

232. Cf. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 30–31 (2004) (describing “prophylactic rules” and suggesting that courts routinely create overprotective rules of decision to operationalize constitutional norms) (citing Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 n.23 (1985)).

the process, electoral outcome, or redistricting map are related to that interest. In homage to traditional EPC doctrine, with its three tiers of scrutiny, I call this analytical framework an EPC-style analysis.

I detail this framework further in Part III, *infra*,<sup>233</sup> but an example showcases the basic structure. Justice Souter's dissent in *Vieth*, drawn from the Supreme Court's Title VII jurisprudence,<sup>234</sup> is illustrative. Justice Souter first outlines the four elements of a *prima facie* case that the plaintiffs must prove, a map-based counterfactual trigger.<sup>235</sup> First, the plaintiffs must show that they are members of a cohesive political group (for example, the Republican Party or a labor union).<sup>236</sup> Second, the plaintiffs must show that the district "paid little or no heed" to traditional redistricting principles, such as compactness, contiguity, and conformity to existing political geographies.<sup>237</sup>

The last two prongs of Justice Souter's *prima facie* test mirror traditional EPC jurisprudence. The third prong requires the plaintiffs to show that specific protuberances or fissures "reach out to include Democrats" or "squirm away from Republicans."<sup>238</sup> This is similar to a traditional EPC case, in which defendants must show that the suspect classification at issue specifically maps onto the legitimate ends posited. Fourth, the plaintiffs must demonstrate that there is a "less restrictive" hypothetical district (that is, a district that more closely adheres to constitutional redistricting principles).<sup>239</sup> This is similar to classical EPC cases, in which plaintiffs must demonstrate that a given law is not the "least restrictive" means of achieving a government interest. Finally, plaintiffs must show intent on a *Washington v. Davis* contextual intent standard;<sup>240</sup> intent, Justice Souter indicates, may be inferred in most cases from the other four elements and buttressed by a legislative process analysis.<sup>241</sup> Note that none of the cases or commentary that endorse a scrutiny-based analytical framework endorse a particular level of scrutiny. That is, Justice Souter does not tell us whether the justification that the defendants will have to put forth must be compelling, important, merely legitimate, or somewhere in the middle.

Once the plaintiffs establish this *prima facie* case, Justice Souter has several options regarding its refutability. As discussed in Part II.C.1, *supra*, Justice Souter could find that the *prima facie* case is dispositive, setting a hard-

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233. See *infra* notes 258–302 and accompanying text.

234. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

235. See *Vieth v. Jubelirer*, 541 U.S. 267, 347–50 (2004).

236. See *id.* at 347.

237. See *id.* at 347–48.

238. *Id.* at 349.

239. See *id.* at 349–50; see also *Thornburg v. Gingles*, 478 U.S. 30, 90–91 (1986).

240. See *Washington v. Davis*, 426 U.S. 229 (1976).

241. See *Vieth*, 541 U.S. at 350 (citing *Washington v. Davis*, 426 U.S. 229 (1976)). Drawing from amici and scholarly articles by Samuel Issacharoff, Justice Souter also expresses an interest in inferring intent from a monopoly. See *id.* at 350 n.5; see also Brief Amicus Curiae of Pennsylvania Voters Joann Erfer and Jeffrey B. Albert in Support of Appellants, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580); Issacharoff, *supra* note 10.

and-fast rule for partisan gerrymandering. Instead however, he chooses to scrutinize. Once a *prima facie* case is made, Justice Souter would look to the defendants to put forth a justification “other than naked partisan advantage.”<sup>242</sup> He gives several examples from which a defendant might select: the need to comply with the Voting Rights Act, the “one person, one vote” rule, or an interest in rough proportionality.<sup>243</sup> Though Justice Souter is not explicit about a final step, presumably, the defendants would also have to show that the oddity of the districting scheme was in fact tailored to the particular non-partisan objective at hand. Justice Souter explicitly declines to give a “comprehensive list” of possible government interests;<sup>244</sup> however, he intriguingly posits that proportional representation might be one such interest.<sup>245</sup> Although the U.S. Constitution does not require proportionality (a point belabored in the Supreme Court’s partisan gerrymandering jurisprudence), per Justice Souter, it may not forbid states from seeking proportionality either.<sup>246</sup> Note that once a *prima facie* case is established, Justice Souter does not revisit the districting map itself. Once a *prima facie* case has been made, defendants cannot argue that the deviations in the districting map are not severe enough to warrant judicial intervention.

### 3. Balance

By contrast, a balancing test allows a defendant to make an argument about severity to be made in the last step. Under a balancing regime, once the plaintiff has made a *prima facie* case for partisan gerrymandering, a court balances the possible government interests served by a particular districting map against the harms of that districting scheme.

