

# VIETH'S GAP: HAS THE SUPREME COURT GONE FROM BAD TO WORSE ON PARTISAN GERRYMANDERING?

*Daniel H. Lowenstein*<sup>†</sup>

INTRODUCTION .....	367
I. JUSTICIABILITY .....	370
II. IN DEFENSE OF <i>BANDEMER</i> .....	373
A. JUSTICE SCALIA'S ATTACK ON <i>BANDEMER</i> .....	373
B. WHAT <i>BANDEMER</i> HELD .....	376
III. <i>VIETH'S GAP</i> e .....	381
IV. THE LAW AFTER <i>VIETH</i> .....	389
CONCLUSION .....	394

## INTRODUCTION

When the Supreme Court decided *Davis v. Bandemer*,<sup>1</sup> a common reaction was that the Court had set forth inadequate standards for identifying partisan gerrymanders and thereby provided little or no guidance to the lower courts.<sup>2</sup> I disagreed with that assessment at the time,<sup>3</sup> and I shall do so again presently. But even those most convinced of *Bandemer's* fogginess must agree that it is a model of clarity when compared with the Court's second and most recent performance on partisan gerrymandering, *Vieth v. Jubelirer*.<sup>4</sup>

In *Bandemer*, the Democrats challenged Indiana's state legislative districting plan, claiming that because it diluted the votes of Indiana Democrats, it violated the Equal Protection Clause.<sup>5</sup> In *Vieth*, the Democrats challenged the Pennsylvania congressional districting plan, claim-

<sup>†</sup> Professor of Law, University of California, Los Angeles. I presented a draft of this paper on October 23, 2004 at the Election Law Symposium of the *Cornell Journal of Law & Public Policy* in Ithaca, New York. I appreciated the helpful comments of Richard Briffault and Heather Gerken as well as the hospitality of the Journal's staff and of many faculty members and students at the Cornell Law School. The reference staff of the UCLA Law Library gave me valuable research assistance.

<sup>1</sup> 478 U.S. 109 (1986).

<sup>2</sup> See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1083-84 (2d ed. 1988). See generally DANIEL H. LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW* 329-30 (3d ed. 2004).

<sup>3</sup> See Daniel H. Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING AND THE COURTS* 64 (Bernard Grofman ed., 1990) [hereinafter Lowenstein, *Bandemer's Gap*].

<sup>4</sup> 541 U.S. 267 (2004).

<sup>5</sup> 478 U.S. at 115.

ing similarly that it denied Equal Protection because it was a partisan gerrymander.<sup>6</sup> In *Bandemer*, a 6-3 majority ruled that the equal protection challenge was justiciable. Four members of that majority, combined with the three justices who disagreed on justiciability, made a 7-2 majority to deny relief to the Indiana Democrats.<sup>7</sup> In *Vieth*, a plurality of four justices would have overruled *Bandemer*'s ruling in favor of justiciability.<sup>8</sup> Justice Kennedy, who could find no basis for identifying an unconstitutional partisan gerrymander but was unwilling to declare the gerrymandering claim nonjusticiable, joined with the plurality to make a majority for denial of relief to the Pennsylvania Democrats.<sup>9</sup>

The Court produced five opinions in *Vieth*: a plurality opinion by Justice Scalia,<sup>10</sup> dissenting opinions by Justices Stevens, Souter<sup>11</sup>, and Breyer, and a pivotal opinion by Justice Kennedy. In my opinion, the Court went 0 for 5 in *Vieth*. But none of the blame for the confusion the Court created should fall on either the plurality or the dissenters. It was Justice Kennedy's concurring opinion that blazed a new trail on the frontier of judicial irresponsibility.

*Vieth* resembles *Bandemer* in one important respect. In both cases, the justices failed to articulate what constitutional requirement or prohibition is at stake and how partisan gerrymandering might violate the Constitution. The failure occurred in *Bandemer* because Justice White began his plurality opinion *in medias res*. Contrary to the claims of those who found insufficient guidance in his opinion, Justice White laid down standards aplenty. But it was difficult to figure out what those standards meant because, as I have argued, Justice White did not "moor [the standards] to the constitutional principles they [were] intended to effectuate."<sup>12</sup> That was *Bandemer*'s gap. Yet, just as it is sometimes possible to reconstruct the earlier events of a story that begins *in medias res*, it was possible to traverse the gap in *Bandemer* and reconstruct its underlying constitutional principles by extrapolating from Justice White's specific standards together with other clues in his opinion, including the body of precedent on which he relied.

*Vieth* cannot be interpreted by that method. Justice Scalia correctly asserts that each of the dissents is bereft of any account of the constitu-

<sup>6</sup> See 541 U.S. at 272-73.

<sup>7</sup> See 478 U.S. at 125.

<sup>8</sup> See 541 U.S. at 281.

<sup>9</sup> See *id.* at 309-10.

<sup>10</sup> The plurality opinion was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas.

<sup>11</sup> Justice Souter's dissent was joined by Justice Ginsburg.

