Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Voting Rights/One Person, One Vote

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Vieth v. Jubelirer, 541 U.S. 267 (2004)

Richard Vieth was a Democrat who resided in Pennsylvania. In 2000, the Republican-dominated state-legislature apportioned congressional districts in the state for the purpose of maximizing the number of Republicans likely to be elected consistently with the principle of one person, one vote. One congressional district was described as "loom[ing] like a dragon descending on Philadelphia from the west." Vieth and others sued Robert Jubelirer, the president of the Pennsylvania Senate, claiming that the state legislature had engaged in an unconstitutional partisan gerrymander. After a series of complex procedural maneuvers and decisions, a three-judge panel in the local federal district court approved the Pennsylvania redistricting. Vieth appealed to the Supreme Court of the United States.

Vieth attracted surprisingly little interest from interest groups. The most interesting amicus brief was submitted by Bernard Grofman and Gary Jacobson, two political scientists. Their brief asserted,

> *Amici wish to alert the Court to the fact that the potential overall impact of partisan bias attributable to redistricting has increased greatly in the last round of redistricting over what was found in earlier redistricting periods. This greater importance of redistricting bias stems from a combination of three factors.*
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> *The first factor is the nearly even partisan balance nationwide, which is reflected in the unusually close balance (by historical standards) between Republicans and Democrats in the U.S. House of Representatives.*
>
> *The second factor is the small number of competitive seats in the U.S. House of Representatives left after the redistrictings that followed release of the 2000 Census data—accentuating a trend that was already readily visible following the last several reapportionment cycles.*
>
> *The third factor is the dramatic rise in ideological polarization between the parties, which is reflected in voting patterns in Congress and in the congressional electorate nationwide.*

The Supreme Court by a 5–4 vote sustained the lower court decision to dismiss the Vieth lawsuit. Justice Scalia and three other justices maintained that courts should not adjudicate claims that partisan gerrymanders were unconstitutional because no judicially manageable standards existed for evaluating such claims. Justice Kennedy agreed that no judicially manageable standards existed in this case, but insisted that such standards might exist in some other, future case. The dissenters insisted that judicially manageable standards existed. Did the dissents demonstrate the existence of those standards? In particular, did the dissenters demonstrate a reasonable analogy between racial gerrymanders, which judicial conservatives in such cases as Shaw v. Reno *(1993) insisted are justiciable, and partisan gerrymanders, which they insisted are not? Given that both liberals and conservatives gerrymander, why were conservatives so opposed and liberals so in favor of having courts adjudicate claims that a state legislature engaged in unconstitutional partisan gerrymandering?*

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

. . .

It is significant that the Framers provided a remedy for [gerrymanders] in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to "make or alter" those districts if it wished. . . .

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

As Chief Justice Marshall proclaimed two centuries ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is." Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights. . . .

One of the most obvious limitations imposed by [the political question] requirement is that judicial action must be governed by standard, by rule. Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.

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We begin our review of possible standards with that proposed by Justice White's plurality opinion in *Bandemer* because, as the narrowest ground for our decision in that case, it has been the standard employed by the lower courts. The plurality concluded that a political gerrymandering claim could succeed only where plaintiffs showed "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." . . .

. . .

In the lower courts, the legacy of the plurality's test is one long record of puzzlement and consternation. Because this standard was misguided when proposed, has not been improved in subsequent application, and is not even defended before us today by the appellants, we decline to affirm it as a constitutional requirement.

Appellants take a run at enunciating their own workable standard based on Article I, § 2, and the Equal Protection Clause. . . .

To satisfy appellants' intent standard, a plaintiff must "show that the mapmakers acted with a predominant intent to achieve partisan advantage," which can be shown "by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage." As compared with the *Bandemer* plurality's test of mere intent to disadvantage the plaintiff's group, this proposal seemingly makes the standard more difficult to meet—but only at the expense of making the standard more indeterminate.

"Predominant intent" to disadvantage the plaintiff's political group refers to the relative importance of that goal as compared with all the other goals that the map seeks to pursue—contiguity of districts, compactness of districts, observance of the lines of political subdivision, protection of incumbents of all parties, cohesion of natural racial and ethnic neighborhoods, compliance with requirements of the Voting Rights Act of 1965 regarding racial distribution, etc. Appellants contend that their intent test must be discernible and manageable because it has been borrowed from our racial gerrymandering cases. To begin with, in a very important respect that is not so. In the racial gerrymandering context, the predominant intent test has been applied to the challenged district in which the plaintiffs voted. Here, however, appellants do not assert that an apportionment fails their intent test if any single district does so. Since "it would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines," appellants propose a test that is satisfied only when "partisan advantage was the predominant motivation behind the entire statewide plan." Vague as the "predominant motivation" test might be when used to evaluate single districts, it all but evaporates when applied statewide. Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc.—statewide? And how is the statewide "outweighing" to be determined? If three-fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political-subdivision lines, and only two-fifths ignore those lines to

disadvantage the plaintiffs, is the observance of political subdivisions the "predominant" goal between those two? We are sure appellants do not think so.