Initially, such a test sounds circuitous. After all, in answering Question 1—by choosing a phase to focus on—a court has implicitly adopted a measure of harm. By the time the plaintiffs have satisfied a trigger condition, they have implemented the first part of the balancing test—harms to a political group. Reinvoking those selfsame harms in the final portion of the analysis would be redundant. However, a balancing test, unlike a scrutiny test, brings the measure of harm that the plaintiffs posit into direct conversation with the interests that the defendants posit.

In doing so, a balancing test has two major benefits. First, partisanship goes from a binary measure, in which the trigger condition is either “present or absent,” to a scalar measure, in which the trigger condition—the test created by Questions 1 and 2—is increasingly or decreasingly present.<sup>247</sup> That is, a

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242. *Vieth*, 541 U.S. at 351.

243. *See id.* at 351–52.

244. *See id.* at 352.

245. *See id.* at 350–51.

246. *See id.* at 352 & n.7.

247. *See Berman, supra* note 26, at 815–18.

balancing test looks beyond *whether* a threshold is crossed to *how far* beyond that threshold a redistricting scheme goes. Second, a balancing test puts a more explicit focus on the harms of a particular scheme. Where a court uses proxies to answer Questions 1 and 2, a balancing test answer to Question 3 forces the court to identify the underlying harm.

Forcing a court to identify an underlying harm is, of course, the biggest downside of the test. As discussed above, courts and scholars disagree on the precise nature of the harm effectuated by partisan gerrymandering. Certain harms—expressive harms and harms to competitiveness, in particular—do not lend themselves to easy measurement. Still others—individual vote dilution harms, in which some voters' ballots count for less than others'—are difficult to balance against the far broader government interests.

One formulation of a balancing test comes to us from Grofman and King.<sup>248</sup> The trigger condition is a symmetry test. As a first step, Grofman and King would find any districting scheme that did not allow the parties an equal opportunity for representation, proportionate or not, constitutionally suspect. The next two steps in Grofman and King's test seem drawn from a scrutiny framework: a court must "consider the quality of the reasons advanced by the State to explain the deviations" and "the State must show that 'the state policy urged . . . is . . . furthered by the plan.'"<sup>249</sup> However, Grofman and King graft a final step onto the scrutiny analysis, rendering their scheme a balancing analysis.<sup>250</sup> Even if a court finds that the deviations in partisan symmetry further an acceptably robust state policy, a court must nonetheless assess whether the deviance is small enough to be constitutionally tolerable.<sup>251</sup> At the last step of constitutional tolerability, Grofman and King reintroduce the harm that triggered a closer examination, balancing that harm with the policies that the defenders of the redistricting scheme put forth.

Crucially, any answer to Question 1 might be grafted onto any answer to Questions 2 or 3. For example, *Baldus v. Members of Wisconsin Gov't Accountability Bd.* found one districting scheme acceptable because its drafting was "a significantly more bipartisan process than that associated with" its predecessor.<sup>252</sup> *Baldus*'s balancing test is thus triggered by a nonretrogression threshold in a legislative process inquiry.

As with each element of this Comment's taxonomy, there are no bright-line boundaries between the answers to Question 3 and the answers to Questions 1 and 2. When the *LULAC* Court finds, for example, that "partisan aims did not guide every line [the state] drew," it is unclear whether, on my framework, the court is drawing a conclusion about a Question 1 legislative

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248. See Grofman & King, *supra* note 188, at 25–33.

249. See *id.* at 27 (citing *Mahan v. Howell*, 410 U.S. 315, 325–26 (1973)).

250. *See id.*

251. *Id.*

252. See 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012).

process analysis or about a Question 3 scrutiny step two analysis.<sup>253</sup> However, divvying up the partisan-gerrymander analysis into discrete doctrinal steps helps throw into sharper relief the competing visions Justice Scalia decried in *Vieth* and reduces those visions to a finite set of inquiries.

#### D. Clashing Doctrinal Visions

This Part has provided a vocabulary to identify and critique the dozens of standards put forth by commentators, lower courts, and plaintiffs. Contrary to Justice Scalia's depiction of utter chaos and complete proliferation of arbitrary standards, each standard can be reduced to a judicially manageable three-question test.

Moreover, each standard put forth above has an analog in existing case law. Courts can perform an inquiry into the legislative process because the *Skidmore* line of administrative law cases look to legislative processes.<sup>254</sup> They can balance harms and gains because the *Mathews v. Eldridge* due process test requires them to do so.<sup>255</sup> And courts can enforce objective, map-based standards thanks to the "one person, one vote" jurisprudence.

Note also that, though Part II was intended as exhaustive—that is, my model is intended to capture every analysis used to locate unconstitutional partisan gerrymanders—I discarded outlier cases in my search.<sup>256</sup>

Finally, note that each of the three questions above is in theory independent of the other two. That is, none of the answers should be dispositive of the other questions.

### III. EPC-STYLE ANALYSIS

This Part responds to Justice Scalia's claim in *Vieth* that no test has proven judicially manageable. I select a map-based, objective, scrutiny, analysis—a typology I call "EPC-style analysis"—and suggest rebuttals to each of Justice Scalia's critiques. This Comment accomplishes this by situating an example of a partisan gerrymandering test alongside an analysis of a analysis of a race-based EPC claim, a type of claim which has not been found nonjusticiable by the Court.