<sup>12</sup> Lowenstein, *Bandemer's Gap*, *supra* note 3, at 66.

tional principles that a partisan gerrymander may violate.<sup>13</sup> In any event, if we want to know what the law of partisan gerrymandering is in the wake of *Vieth*, we must work with the opinions of Justices Scalia and Kennedy, which between them speak for the majority that rejected the constitutional claim. Neither opinion purports to set forth specific standards as did Justice White in *Bandemer*. Nor does either opinion provide any other opening through which one might pursue the search for guiding constitutional principles.

Justice Scalia concedes that partisan gerrymandering can offend the Constitution and therefore would warrant judicial regulation if only one could separate the problematic cases from the constitutionally innocent. As Justice Kennedy notes, Justice Scalia faces the inevitable difficulty that confronts anyone who wishes to prove a negative—here, that no workable standard can distinguish an unconstitutional partisan gerrymander from a permissible districting plan.<sup>14</sup> Justice Scalia attempts to accomplish his proof by showing that several proposed standards—the one adopted by the plurality in *Bandemer*, the one proposed by Justice Powell in his *Bandemer* dissent, the one proposed by the *Vieth* plaintiffs, and the ones proposed by the dissenters in *Vieth*—are all inadequate. To succeed, Justice Scalia must show that each of these possibilities is a failure *and* that no better standard is possible. I believe he fails on the first count, but whether or not that is the case, Justice Kennedy is surely correct to suggest that the second count is, in the nature of things, a very tough nut.<sup>15</sup>

Justice Scalia's best chance to crack that nut would have been to identify just what it is in the Constitution that he thinks might be offended by a partisan gerrymander. If he had done so, he might have been able to show why the offensive trait is peculiarly difficult for courts to identify. He attempts nothing of the sort. Because he limits himself to debunking the constitutional standards proposed by others, his analysis is entirely negative—albeit very cogently negative in all his attacks other than the one on the *Bandemer* plurality opinion. Justice Scalia provides no affirmative analysis from which we can extrapolate in order to reconstruct the constitutional principles on which he is relying, as was possible in the case of the plurality opinion in *Bandemer*.

<sup>13</sup> Addressing Justice Stevens' dissent, Justice Scalia observes that the Court "may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms." 541 U.S. at 295. Criticizing Justice Souter's proposed five-part test, he denies that any test "can possibly be successful unless one knows what he is testing *for*." *Id.* at 297. Finally, he says that "[d]espite his promise to do so, [Justice Breyer] never tells us what he is testing for, beyond the unhelpful '*unjustified* entrenchment.'" *Id.* at 299.

<sup>14</sup> *See id.* at 311.

<sup>15</sup> *See id.*

Justice Kennedy says that he knows of no sufficient standard for identifying unconstitutional partisan gerrymanders but unlike the plurality, he declines to conclude that no sufficient standard exists.<sup>16</sup> Also in contrast to the plurality, Justice Kennedy at least makes a slight nod towards explaining how a partisan gerrymander might offend the Constitution.<sup>17</sup> His effort, though, is far too vague, feeble, and misguided to be of any help.

I explain in this paper why I think the Court went 0 for 5 in *Vieth*. Because Justice Scalia successfully demonstrates the weaknesses of the other four opinions, I concentrate on the plurality opinion. In addition, I address the important question of what the law is now. I conclude that *Bandemer* is still good law. This is no doubt an odd conclusion, because all nine justices seem implicitly or explicitly to have rejected it in *Vieth*. For that reason, I confess a certain shakiness. Nevertheless, the conclusion finds support in the principle that you can't replace something with nothing.

## I. JUSTICIABILITY

Writing for the plurality in *Vieth*, Justice Scalia quotes the passage from *Baker v. Carr*<sup>18</sup> in which the Court listed the reasons why a question tendered to a federal court may be nonjusticiable.<sup>19</sup> The plurality concludes that the second reason in the *Baker* list—"a lack of judicially discoverable and manageable standards for resolving" the issue<sup>20</sup>—renders constitutional attacks on partisan gerrymanders nonjusticiable. It is perhaps surprising that Justice Scalia did not dwell on the first of the *Baker* reasons for nonjusticiability, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." As he himself later points out, Article I, § 4 of the Constitution empowers Congress to "make or alter" the states' arrangements for House elections. Justice Scalia further shows that Congress has made frequent use of this power.<sup>21</sup> Why not conclude, then, that the power to oversee how state legislatures define congressional districts has been constitutionally committed in a textually demonstrable way to Congress?

One reason could be *Wesberry v. Sanders*.<sup>22</sup> *Wesberry* held that the injunction of Article I, § 2—that the members of the House of Representatives be chosen "by the people of the several states"—implied that

<sup>16</sup> See *id.* at 309-310.

<sup>17</sup> See *id.* at 313-314.

<sup>18</sup> 369 U.S. 186 (1962).

<sup>19</sup> 541 U.S. at 277-78 (quoting 369 U.S. at 217).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 273-278.