Even within the narrower compass of challenges to a single district, applying a "predominant intent" test to racial gerrymandering is easier and less disruptive. The Constitution clearly contemplates districting by political entities, and unsurprisingly that turns out to be root-and-branch a matter of politics. By contrast, the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered. Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it. Moreover, the fact that partisan districting is a lawful and common practice means that there is almost always room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering. . . .

The effects prong of appellants' proposal replaces the *Bandemer* plurality's vague test of "denied its chance to effectively influence the political process" with criteria that are seemingly more specific. The requisite effect is established when "(1) the plaintiffs show that the districts systematically 'pack' and 'crack' the rival party's voters, and (2) the court's examination of the 'totality of circumstances' confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats." . . . But a person's politics is rarely as readily discernible—and never as permanently discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. . . . These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy.

Assuming, however, that the effects of partisan gerrymandering can be determined, appellants' test would invalidate the districting only when it prevents a majority of the electorate from electing a majority of representatives. . . . Deny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. . . .

But if we could identify a majority party, we would find it impossible to ensure that that party wins a majority of seats—unless we radically revise the States' traditional structure for elections. In any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party. . . .

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

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

We turn next to consideration of the standards proposed by today's dissenters. We preface it with the observation that the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard.

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Justice STEVENS's confidence that what courts have done with racial gerrymandering can be done with political gerrymandering rests in part upon his belief that "the same standards should apply." But in fact the standards are quite different. A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not. . . .

. . . To say that suppression of political speech (a claimed First Amendment violation) triggers strict scrutiny is not to say that failure to give political groups equal representation (a claimed equal protection violation) triggers strict scrutiny. Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful all consideration of political affiliation in districting, just as it renders unlawful all consideration of political affiliation in hiring for non-policy-level government jobs. . . .

. . .

Justice SOUTER's proposal is doomed to failure for a more basic reason: No test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing for. In the present context, the test ought to identify deprivation of that minimal degree of representation or influence to which a political group is constitutionally entitled. As we have seen, the *Bandemer* test sought (unhelpfully, but at least gamely) to specify what that minimal degree was: "[a] chance to effectively influence the political process." . . . Justice SOUTER avoids the difficulties of those formulations by never telling us what his test is looking for, other than the utterly unhelpful "extremity of unfairness." . . .

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

. . .

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

. . .

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

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JUSTICE KENNEDY, concurring in the judgment.

A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation's political life. While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed,

and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.

. . .

A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.

The object of districting is to establish "fair and effective representation for all citizens." At first it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights. The lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue.

The second obstacle—the absence of rules to confine judicial intervention—is related to the first. Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights. Suitable standards for measuring this burden, however, are critical to our intervention. Absent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent.

. . .

There are, then, weighty arguments for holding cases like these to be nonjusticiable; and those arguments may prevail in the long run. In my view, however, the arguments are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander. It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied. Nor is it alien to the Judiciary to draw or approve election district lines. . . .

Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering. The plurality's conclusion that absent an "easily administrable standard" the appellants' claim must be nonjusticiable contrasts starkly with the more patient approach of *Baker v. Carr*.

. . .

That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution. Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that "the right to vote" is one of "those political processes ordinarily to be relied upon to protect minorities." If a State passed an enactment that declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles," we would surely conclude the Constitution had been violated. If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive. This possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment's de facto incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is unrelated to the aims of apportionment and thus is used in an impermissible fashion).

. . .

Because, in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants cannot establish that the alleged political classifications burden those same rights. Failing to show that the alleged classifications are unrelated to the aims of apportionment, appellants' evidence at best demonstrates only that the legislature adopted political classifications. That describes no constitutional flaw, at least under the governing Fourteenth Amendment standard. . . .

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. . . The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. . . . Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. . . . In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

The plurality suggests there is no place for the First Amendment in this area. . . . That misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest. Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters.

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The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order. . . .

Still, the Court's own responsibilities require that we refrain from intervention in this instance. The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper. If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief. With these observations, I join the judgment of the Court.

JUSTICE STEVENS, dissenting.

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The concept of equal justice under law requires the State to govern impartially. Today's plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification. In my view, when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.

. . .

At issue in this case is *Baker v. Carr*'s (1962) second test—the presence or absence of judicially manageable standards. The judicial standards applicable to gerrymandering claims are deeply rooted in decisions that long preceded *Bandemer* and have been refined in later cases. Among those well-settled principles is the understanding that a district's peculiar shape might be a symptom of an illicit purpose in the line-drawing process. . . .