Why this test, given that this Comment has remained agnostic on the subject of which is the most appropriate analytical framework for assessing partisan gerrymandering claims? First, the explicit analogy to traditional EPC claims allows greater pushback on Justice Scalia's concerns. By demonstrating

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253. See *LULAC v. Perry*, 548 U.S. 399, 417 (2006).

254. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

255. See 424 U.S. 319 (1976).

256. See, e.g., *Holloway v. Hechler*, 817 F. Supp. 617, 628 (S.D.W. Va. 1992), *aff'd*, 507 U.S. 956 (1993) (evaluating the number of Republican plaintiffs who testify, a metric not captured in this Comment's taxonomy).

how these concerns apply equally to traditional EPC claims and to this mode of partisan-gerrymandering analysis, I hope to demonstrate that judicial manageability cannot be the only explanation for the nonjusticiability of partisan gerrymandering claims. Second, this EPC-style analysis crops up often in existing case law.<sup>257</sup> Thus, unifying EPC-based partisan gerrymandering claims with EPC-based suspect classification claims accords with some existing lower court cases. Third, courts have been concerned primarily with arbitrariness in deciding when to strike down a partisan gerrymander.<sup>258</sup> EPC-style analysis responds to this concern: an arbitrary standard for ascertaining when to strike down a partisan gerrymander indeed seems problematic, whereas an arbitrary standard for deciding when to take a closer look may not. Finally, because no portion of the EPC-style analysis asks for an identification of the harm of a classification or redistricting deviation, the EPC-style analysis sidesteps thorny theoretical questions.

#### *A. Step 1: Facial Partisanship*

Just as traditional EPC jurisprudence begins by identifying facial race classifications, an EPC-style analysis of partisan gerrymanders begins by identifying maps that are “facially partisan”—that is, maps that, by a metric combining compactness, contiguity, and adherence to political subdivisions, deviate sufficiently from traditional districting principles to trigger heightened scrutiny.

Justice Scalia would interpose two objections at this point. He would first suggest that because traditional redistricting criteria work at cross purposes, identifying facially partisan gerrymanders will prove impossible.<sup>259</sup> That is, to increase compactness, mapmakers must sometimes sacrifice contiguity. But surely Justice Scalia would not argue that courts are unable to perform a nested balancing inquiry, first balancing the various districting criteria and a districting scheme’s departure from those criteria, then addressing the question of a legitimate government interest.

Second, Justice Scalia would object to the inquiry into facial partisanship because it does not specify the harm for which it is testing.<sup>260</sup> As explained above, a map-based trigger might use traditional districting criteria because they represent an intrinsic constitutional value (i.e., compactness, contiguity, and adherence to existing political boundaries). It might use such criteria because they serve as proxies for underlying harms, such as lack of competition

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257. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 333 (2004) (Stevens, J., dissenting); *Davis v. Bandemer*, 478 U.S. 109, 164 (1986); *Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 405–06 (W.D. Va. 1991).

258. See, e.g., *Radogno v. Ill. State Bd. of Elections*, No. 1:11-CV-04884, 2011 WL 5868225, at \*4 (N.D. Ill. Nov. 22, 2011), *aff'd*, *Radogno v. Ill. State Bd. of Elections*, 133 S. Ct. 103 (2012).

259. See *Vieth*, 541 U.S. at 294–95.

260. See *id.* at 295.

or unfair representation. Or, the trigger might use those criteria because departure from traditional redistricting results in expressional harms and decreased perceptions of legitimacy.

However, for the past fifty years scholars and judges have debated the reason for applying strict scrutiny to facial race-based classifications.<sup>261</sup> On one reading, the anti-subordination reading, facial race-based classifications are merely proxies for the far deeper harm of racial subordination. On another, race classifications are a constitutional ill in and of themselves, either because the very act of classifying individuals disenfranchises them or because racial classifications lead to a diminishment in governmental legitimacy. Because no portion of the scrutiny analysis inquires into the magnitude of actual harm, under either reading of strict scrutiny Justice Scalia's criticism does not undermine manageability.

### B. Step 2: Neutral Justification

At the second step of the EPC mode of analysis, the burden shifts to the defendants, who must provide a neutral justification for the harm. Critics might argue that we have come full circle, delving back into identifying the harms of partisan gerrymandering, which, as noted above, would divide scholars and Justices.<sup>262</sup> After all, without knowing the precise harms partisan gerrymandering is designed to protect against, how are we to identify non-legitimate government interests?