<sup>22</sup> 376 U.S. 1 (1964).

districts within a state must have equal populations.<sup>23</sup> If Article I, § 4 demonstrably committed the control of congressional district malapportionment to Congress to the exclusion of the federal courts, then the Court should have declined to take on that assignment in *Wesberry*. Is it possible to believe that Article I, § 4 demonstrably commits control of partisan gerrymandering to Congress but does not similarly commit control of malapportionment?<sup>24</sup> Perhaps, on the ground that the Constitution (according to *Wesberry*) prohibits malapportionment, but contains no similar prohibition against partisan gerrymandering (so long as the districts are equally populated). Congress is thus free to regulate partisan gerrymandering or not as it sees fit, but cannot validate malapportionment in the face of the specific (although not explicit) constitutional prohibition. On this understanding, both Congress and the courts have a responsibility to prevent malapportionment, but prevention of gerrymandering lies within the discretion of Congress. The weakness of this approach is that it requires a conclusion on the substantive constitutional issue, which is supposed to be avoided when the issue is nonjusticiable.

Despite an uneasy fit with *Wesberry*, the hypothesis that the partisan gerrymandering claim in *Vieth* was nonjusticiable by reason of a textually demonstrable commitment of the issue to Congress should have had considerable appeal. For one thing, it would have led to a modest decision limited to congressional districting plans. The justiciability of gerrymandering claims against districting plans for state legislatures and local governing bodies would have been left open. If the reputedly conservative judges who made up the *Vieth* plurality really believed in the passive virtues as a form of judicial restraint, they ought to have found attractive the narrow reach of such a decision.

Furthermore, such a holding of nonjusticiability in *Vieth* would have honored *stare decisis* by avoiding conflict with *Bandemer*, which concerned a state legislature.<sup>25</sup> Indeed, the *stare decisis* benefit of avoiding a direct conflict with *Bandemer* should have outweighed the detriment of creating tension far short of a direct conflict with *Wesberry*. Even that tension dissipates if we consider *Baker*'s reasons for nonjusticiability not as entirely distinct but as mutually reinforcing. That is, if there is room to doubt whether oversight of congressional redistricting is demonstrably committed to Congress by Article I, § 4, a federal court might resolve

<sup>23</sup> See *id.* at 17.

<sup>24</sup> I now believe that the discussion of this subject in the Teacher's Manual for the third edition of Richard Hasen's and my textbook did not adequately appreciate the force of this question. See DANIEL H. LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW, THIRD EDITION: TEACHER'S MANUAL 65 (2004).

<sup>25</sup> But see *Badham v. Eu*, 694 F.Supp. 664, 667-68 (N.D.Cal. 1988), *aff'd*, 488 U.S. 1024 (1989) (reading *Bandemer* to hold that a complaint of partisan gerrymandering in a congressional redistricting plan was justiciable).

that doubt in favor of justiciability when a readily discoverable and highly manageable standard is available for judicial resolution as in the case of malapportionment. An issue would be nonjusticiable when any standard at all is hard to discover and likely to be very difficult to manage, as the *Vieth* plurality believed to be true in the case of partisan gerrymandering.

Yet another consideration favoring a finding of nonjusticiability by reason of Article I, § 4 is that the central objection to partisan gerrymandering is one that the courts are peculiarly unable to address in the case of congressional districting. The central objection is that the representational system converting votes into legislative seats favors one party over the other. Congressional districting occurs state-by-state, so that a challenge to a congressional redistricting plan puts in question only the districts of a small fraction of the House of Representatives, even if the plan in question is that of the largest state. A finding of improper advantage for one party in one state—whatever an “improper advantage” might be in this context and however it might be determined—would not imply an advantage for the party in the House as a whole. The favored treatment might be offset by an advantage for the other party in other states, so that judicial relief could easily exacerbate rather than ameliorate favoritism overall.<sup>26</sup> This peculiar incapacity is unique to *judicial* review of partisan gerrymandering in *congressional* districting. It does not affect Congress, which could impose uniform districting requirements on all the states under its Article I, § 4 power.<sup>27</sup> Nor does it afflict a court when it reviews state or local redistricting plans. In such cases, the court can take into account the system of representation for the entire body under consideration.<sup>28</sup>

<sup>26</sup> This of course assumes what I deny but what any constitutional attack on gerrymandering must affirm, that it is meaningful to attribute partisan “favoritism” to a politically drawn districting plan. In my view, one plan may be more favorable to a party than another plan, but there is no normative benchmark against which the plans can be measured to ground a claim of favoritism.

<sup>27</sup> A proposed Fairness and Independence in Redistricting Act that would require each state to use a commission for congressional redistricting has recently been introduced in the House. For a description and endorsement of the proposal, see Editorial, *Time to put an end to the gerrymander*, SAN ANTONIO EXPRESS NEWS, July 23, 2005, at 10B, available at <http://www.mysanantonio.com/opinion/editorials/stories/MYSA072305.10.redistricting1ed.bfb1c5b.html>. I strongly oppose passage of any such legislation, but concede that it is squarely within the constitutional powers delegated to Congress, whereas interference by the federal judiciary into districting on grounds of partisan gerrymandering absent the peculiar and unlikely circumstances allowed for in *Davis v. Bandemer* seems to me entirely unwarranted by any express or implied provision of the Constitution.