With purpose as the ultimate inquiry, other considerations have supplied ready standards for testing the lawfulness of a gerrymander. In his dissent in *Davis v. Bandemer* (1986), Justice Powell explained that "the merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting." . . .

. . .

Given this clear line of precedents, I should have thought the question of justiciability in cases such as this—where a set of plaintiffs argues that a single motivation resulted in a districting scheme with discriminatory effects—to be well settled. The plurality's contrary conclusion cannot be squared with our long history of voting rights decisions. Especially perplexing is the plurality's ipse dixit distinction of our

racial gerrymandering cases. Notably, the plurality does not argue that the judicially manageable standards that have been used to adjudicate racial gerrymandering claims would not be equally manageable in political gerrymandering cases. . . .

To begin with, the plurality errs in assuming that politics is "an ordinary and lawful motive." . . . On the contrary, "political belief and association constitute the core of those activities protected by the First Amendment" and discriminatory governmental decisions that burden fundamental First Amendment interests are subject to strict scrutiny. . . .

State action that discriminates against a political minority for the sole and unadorned purpose of maximizing the power of the majority plainly violates the decisionmaker's duty to remain impartial. . . . Thus, the critical issue in both racial and political gerrymandering cases is the same: whether a single nonneutral criterion controlled the districting process to such an extent that the Constitution was offended. . . .

. . .

Although the complaint in this case includes a statewide challenge, plaintiff-appellant Furey states a stronger claim as a resident of the misshapen District 6. She complains not merely about the injury resulting from the probable election of a congressional delegation that does not fairly represent the entire State, or about the harm flowing from the probable election of a Republican to represent District 6. She also alleges that the grotesque configuration of that district itself imposes a special harm on the members of the political minority residing in District 6 that directly parallels the harm recognized in [*Shaw v. Reno* (1989)] Officials elected by the majority party in such a district, she claims, "are more likely to believe that their primary obligation is to represent only the members of that group, rather than the constituency as a whole." This is precisely the harm that the Shaw cases treat as cognizable in the context of racial gerrymandering. The same treatment is warranted in this case.

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In evaluating a claim that a governmental decision violates the Equal Protection Clause, we have long required a showing of discriminatory purpose. . . . That requirement applies with full force to districting decisions. The line that divides a racial or ethnic minority unevenly between school districts can be entirely legitimate if chosen on the basis of neutral factors—county lines, for example, or a natural boundary such as a river or major thoroughfare. But if the district lines were chosen for the purpose of limiting the number of minority students in the school, or the number of families holding unpopular religious or political views, that invidious purpose surely would invalidate the district.

. . . Under the *Shaw* cases, then, the use of race as a criterion in redistricting is not per se impermissible, but when race is elevated to paramount status—when it is the be-all and end-all of the redistricting process—the legislature has gone too far. "Race must not simply have been a motivation . . . but the predominant factor motivating the legislature's districting decision."

. . .

In my view, the same standards should apply to claims of political gerrymandering, for the essence of a gerrymander is the same regardless of whether the group is identified as political or racial. Gerrymandering always involves the drawing of district boundaries to maximize the voting strength of the dominant political faction and to minimize the strength of one or more groups of opponents. . . . It follows that the standards that enable courts to identify and redress a racial gerrymander could also perform the same function for other species of gerrymanders.

. . .

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

. . .

The Constitution does not, of course, require proportional representation of racial, ethnic, or political groups. In that I agree with the plurality. We have held, however, that proportional representation of political groups is a permissible objective, and some of us have expressed the opinion that a majority's decision to enhance the representation of a racial minority is equally permissible, particularly when the decision is designed to comply with the Voting Rights Act of 1965. Thus, the view that the plurality implicitly embraces today—that a gerrymander contrived for the sole purpose of disadvantaging a political minority is less objectionable than one seeking to benefit a racial minority—is doubly flawed. It disregards the obvious distinction between an invidious and a benign purpose, and it mistakenly assumes that race cannot provide a legitimate basis for making political judgments.

In sum, in evaluating a challenge to a specific district, I would apply the standard set forth in the *Shaw* cases and ask whether the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles. Under my analysis, if no neutral criterion can be identified to justify the lines drawn, and if the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge. Such a narrow test would cover only a few meritorious claims, but it would preclude extreme abuses, and it would perhaps shorten the time period in which the pernicious effects of such a gerrymander are felt. This test would mitigate the current trend under which partisan considerations are becoming the be-all and end-all in apportioning representatives.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

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The notion of fairness assumed to be denied in these cases has been described as "each political group in a State [having] the same chance to elect representatives of its choice as any other political group" and as a "right to 'fair and effective representation.'" . . . The difficulty has been to translate these notions of fairness into workable criteria, as distinct from mere opportunities for reviewing courts to make episodic judgments that things have gone too far, the sources of difficulty being in the facts that some intent to gain political advantage is inescapable whenever political bodies devise a district plan, and some effect results from the intent. Thus, the issue is one of how much is too much, and we can be no more exact in stating a verbal test for too much partisanship than we can be in defining too much race consciousness when some is inevitable and legitimate. Instead of coming up with a verbal formula for too much, then, the Court's job must be to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness.