The analogy to classical EPC jurisprudence rebuts this charge. The Court and commentators have debated ad nauseam whether the Fourteenth Amendment is designed to protect against the harm of classification—no matter how apparently benign—or against the harm of subordination.<sup>263</sup> However, both sides agree that certain justifications, such as racial animus, are invalid.<sup>264</sup> Here, too, all sides of the harm debate would surely agree that a legislature that put forth ostensible justifications such as disenfranchising a particular group (the harm posited by *Karcher* and *Baker*)<sup>265</sup> or diminishing political competition (the harm posited by Issacharoff and Karlan)<sup>266</sup> would not have

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261. A full survey of the relevant literature is beyond the scope of this article. For helpful introductory remarks, see generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).

262. See *supra* note 18 and accompanying text.

263. See *supra* notes 10–11, 261 and accompanying text.

264. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding animus against the LGBT community invalid); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); Pildes, *supra* note 170, at 2511–12.

265. See *Karcher v. Daggett*, 462 U.S. 725, 742–44 (1983); *Baker v. Carr*, 369 U.S. 186, 206 (1962).

266. See Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB.

met its burden of putting forth a neutral justification. Just as some proffered government interests in EPC jurisprudence, such as increasing diversity or rectifying past discrimination, have divided courts and commentators who disagree on the structural underpinnings of Fourteenth Amendment jurisprudence, in partisan gerrymandering cases, too, it is likely that some proffered justifications will divide courts and commentators.<sup>267</sup> But, as evidenced by the fact that courts continue to adjudicate affirmative action and same-sex marriage disputes, such division apparently does not mean a standard is not judicially manageable.<sup>268</sup>

Justice Scalia objects to Step 2 of the EPC-style analysis on two grounds. First, he asserts that there “always is a neutral explanation,” suggesting that such a test will police for nothing whatsoever.<sup>269</sup> At a minimum, this response is inconsistent. If a “neutral explanation” is anything other than animus, surely the same charge might be leveled against classical EPC jurisprudence. Courts have proven adept at screening for pretext in the EPC context, so to plead judicial unmanageability in the partisan gerrymandering context seems inconsistent. Justice Scalia’s charge also seems contextually bizarre: it is leveled at Justice Breyer’s “know it when I see it” framework<sup>270</sup> but misreads the framework entirely. Justice Breyer lays out three scenarios, arrayed from most to least unconstitutional.<sup>271</sup> What distinguishes the three scenarios is how many elections we have data for: in the first scenario, the majority party has twice failed to get a majority of seats; in the second scenario, the majority has only once failed to get a majority of seats; and in the third, the majority party is only projected to obtain a minority of seats.<sup>272</sup> In all three scenarios, Justice Breyer assumes the absence of a neutral explanation.<sup>273</sup> Thus, Justice Scalia’s charge that Justice Breyer is attempting to use the presence or absence of a neutral explanation to differentiate his first scenario from his subsequent two scenarios is misplaced. Justice Breyer takes as axiomatic that there is no neutral explanation but goes on to assess constitutionality as a matter of the volume of disproportionate electoral outcomes.

The demand for a neutral explanation serves two functions in the partisan gerrymandering context as well as in the more traditional EPC cases. First, this “imaginary process” inquiry allows courts to create explanations for a particular districting scheme. That is, the inquiry does not rely on the legislative

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POL’Y 91, 98–100 (2000); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1715 (1999).

267. See, e.g., *Parents Involved in Cmty. Schs v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

268. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

269. *Vieth v. Jubelirer*, 541 U.S. 267, 299–300 (2004) (emphasis omitted).

270. See *id.* at 299–301.

271. See *id.* at 365–68 (Breyer, J., dissenting).

272. See *id.*

273. See *id.*

record; instead, it asks whether anyone—plaintiffs, defendants, or judges—can come up with a well-reasoned defense.<sup>274</sup> Second, the inquiry acts as a “conversational constraint,” requiring that at least some portion of the redistricting process is devoted to ensuring that the gerrymander, whatever its true end goal, can be robustly defended using neutral districting criteria.<sup>275</sup>

A more charitable gloss on Justice Scalia’s seeming double standard might read the universal incumbency explanation into his “no neutral explanations” claim. As Peter Schuck explains, at least one explanation can legitimize just about any partisan gerrymandering plan: protecting incumbents.<sup>276</sup> In *Anne Arundel County Republican Commission*, for example, the dissent rightly pointed out that, were protecting incumbents accepted as a legitimate justification, a plan that “snake[d] through the alleys and cul-de-sacs of 23 different counties . . . to match . . . two democrats for each republican” would pass muster.<sup>277</sup> Perhaps Justice Scalia did not intend “neutral explanation” to mean that there is always a benign explanation for any law, but that there is always *one particular* neutral justification, unique to the partisan gerrymandering context, that hampers policing redistricting schemes.