<sup>28</sup> For a thorough consideration of the incapacity of courts to review partisan gerrymandering in House districting, in contrast to state or local districting, see generally Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409.

The constitutional standard proposed by the plaintiffs in *Vieth* was devoid of sense in the context of congressional districting. 541 U.S. at 283-88. Their standard included a requirement

A final point in favor of nonjusticiability by reason of the textually demonstrable commitment of the issue to Congress is its considerable superiority to Justice Scalia's reliance, to which we now turn, on *Baker's* second ground, "a lack of judicially discoverable and manageable standards" for resolving the issue.<sup>29</sup> Preliminarily, it may be recalled that part of the objection to relying on the textually demonstrable commitment of the issue to Congress was that doing so might require resolving the substantive issue in order to decide on justiciability. That problem is built into the discoverable and manageable standards criterion. How can one decide whether the standards for determining constitutionality in a certain type of case are discoverable and manageable without considering what the Constitution requires and how those requirements apply to such cases? Although well beyond the scope of this paper, it should be questioned whether the "discoverable and manageable standards" basis for nonjusticiability might not best be scrapped, with the thought that its useful work could be accomplished by either the textually demonstrable conflict criterion or nonjusticiability because of "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."<sup>30</sup>

## II. IN DEFENSE OF *BANDEMER*

### A. JUSTICE SCALIA'S ATTACK ON *BANDEMER*

In *Vieth*, Justice Scalia offers several reasons for concluding that the *Bandemer* plurality failed to provide discoverable and manageable standards for resolving partisan gerrymandering claims. As we shall see, these reasons do not include serious consideration of the content of the plurality's opinion. In that sense, his rejection of *Bandemer* stands in

that "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." *Id.* at 286-87. Justice Scalia likened this proposal to a requirement of proportional representation, *id.* at 287, but at most the plaintiffs' standard called for a very limited version of proportionality. It did not require a minority party to receive a proportional number of seats. Nor did it require proportionality for a majority party, so long as it received a majority of seats. One could understand the focus on the majority of seats if the standard had been proposed for a legislative body within a single state, but there is nothing special about controlling a majority of a state's delegation to the House of Representatives. Oddly, Justice Scalia did not mention this point, though he criticized the plaintiffs' proposal on numerous other grounds, all meritorious in my opinion. *Id.* at 283-90.

Justice Breyer's proposed ban on "the unjustified use of political factors to entrench a minority in power," *id.* at 360 (emphasis omitted), is also senseless as applied to judicial review of a congressional plan for the same reason and for the additional reason that members of the House do not draw district lines and therefore are not situated to use redistricting as a means of "entrenching" themselves under any circumstances. For a response to the objection that House members influence legislative design of congressional districts, see *infra*, note 93.

<sup>29</sup> *Vieth*, 541 U.S. at 278 (quoting *Baker*, 369 U.S. at 217).

<sup>30</sup> *Id.*

contrast with his primarily substantive arguments for the inadequacy of the proposal put forth by the *Vieth* plaintiffs,<sup>31</sup> of Justice Powell's *Bandemer* dissent,<sup>32</sup> and of the *Vieth* dissents.<sup>33</sup>

Justice Scalia begins his attack by noting that the dissenting and concurring justices in *Bandemer*, various commentators, and some lower court judges have asserted that *Bandemer* failed to provide a discernible standard.<sup>34</sup> That justices and commentators have attacked *Bandemer* on this ground is no argument for nonjusticiability.<sup>35</sup> Dissenting justices routinely claim that the majority's holding will be unworkable,<sup>36</sup> but their doing so has not been thought a reason for doubting the decision's authoritativeness, on justiciability grounds or otherwise. Even less has the carping of disgruntled academics been thought to cast doubt on the Court's decisions. The views expressed by lower court judges charged with implementing the Court's decisions deserve more serious consideration. But their actual success or failure in applying *Bandemer* is far more important than their complaints.<sup>37</sup> If one bears in mind the remarkable consistency with which the lower courts have been able to apply *Bandemer*, it becomes clear that Justice Scalia is only half right when he cites the complaints of some lower court judges as evidence of "one long record of puzzlement and consternation."<sup>38</sup> There has been consternation on the part of those judges who would have liked to intervene more aggressively into redistricting, but precious little puzzlement over the restraint that *Bandemer* imposes on them.

Because it is much more pertinent to consider what the lower courts were able to accomplish than how much the judges complained, Justice Scalia's second claim, that the lower courts have failed to shape a stan-

<sup>31</sup> *Id.* at 283-88.

<sup>32</sup> *Id.* at 290-91.

<sup>33</sup> *Id.* at 292-301. I have previously published analysis of the Powell opinion in *Bandemer*, *Bandemer's Gap*, *supra* note 3, at 91-94. I find Justice Scalia's criticism of the *Vieth* plaintiffs and dissenters persuasive. Accordingly, I concentrate attention on his criticism of the *Bandemer* plurality.