. . .

For a claim based on a specific single-member district, I would require the plaintiff to make out a prima facie case with five elements. First, the resident plaintiff would identify a cohesive political group to which he belonged, which would normally be a major party, as in this case and in *Davis v. Bandemer* (1986). . . .

Second, a plaintiff would need to show that the district of his residence paid little or no heed to those traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features like rivers and mountains.

. . .

Third, the plaintiff would need to establish specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group. . . . To make their claim stick, they would need to point to specific protuberances on the Draconian shape that reach out to include Democrats, or fissures in it that squirm away from Republicans. They would need to show that when towns and communities were split, Democrats tended to fall on one side and Republicans on the other. . . .

Fourth, a plaintiff would need to present the court with a hypothetical district including his residence, one in which the proportion of the plaintiff's group was lower (in a packing claim) or higher

(in a cracking one) and which at the same time deviated less from traditional districting principles than the actual district

Fifth, and finally, the plaintiff would have to show that the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group. . . .

. . .

A plaintiff who got this far would have shown that his State intentionally acted to dilute his vote, having ignored reasonable alternatives consistent with traditional districting principles. I would then shift the burden to the defendants to justify their decision by reference to objectives other than naked partisan advantage.

. . .

The plurality . . . . says that my standard is destined to fail because I have not given a precise enough account of the extreme unfairness I would prevent. But this objection is more the reliable expression of the plurality's own discouragement than the description of an Achilles heel in my suggestion. The harm from partisan gerrymandering is a species of vote dilution: the point of the gerrymander is to capture seats by manipulating district lines to diminish the weight of the other party's votes in elections. To devise a judicial remedy for that harm, however, it is not necessary to adopt a full-blown theory of fairness, furnishing a precise measure of harm caused by divergence from the ideal in each case. It is sufficient instead to agree that gerrymandering is, indeed, unfair, as the plurality does not dispute; to observe the traditional methods of the gerrymanderer, which the plurality summarizes, and to adopt a test aimed at detecting and preventing the use of those methods, which, I think, mine is. . . . My test would no doubt leave substantial room for a party in power to seek advantage through its control of the districting process; the only way to prevent all opportunism would be to remove districting wholly from legislative control, which I am not prepared to say the Constitution requires. But that does not make it impossible for courts to identify at least the worst cases of gerrymandering, and to provide a remedy. . . .

JUSTICE BREYER, dissenting.

I start with a fundamental principle. "We the People," who "ordain[ed] and establish[ed]" the American Constitution, sought to create and to protect a workable form of government that is in its "'principles, structure, and whole mass,'" basically democratic. . . . In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators representing equally populous electoral districts. There must also be a method for transforming the will of the majority into effective government.

. . .

[S]ingle-member districts . . . diminish the need for coalition governments. And that fact makes it easier for voters to identify which party is responsible for government decisionmaking (and which rascals to throw out), while simultaneously providing greater legislative stability. . . .

Given the resulting need for single-member districts with nonrandom boundaries, it is not surprising that "traditional" districting principles have rarely, if ever, been politically neutral. Rather, because, in recent political memory, Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs and sometimes rural areas, geographically drawn boundaries have tended to "pac[k]" the former.

This is to say that traditional or historically based boundaries are not, and should not be, "politics free." Rather, those boundaries represent a series of compromises of principle—among the virtues of, for example, close representation of voter views, ease of identifying "government" and "opposition" parties, and stability in government. They also represent an uneasy truce, sanctioned by tradition, among different parties seeking political advantage.

[T]hese considerations can help identify at least one circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, namely, the unjustified use of political factors to entrench a minority in power. By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold,

legislative power. By unjustified entrenchment I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors.

. . .

[W]e cannot always count on a severely gerrymandered legislature itself to find and implement a remedy. The party that controls the process has no incentive to change it. And the political advantages of a gerrymander may become ever greater in the future. . . . [C]ourt action may prove necessary.

[C]ourts should be able to identify the presence of one important gerrymandering evil, the unjustified entrenching in power of a political party that the voters have rejected. They should be able to separate the unjustified abuse of partisan boundary-drawing considerations to achieve that end from their more ordinary and justified use. And they should be able to design a remedy for extreme cases.

. . .

The dissenting opinions recommend sets of standards that differ in certain respects. Members of a majority might well seek to reconcile such differences. But dissenters might instead believe that the more thorough, specific reasoning that accompanies separate statements will stimulate further discussion. . . .