The theoretical justification for allowing incumbent protection to motivate redistricting is severalfold. First, incumbent protection allows the creation of legislative expertise—repeat legislators are more effective legislators.<sup>278</sup> In parallel, by upping the returns to victory—a “victory bonus” in the form of incumbent protection—an electoral scheme attracts more talented individuals.<sup>279</sup> Incumbent protection also promotes stability and continuity in governance.<sup>280</sup> Finally, the Framers clearly contemplated incumbent protection, putting the power to redistrict in the hands of the legislature.<sup>281</sup>

The argument for incumbency is the most potent that can be leveled against the judicial manageability of the EPC-style analysis. I see two responses. The first depends on a court’s conception of harm. If the harm is to political competition, none of the theoretical justifications outlined above suffice. The polity still suffers when a map privileges incumbents at the expense of new political entrants. If, however, the harm in question is to an

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274. See *supra* notes 150–66 and accompanying text; see also *Smith v. Boyle*, 144 F.3d 1060, 1064 (7th Cir. 1998).

275. See BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 8–10 (1980).

276. See Schuck, *supra* note 8, at 1354–55; see also Fuentes-Rohwer, *supra* note 8, at 550 n.86 (citing Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices*, 1942–2000, 1 ELECTION L.J. 315 (2002)).

277. See *Anne Arundel Cnty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 401–02 (D. Md. 1991) (Niemeyer, J., dissenting).

278. See Persily, *supra* note 8, at 650.

279. See Schuck, *supra* note 8, at 1350–51.

280. See *id.*

281. See *Miller v. Cunningham*, 512 F.3d 98, 102 (4th Cir. 2007) (“The Framers were surely aware of the desire of those who hold elective office to retain elective office, yet they were clearly comfortable giving incumbents the authority to write election law.”).

individual running for office, it is difficult to argue that the Framers' comfort with incumbent protection is unimportant. More potently, arguing incumbent protection imposes a "conversational constraint" of a different sort.<sup>282</sup> At the very least, parties pleading incumbent protection have to ensure that they are equally protecting incumbents of both parties in order to submit incumbent protection as a defense of a redistricting scheme.

Justice Scalia's second concern about Step 2 of the EPC-style analysis also misreads Justice Stevens's dissenting opinion in *Vieth*. Justice Stevens argues that the level of scrutiny matters for adjudicating claims but not for the threshold question of whether a claim is justiciable.<sup>283</sup> If a court is capable of performing the nested balancing analysis required of an EPC-style claim, it could surely do so whether it is screening for compelling interests or rational interests. Not so, Justice Scalia responds: "To state this [the notion of a nested balancing analysis] is to refute it."<sup>284</sup> However, Justice Scalia does not clarify how such a claim might be refuted. Instead, he goes on to assume the harm is *manageable*, but not constitutionally discoverable.<sup>285</sup> Despite his stated aim of establishing the unmanageability of Justice Stevens's proposed test, Justice Scalia evades the question of manageability altogether.<sup>286</sup>

Again, we might formulate an alternative version of Justice Scalia's critique. The Court's hesitation to peg partisan gerrymandering to a particular level of scrutiny might indicate a problem of poor fit. That is, the reason we cannot decide what level of scrutiny to give a partisan gerrymander is because we cannot ascertain who is being harmed by the gerrymander: Is it the polity as a whole? Members of the minority party? Voters affiliated with the minority party? Is the harm to voting rights—fundamental rights<sup>287</sup>—or to some more abstract representational right? For example, the plaintiffs in *Pope v. Blue*,<sup>288</sup> consisted of Republicans, Democrats, and Independents. The court allowed the case to proceed only on behalf of Republicans, implicitly suggesting that harm, which is a prerequisite to justiciability, was done to members of the minority party and not to the polity as a whole.<sup>289</sup> Adjudicating this threshold standing question requires answering the same set of questions as ascertaining the requisite level of scrutiny.

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282. ACKERMAN, *supra* note 275, at 10–12, 355–57.

283. See *Vieth v. Jubelirer*, 541 U.S. 267, 325–26 (2004) (Stevens, J., dissenting); see also *Johnson-Lee v. City of Minneapolis*, No. 02-1139(JRT/FLN), 2004 WL 2212044 (D. Minn. Sept. 30, 2004), *aff'd*, 170 F. App'x 15 (8th Cir. 2006) (finding rational basis appropriate in adjudicating claim but not in determining its justiciability); *Quilter v. Voinovich*, 912 F. Supp. 1006, 1019 (N.D. Ohio 1995), *vacated*, 518 U.S. 1014 (1996) (finding strict scrutiny appropriate in adjudicating claim but not in determining its justiciability).

284. See *Vieth*, 541 U.S. at 294.

285. See *id.*

286. See generally *Vieth*, 541 U.S. at 317–42 (Stevens, J., dissenting).

287. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 639 (1969).

288. 809 F. Supp. 392, 397 (W.D.N.C. 1992), *aff'd*, 506 U.S. 801 (1992).