<sup>34</sup> *Vieth*, 541 U.S. at 281-85.

<sup>35</sup> That *Bandemer* was "not even defended by the appellants," who were challenging the Pennsylvania congressional plan in *Vieth*, is even less noteworthy. *Id.* at 283-84. Since the appellants plainly could not succeed under *Bandemer*, it is hardly surprising that they were uninterested in defending it. The respondents, defending the Pennsylvania plan, relied strongly on *Bandemer*.

<sup>36</sup> Justice Scalia himself often does so with great cogency.

<sup>37</sup> By Justice Scalia's test of relying on what the lower courts say rather than what they do, the early returns on *Vieth* are not encouraging. See *Henderson v. Perry*, No. 2:03-CV-354, 2005 WL 3370536, at \*6 (E.D.Tex. June 9, 2005) ("The light offered by *Vieth* is dim, and the search for a core holding is elusive"), *prob. juris. noted*, *League of United Latin American Citizens v. Perry*, 126 S.Ct. 827 (2005); *Travis County v. Perry*, 126 S.Ct. 827 (2005); *Jackson v. Perry*, 126 S.Ct. 827 (2005); *GI Forum of Texas v. Perry*, 126 S.Ct. 829 (2005).

<sup>38</sup> *Vieth*, 541 U.S. at 282.



dard, is important. But as we shall see shortly, his basis for this claim is a *non sequitur*:

Nor can it be said that the lower courts have, over 18 years, succeeded in shaping the standard that this Court was initially unable to enunciate. They have simply applied the standard set forth in *Bandemer*'s four-Justice plurality opinion. This might be thought to prove that the four-Justice plurality standard has met the test of time—but for the fact that its application has almost invariably produced the same result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable: judicial intervention has been refused.<sup>39</sup>

As we evaluate the claim that the *Bandemer* standard is unmanageable, it is worth dwelling on Justice Scalia's characterization of what the lower courts have actually done—they have “simply applied” the *Bandemer* plurality's standard.<sup>40</sup> What better proof of manageability could there be than experience showing that the standard can be and has been “simply applied”?

Furthermore, that the simple application of *Bandemer* has yielded a uniform result in the 18 reported cases calling for its application points toward the *presence* of a workable standard.<sup>41</sup> Justice Scalia's reasoning is a *non sequitur* because the fact that the results reached happen to be the same as they would have been if these cases had been nonjusticiable is entirely irrelevant to the question of manageability. Perhaps it would be more efficient if that result were reached by means of barring the courthouse doors to the plaintiffs rather than giving them their day in court and then ruling against them. That is probably what Justice Scalia had in mind with his reference to attorney's fees. But a total of 18 cases in the 18 years between *Bandemer* and *Vieth* is neither a large burden on the courts nor a large drain on the economy.<sup>42</sup> Whoever the named par-

<sup>39</sup> *Id.* at 279.

<sup>40</sup> *Id.* at 279. In the passage quoted, Justice Scalia emphasizes that Justice White spoke for only four justices in *Bandemer*. For all practical purposes, the standards contained in Justice White's plurality opinion are the standards that were adopted by the Court in *Bandemer*. See Lowenstein, *Bandemer's Gap*, *supra* note 3, at 90-95.

<sup>41</sup> See, e.g., *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2003); *Smith v. Boyle*, 144 F.3d 1060 (7th Cir. 1998). There is one exception, mentioned by Justice Scalia, *Republican Party of North Carolina v. Martin*, 980 F.2d 943 (4th Cir. 1992). As Justice Scalia wrote, *Martin* “did not involve the drawing of district lines.” *Vieth*, 541 U.S. at 279 (emphasis omitted). The Fourth Circuit erred in believing that case was governed by *Bandemer*. See LOWENSTEIN & HASEN, *TEACHER'S MANUAL*, *supra* note 24, at 63.

<sup>42</sup> There could have been unreported cases in addition to the 18 cases Justice Scalia identified, see *Vieth*, 541 U.S. at 281 n.6, but probably not many. Decisions in partisan gerrymandering cases brought with serious intent are likely to be published.

ties may be, the real parties in interest are the Democrats and the Republicans, and they can afford the attorneys' fees.<sup>43</sup> Furthermore, even if we were to conclude that a nonjusticiability rule is more efficient than *Bandemer*, so what? Inefficiency is not a ground for nonjusticiability.

Finally, it is of no moment that the districting plans that survived attack included some with allegedly "extreme partisan discrimination, bizarrely shaped districts, and disproportionate results."<sup>44</sup> *Bandemer* did not find that extreme partisan discrimination, bizarrely shaped districts, or disproportionate results were sufficient to make a districting plan unconstitutional. Why should we be surprised that plans disliked by plaintiffs for reasons that do not render the plans unconstitutional should survive the plaintiffs' judicial challenges?

#### B. WHAT *BANDEMER* HELD

We have seen that the unanimity of the cases decided after *Bandemer* if anything confirms its manageability rather than drawing that manageability into question. The unanimity is nonetheless a striking fact. Why do the political parties bring cases they will not win? Probably for two reasons. First, in some circumstances, the electoral consequences party leaders perceive to be at stake dwarf the costs of litigation, so that suing is rational even if the probability of winning is very low. Second, although the *Bandemer* standard is manageable and usually may be applied simply (to use Justice Scalia's term), the exposition in the plurality opinion is admittedly cryptic. The best remedy for the first of these causes would be the passage of time. If *Bandemer* were reaffirmed by the Court and major party plaintiffs lost another 18 consecutive cases in 18 years, perhaps they would eventually get the point. The second cause would best be remedied by clarifying *Bandemer*, not junking it.

Which brings us to the question of what *Bandemer* held. In lieu of analyzing *Bandemer* or demonstrating that it is in any sense deficient, Justice Scalia in *Vieth* points to the judges and commentators who have found it unclear and concludes by quoting Bernard Grofman's statement that he (Grofman) and I (Lowenstein) are the only two people who believe *Bandemer* makes sense and that our interpretations are conflicting.<sup>45</sup> Everyone acquainted with Professor Grofman must have been pleased, on reading *Vieth*, to see Justice Scalia make good rhetorical use of a characteristic example of Grofman's well-known and widely appre-

<sup>43</sup> *Bandemer* prompted national committees of the two major parties to set up programs assisting state party groups in bringing and defending gerrymandering claims. Ronald E. Weber, *Redistricting and the Courts: Judicial Activism in the 1990s*, 23 AM. POL. Q. 204, 209-10 (1995).

<sup>44</sup> 541 U.S. at 280-81.

<sup>45</sup> *Id.* at 283 (quoting Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies*, 21 STETSON L. REV. 783, 816 (1992)).

ciated wit. At a cocktail party, the Grofman *bon mot* could have sufficed to show that *Bandemer* was incoherent. But in a decision of the United States Supreme Court, one might have expected Justice Scalia to go on and ask whether either of the proposed interpretations is correct.<sup>46</sup> Readers will not be shocked to learn that I believe one of the interpretations mentioned by Grofman is correct. A brief summary here will be helpful.<sup>47</sup>

To understand Justice White's plurality opinion in *Bandemer*, one must rid one's mind of two preconceptions that have obscured the opinion's meaning for many readers. First, readers have misunderstood the question that Justice White spent most of his time answering. The question the *Bandemer* plaintiffs wanted answered and that most observers expected the Court to answer was: "When is a partisan gerrymander performed under normal circumstances of American politics unconstitutional?" Justice White's answer was short and simple: Never! But because he did not express the point directly and because he spent most of his time answering a quite different question, it was easy to miss his answer.

To see what the other question was, one needs to get rid of the other preconception, which is that *Bandemer* is a "fundamental voting rights" case in the line started by *Baker v. Carr*,<sup>48</sup> and *Reynolds v. Sims*.<sup>49</sup> Although Justice White's finding that partisan gerrymandering cases are justiciable was based firmly on *Baker* and other malapportionment cases,<sup>50</sup> his discussion of the merits did not draw on those cases in any significant way.<sup>51</sup> Rather, he relied predominantly on cases in which the issue was racial discrimination.<sup>52</sup> Why does that matter? Because it is a sign that *Bandemer* falls under the "suspect classifications" branch of Equal Protection doctrine, unlike the malapportionment cases, which fall under the "fundamental rights" branch. A partisan gerrymander is un-

<sup>46</sup> Justice Scalia uses the same pseudo-logic against the dissenting justices when he observes "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." 541 U.S. at 292. In truth, that fact by itself goes a very short way to establishing anything. But in contrast to his failure to consider on their merits the proposed interpretations of *Bandemer*, Justice Scalia does consider all the dissenting opinions individually and gives excellent reasons for rejecting them.

<sup>47</sup> The following four paragraphs summarize my longer argument in Lowenstein, *Bandemer's Gap*, *supra* note 3 at 69-90.

<sup>48</sup> 369 U.S. 186 (1962).

<sup>49</sup> 377 U.S. 533 (1964).

<sup>50</sup> *Bandemer*, 478 U.S. at 118-127.

<sup>51</sup> See Lowenstein, *Bandemer's Gap*, *supra* note 3, at 79-81.

<sup>52</sup> See *EEOC v. Shell Oil Co.*, 412 U.S. 755 (1984); *Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Burns v. Richardson*, 384 U.S. 73 (1966).

constitutional under *Bandemer*, not because the “dishing” of one major party by the other is “excessive,”<sup>53</sup> but because the gerrymander is directed against a political group that is subject to pervasive discrimination comparable to what was in the past directed against certain racial groups. Thus, the question Justice White addressed at length was not, “when is a normal Republican or Democratic gerrymander unconstitutional?” The answer to that question, as mentioned above, was never. The question that received most of Justice White’s attention was, “what kind of group would have to be the target of a gerrymander in order for the suspect classification doctrine to render the gerrymander constitutionally infirm.”<sup>54</sup>

The existence of a “suspect classification” is the first reason a partisan gerrymander might be unconstitutional under *Bandemer* and the only reason firmly grounded in Justice White’s opinion. However, there is a second possible reason, albeit more speculative because it is based on only a few hints in the opinion.<sup>55</sup> This second possibility would arise if a partisan gerrymander somehow became an instrument so powerful that a minority party could permanently control a state legislature, as malapportionment enabled certain regions to control some state legislatures prior to *Reynolds*.