289. See *id.* at 396 n.3.

Traditional EPC jurisprudence again comes to our rescue. Though strict scrutiny is to be reserved for harms to “discrete and insular minorities,”<sup>290</sup> we have seen it be applied to invalidate laws on the grounds that they invidiously discriminate against members of a majority race, for instance.<sup>291</sup> Thus, it cannot be the case that setting the level of scrutiny requires ascertaining to whom a particular harm is done. Even if the very act of racial classification harms majority groups as much as minority groups, those groups surely do not qualify as a “discrete and insular minority.” Moreover, traditional EPC jurisprudence has moved away from tiered levels of scrutiny towards a scalar analysis. Partisan gerrymandering, too, might fit comfortably in the mushy middle between strict and rational-basis scrutiny.<sup>292</sup>

Thus, Justice Scalia’s apoplectic opinion to the contrary, no feature of Step 2 renders a partisan gerrymandering inquiry any less justiciable than a traditional EPC inquiry.

### C. Step 3: Means-Ends Fit

Traditional EPC jurisprudence concludes with an analysis of the fit between the suspect classification and the government ends to be achieved. In the partisan gerrymandering equivalent, a defendant will, in the end, need to justify the fit between the legitimate interest asserted and the particular redistricting scheme challenged. Though no court has moved past Steps 1 and 2 to the third part of the EPC-style analysis, I nonetheless offer two thoughts on why this step is both necessary and judicially manageable.

First, the third step is crucial to screening for pretext, avoiding Justice Scalia’s concern that every gerrymander will have a purported neutral justification. Such a justification must not only be acceptable, but it must also be able to explain the lack of compactness or contiguity at issue. In the “one person, one vote” case law, the Court calls this “justifying some deviations.”<sup>293</sup>

Second, defendants must not only link up specific departures from accepted redistricting principles to the ends asserted, but they must also show that there is no better way to achieve those ends.<sup>294</sup> Note the relationship

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290. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

291. See generally Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); see, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

292. See William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism* 2–4, (Brooklyn Law Sch. Legal Studies Research Papers Working Paper Series, Research Paper No. 354, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2310586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2310586).

293. See *Reynolds v. Sims*, 377 U.S. 533, 558, 579–80 (1964).

294. Cf. *Brown v. Thomson*, 462 U.S. 835, 852 (1983) (Brennan, J., dissenting) (noting that, in the apportionment context, “if another plan could serve that policy substantially as well while providing smaller deviations from equality, it can hardly be said that the larger deviations advance the policy”); *Kilgarlin v. Hill*, 386 U.S. 120, 122 (1967) (finding in the apportionment context that “appellants had the burden not only of demonstrating the degree of variance from the equality

between this requirement and Justice Souter's hypothetical-district analysis: in Step 3, a *defendant* must show that there is no more compact or contiguous way to achieve the stated government ends; in Justice Souter's analysis, a *plaintiff* must show, as part of a *prima facie* case, that there *is* a more compact or contiguous way to district the region.<sup>295</sup>

#### *D. Learning from Traditional EPC Jurisprudence*

Even if an EPC-style analysis is judicially manageable given our Fourteenth Amendment baseline, Justice Scalia might plausibly respond that, if only one of thirty-nine lower-court cases struck down a partisan gerrymander, litigating partisan gerrymandering will prove a waste of time and resources. This Section briefly suggests ways to make an already manageable EPC-style analysis more effective by drawing on courts' experiences with traditional EPC jurisprudence.

First, just as the *Davis*, *Feeley*, and *McCleskey* line of cases allowed Fourteenth Amendment challenges against laws that were not facially discriminatory but had a disparate impact on a protected group, so, too, should our "EPC model" allow for alternative challenges.<sup>296</sup> That is, where a district is not "facially partisan," as established by objective indicia, plaintiffs should be allowed to present evidence of partisan intent plus disproportionate impact. In other words, as legislatures become more effective at drawing boundaries that pass the map-based analysis but nonetheless disenfranchise voters, an alternative schema for triggering scrutiny will prove necessary.

Second, though some Justices argue that statewide claims will be more difficult to bring than district-specific claims,<sup>297</sup> our experience with the *McCleskey* standard suggests that more particularized evidence may be harder to come by.<sup>298</sup> Attempting to demonstrate the illegitimacy of a statewide process in the case of a particular district may be akin to *McCleskey*'s call for plaintiffs to show racial discrimination in their particular case, despite an abundance of evidence of racism in the criminal-justice system as a whole. Thus, courts should consider allowing plaintiffs to file statewide claims as well as district-by-district claims.

Third, just as, under rational basis review, a plaintiff has the burden of negating not only the interests put forth by the state but also 'any conceivable interest,' in an EPC-style partisan gerrymandering analysis, courts should be

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principle but also of 'negat[ing] the existence of any state of facts which would sustain the constitutionality of the legislation").

295. Though note that such a hypothetical district need not meet the government's stated goals.

296. See *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Pers. Adm'r of Mass. v. Feeley*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

297. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 297–99 (2004) (summarizing Justice Stevens's and Justice Souter's standards, which allow only for district-level, rather than statewide, claims).