For reasons stated above, this possibility that *Bandemer* could be invoked to remedy self-perpetuating minority control of a legislature does not extend to congressional redistricting, through which no state controls more than a small fraction of the House membership.<sup>56</sup> It is almost as inapplicable to state government, for many reasons. One is that in the case of malapportionment, the problem could and did grow through inertia. It was the failure of legislatures to redistrict decade after decade that caused the most characteristic malapportionment problems.

<sup>53</sup> The “dishing of one political party by another” is the definition of partisan gerrymandering offered by David Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970’S 249, 274 (Nelson Polsby ed., 1971). “Excessive manipulation” is the key phrase in the definition used by Charles Backstrom, Leonard Robins & Scott Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1122 n.7 (1978). For a collection of similar definitions, see Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. REV. 1, 9-11 (1985).

<sup>54</sup> No doubt certain political groups have experienced pervasive discrimination in the course of American history and it is not especially improbable that such groups will exist in the future. For such a group to be the target of a gerrymander, however, it must have sufficient supporters, sufficiently concentrated geographically, that it could win at least one legislative district. Usually political groups that achieve pariah status are small. Therefore, the likelihood of a group being able to succeed under this aspect of *Bandemer* is also small. However, as we shall see, the likelihood of success under the alternative claim recognized by *Bandemer* is even smaller.

<sup>55</sup> See Lowenstein, *Bandemer’s Gap*, *supra* note 3, at 86-89.

<sup>56</sup> See *supra* notes 26-28, and accompanying text.

In contrast, partisan gerrymanders need to be updated to work as intended. Furthermore, by reason of the one person, one vote rule, periodic redistricting is mandatory, making partisan reliance on inertia impossible. A second reason is that gerrymandering is by nature a self-limiting enterprise.<sup>57</sup> Using votes most efficiently against the opposing party is achieved by shaving margins of victory in one's own party's districts as closely as possible. But the self-interest of the gerrymandering party's incumbents, whose support is needed to enact a plan, pushes toward wider margins of victory for themselves. A third reason is that under typical state governing arrangements, even if a minority party were able to use redistricting to control the legislature for a decade, it would be unable to update its plan for the next decade without winning the governorship—and governors are elected by majorities.<sup>58</sup> Despite these considerations, which make it highly unlikely that partisan gerrymandering could ever become an instrument of minority control of government at all comparable to the malapportionment problem prior to *Reynolds*,<sup>59</sup> language in *Bandemer* hints that were such a situation to arise, the Court would be receptive to a constitutional claim.<sup>60</sup> Justice White did not—and did not need to—specify on what doctrinal grounds the claim would stand.

Facts satisfying either of the bases for a cause of action suggested in Justice White's opinion were neither alleged nor proved in any of the 18 cases in which relief has been denied. Accordingly, the uniform results in post-*Bandemer* partisan gerrymandering cases confirm that the lower courts have been able to understand *Bandemer* correctly and apply it properly. But it is not only the results that confirm the lower courts' correct understanding of *Bandemer*. At least some of their opinions explicitly articulate an understanding of *Bandemer* more or less as de-

<sup>57</sup> See *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring).

<sup>58</sup> See Michael A. Carvin & Louis K. Fisher, "A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts, 4 ELECTION L. J. 2, 7 (2005) (pointing out the unlikelihood that a minority party could consistently maintain control of all the branches of state government necessary to update a gerrymander each decade).

<sup>59</sup> Justice Scalia makes the same point when he observes that Justice Breyer "gives no instance (and we know of none) of permanent frustration of majority will" by reason of partisan gerrymandering. 541 U.S. at 300.

<sup>60</sup> There are portions of Justice Breyer's opinion in *Vieth* that could be read as making explicit what is hinted in *Bandemer*. If that were all Justice Breyer had in mind, I would find his opinion entirely unobjectionable. But it clearly is not all he had in mind. This is apparent from his concrete examples, such as his assertion that a plan would be presumptively unconstitutional if it resulted in two consecutive elections in which a "majority party" (however that might be defined) received fewer than a majority of the seats. *Vieth*, 541 U.S. at 366. As "entrenchment," such a situation would be insignificant compared to what was typical in state legislatures before *Reynolds*. The disjunction between Justice Breyer's general description and specific illustrations of his proposed standard comes uncomfortably close to disingenuousness.

scribed above. A good example is *Badham v. Eu*,<sup>61</sup> which rejected a challenge to the California congressional plan, the most controversial re-districting plan of the 1980s<sup>62</sup>:

[T]here are no factual allegations regarding California Republicans' role in "the political process as a whole." There are no allegations that California Republicans have been "shut out" of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in the "uninhibited, robust, and wide-open" public debate on which our political system relies.<sup>63</sup>

A cause of action that requires such allegations is founded on "suspect classification"—not "fundamental rights"—doctrine.<sup>64</sup> The key variable in a *Bandemer* claim is not the extremity of the plan, but the identity of the plaintiff. Under normal conditions, neither Democrats nor Republicans are plaintiffs who can prevail in a partisan gerrymandering claim.