298. See *Haney-López*, *supra* note 71, at 1847–53.

able to come up with plausible state interests not articulated by the defendants. Such a formulation takes the court's focus off the process by which a partisan gerrymander is passed<sup>299</sup> and the justifications provided by a party; as we know from the traditional EPC context, discriminatory intent turns out to be difficult to prove when legislators learn what "magic words" not to say.<sup>300</sup>

Though courts will undoubtedly identify many other modifications to ensure manageability, drawing from traditional EPC jurisprudence as a starting point emphasizes that a partisan gerrymandering test is, in fact, judicially manageable.

### CONCLUSION

Justice Scalia's conviction that partisan gerrymandering is not justiciable stems from two misconceptions. First, Justice Scalia is convinced that the sheer number of standards, coupled with a lack of analytical clarity as to the standards' origins, indicates there is no principled way to choose among standards. This Comment attempts to create a framework for selecting among the various lower court standards by breaking the inquiry into three separate steps. Second, Justice Scalia criticizes each possible standard as judicially unmanageable. However, by selecting one standard—the EPC-style analysis—and pairing each of Justice Scalia's criticisms of the standard with an equivalent criticism of traditional EPC jurisprudence, this Comment shows that EPC-style partisan gerrymandering analysis is at least as judicially manageable as traditional EPC jurisprudence.

Thus, an EPC-style analysis provides at least one example of a judicially manageable approach to partisan gerrymandering, giving lie to Justice Scalia's assertion that no such standard could exist. Why, then, did the *Vieth* majority choose to ignore a standard that roughly approximates the EPC framework, a framework with which courts have developed an institutional competence? I believe the answer lies in the majority's assertion that "courts might be justified in accepting a modest degree of unmanageability to enforce a [clear] constitutional command."<sup>301</sup> The use of the EPC to strike down an affirmative action regime or a school redistricting plan is no less messy and value-laden than employing the partisan gerrymandering standard to mandate redistricting. However, the harms associated with the former—or, to use the *Vieth* plurality's term, the clarity of the constitutional command against the former—apparently outweigh its messiness. Perhaps the majority believes, as do Justice O'Connor

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299. For advocacy on behalf of scrutinizing the procedure by which a gerrymander was implemented, *see, e.g.*, Karcher v. Daggett, 462 U.S. 725, 751 (1983) (Stevens, J., concurring) (listing exclusion of divergent viewpoints, openly partisan criteria, and lack of a neutral explanation as objective indicia of irregularity); Issacharoff & Karlan, *supra* note 10, at 576.

300. *See* Haney-López, *supra* note 71, at 1848–49.

301. *See* Vieth v. Jubelirer, 541 U.S. 267, 286 (2004).

and Schuck, that partisan gerrymandering is inevitably self-limiting.<sup>302</sup> Perhaps they simply see the harm itself as restricted.<sup>303</sup> That the Court finds no interest sufficiently compelling to justify imposing a “modestly unmanageable” standard in partisan gerrymandering may be a valid outcome. That it does so under the guise of judicial manageability rather than acknowledging a balance between judicial manageability and the importance of the harm leads the Court to shirk its constitutional duties to hear cases and controversies. Thus, this Comment’s close reading of the dozens of post-*Bandemer*, pre-*Vieth* cases gives fodder to Justice Stevens’s comment that it is not “the unavailability of judicially manageable standards” that drives the *Vieth* decision but instead, a “failure of judicial will.”<sup>304</sup>

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302. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O’Connor, J., dissenting); Schuck, *supra* note 8, at 1341–43 (listing the practical risks of partisan gerrymandering, such as division within the party and increased costs associated with a more competitive seat), 1356 (noting that no legislature has opted to enshrine a particular districting plan by, for instance, mandating supermajorities for future changes in the law).

303. Even Madison, in championing Article I, section 4, could muster up no stronger endorsement than that the power would likely be only rarely invoked. See *Vieth*, 541 U.S. at 275 (citing two Records of the Federal Convention of 1787, at 240–241 (M. Farrand ed. 1911)).

304. See *Vieth*, 541 U.S. at 341 (Stevens, J., dissenting).

## APPENDIX

Case	Source	Which Phase?			How Measured?			What Next?			
		Process	Map	Electoral Outcome	Nonretrogression	Objective	Know it when I see it	Counterfactual	Hard and fast rule	Scrutinize	Balance
<i>Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. Of Election Laws</i> , 781 F. Supp. 394 (D. Md. 1991)	Niemeyer dissent	X			X				X		
<i>Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. Of Election Laws</i> , 781 F. Supp. 394 (D. Md. 1991)	Majority Opinion	X			X				X		
<i>Baldham v. Eu</i> , 695 F. Supp. 664 (N.D. Cal. 1988)	Opinion		X					X	X		
<i>Baldus v. Members of Accountability Bd.</i> , 849 F. Supp. 2d 840, 854 (E.D. Wis. 2012)	Opinion	X			X				X		
<i>Comm. for Fair &amp; Balanced Map v. Illinois State Bd. of Elections</i> , 1:11-CV-518567 (N.D. Ill. Nov. 1, 2011)	Plaintiff's Brief	X						X		UNK	UNK
										UNK	X

Case	Source	Which Phase?			How Measured?			What Next?			
		Process	Map	Electoral Outcome	Nonretrogression	Objective	Know it when I see it	Counterfactual	Hard and fast rule	Scrutinize	Balance
<i>Cox v. Larios</i> , 542 U.S. 947 (2004)	District Court opinion (summary affirmed)		X			X			X		
<i>Cox v. Larios</i> , 542 U.S. 947 (2004)	Stevens concurrence	X		X				X	X		
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1985)	Majority			X			X			X	
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1985)	Powell concurrence /dissent	X	X				X			X	
<i>Davis v. Bandemer</i> , 478 U.S. 109 (1985)	Lower court opinion	X	X	X		X			X		
<i>Duckworth v. State Admin. Bd. of Election Laws</i> , 332 F.3d 769 (4th Cir. 2003)	Opinion		X					X		X	
<i>Gaffney v. Cummings</i> , 412 U.S. 735 (1973)	Plaintiff's Brief	X					X			X	
<i>Hastert v. State Bd. of Elections</i> , 777 F. Supp. 634 (N.D. Ill. 1991)	Opinion			X					UNK	UNK	UNK

Case	Source	Which Phase?			How Measured?			What Next?			
		Process	Map	Electoral Outcome	Nonretrogression	Objective	Know it when I see it	Counterfactual	Hard and fast rule	Scrutinize	Balance
<i>Hastert v. State Bd. of Elections</i> , 777 F. Supp. 634 (N.D. Ill. 1991)	Plaintiff's brief		X			X			X		
<i>Holloway v. Hechler</i> , 817 F. Supp. 617 (S.D. W. Va. 1992)	Opinion		X				X		X		
<i>Johnson-Lee v. City of Minneapolis</i> , 2004 WL 2212044 (D. Minn. Sept. 30, 2004)	Opinion		X			X					
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983)	Stevens concurrence		X			X					
<i>Karcher v. Daggett</i> , 462 U.S. 725 (1983)	Opinion	X	X				X		X		
<i>League of United Latin Am. Citizens v. Perry</i> , 548 U.S. 399 (2006)	Plaintiff's Brief			X		X					
<i>Martinez v. Bush</i> , 234 F. Supp. 2d 1275 (S.D. Fla. 2002)	Opinion	X		X			X		X		
<i>Marylanders for Fair Representation v. Scheuer</i> , 849 F. Supp. 1022 (D. Md. 1994)	Opinion	X		X			X				
<i>Peterson v. Borst</i> , 789 N.E.2d 460 (2003)	Majority opinion									X	

Case	Source	Which Phase?			How Measured?			What Next?			
		Process	Map	Electoral Outcome	Nonretrogression	Objective	Know it when I see it	Counterfactual	Hard and fast rule	Scrutinize	Balance
<i>Pope v. Blue</i> , 809 F.Supp. 392 (W.D.N.C.)	Opinion	X			X				X		
<i>Radogno v. Illinois State Bd. of Elections</i> , 1:11-CV-04884, 2011 WL 58668225 (N.D. Ill. Nov. 22, 2011)	Plaintiffs' brief	X		X					X		
<i>Republican Party of North Carolina v. Marin</i> , 980 F.2d 943 (4th Cir. 1992)	Opinion	X		X			X			X	
<i>Republican Party of Virginia v. Wilder</i> , 774 F. Supp. 400 (W.D. Va. 1991)	Opinion			X			X			X	
<i>Republican Party of Virginia v. Wilder</i> , 774 F. Supp. 400 (W.D. Va. 1991)	Plaintiffs' brief	X			X				X		
<i>Smith v. Boyle</i> , 144 F.3d 1060 (7th Cir. 1998)	Opinion			X						X	
<i>Terrazas v. Slagle</i> , 821 F. Supp. 1162, 1172 (W.D. Tex. 1993)	Opinion			X			X	X		X	
<i>Vieh v. Juheliver</i> , 541 U.S. 267 (2003)	Stevens dissent	X							X		X

Case	Source	Which Phase?			How Measured?			What Next?			
		Process	Map	Electoral Outcome	Nonretrogression	Objective	Know it when I see it	Counterfactual	Hard and fast rule	Scrutinize	Balance
<i>Vieh v. Jubelirer</i> , 541 U.S. 267 (2003)	Souter dissent	X	X			X				X	
<i>Vieh v. Jubelirer</i> , 541 U.S. 267 (2003)	Breyer dissent	X		X			X			X	
<i>Vieh v. Jubelirer</i> , 541 U.S. 267 (2003)	Plaintiffs' brief				X						
<i>Vieh v. Pennsylvania</i> , 188 F. Supp. 2d 532 (M.D. Pa. 2002)	Opinion			X	X				UNK	UNK	UNK
<i>White v. State of Ala.</i> , 867 F. Supp. 1571 (M.D. Ala. 1994)	Opinion			X			X		X		