Nothing in Justice Scalia's opinion in *Vieth* attempts to refute the interpretation of *Bandemer* that I have summarized here and that has been followed universally and articulated sometimes by lower courts. Indeed, to the best of my knowledge, no one has attempted to refute it since its publication.<sup>65</sup> When Justice Scalia wrote that "no judicially discernible and manageable standards for adjudicating political gerrymandering

<sup>61</sup> 694 F.Supp. 664 (N.D.Cal. 1988), *summ. aff'd*, 488 U.S. 1024 (1989).

<sup>62</sup> See generally Morgan Kousser, *Reapportionment War: Party, Race & Redistricting in California, 1971-1992*, in *RACE AND REDISTRICTING IN THE 1990s* (Bernard Grofman ed. 1998).

<sup>63</sup> 694 F.Supp. at 670.

<sup>64</sup> A bit of disclosure may shed light on the similar understanding of *Bandemer* contained in *Badham* and in Lowenstein, *Bandemer's Gap*, *supra* note 3. The lead attorney defending the California congressional plan was Jonathan Steinberg, my co-author in *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 318 (1985). I consulted extensively with Mr. Steinberg during the 1980s on redistricting issues in general and on the *Badham* litigation in particular. I presented a paper at the annual meetings of the American Political Science Association a couple of months after *Bandemer* was decided, expressing views similar to those in *Bandemer's Gap*. Those views were reflected in the *Badham* briefs.

<sup>65</sup> Professor Grofman, in the same volume that contains *Bandemer's Gap*, disputed my interpretation. See Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*, in *POLITICAL GERRYMANDERING AND THE COURTS* 29, 47-53 (Bernard Grofman ed., 1990). I responded to these criticisms in an appendix to *Bandemer's Gap*, *supra* note 3, at 97-103.

dering claims have emerged,”<sup>66</sup> he was (to borrow his term again) “simply” mistaken.

### III. VIETH'S GAP

Aside from *Bandemer*'s manageable standard for partisan gerrymandering cases, which the lower courts have followed consistently, there is another, even more easily managed standard that the courts could apply to decide partisan gerrymandering claims. The standard derives from the plausible principle that partisan gerrymandering does not violate the Equal Protection Clause.<sup>67</sup> Any constitutional challenge to a districting plan claimed to be a partisan gerrymander would *ipso facto* be dismissed for failure to state a cause of action. For convenience, let us refer to this as the null standard. Adoption of the null standard by the Supreme Court would have the same practical effect as a ruling that partisan gerrymandering cases are nonjusticiable, but would stand on an entirely different doctrinal and conceptual basis. My purpose in identifying it here is not to urge its adoption—though the Court could do far worse—but to emphasize what should be an obvious point: *Rejection of the null standard requires an explanation of why and how partisan gerrymandering offends the Equal Protection Clause.*

*Vieth*'s gap exists because the plurality rejected the null standard without providing any such explanation. Contrary to what some may suppose, the malapportionment cases do not obviate the need for an ex-

<sup>66</sup> 541 U.S. 267, 281 (2004).

<sup>67</sup> I do not address, other than in this footnote, the suggestion that federal courts should entertain claims that partisan gerrymandering denies to the states a republican form of government. See generally, Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. OF L. & PUB. POL'Y 103 (2000-01). McConnell suggests that a districting plan “so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government.” *Id.* at 105. Perhaps so, but his arguments for abandoning *Reynolds*'s reliance on the Equal Protection Clause in favor of the Guarantee Clause are not persuasive. McConnell gives *Karcher v. Daggett*, 462 U.S. 725 (1983), as an example of excessive enforcement of anti-malapportionment doctrine that results from treating malapportionment as an equal protection problem. *Id.* at 109. Perhaps (now) Judge McConnell is correct that the Court has been excessive in its application of the “one person, one vote” rule to congressional plans, but the Equal Protection Clause is not the culprit. It cannot be, because the congressional cases, including *Karcher*, have not been decided under the Equal Protection Clause.

Nor would application of the Guarantee Clause be a helpful innovation in partisan gerrymandering cases. Even if one ignores the hyperbole which—it seems to me—is present in McConnell's statement above regarding the effects of malapportionment, such effects cannot result from gerrymandering, which requires updates, whereas the worst effects of malapportionment resulted from inertia. If the primary situation contemplated in *Bandemer* ever did arise—a gerrymandering claim brought by a political group that was being treated as a pariah group—the Equal Protection Clause, not the Guarantee Clause, would be well-suited to deal with it.

planation. *Reynolds v. Sims*<sup>68</sup> emphasized that the voting rights protected by the Equal Protection Clause are individual rights.<sup>69</sup> An individual assigned to a district whose population is equal to that of other districts suffers no discrimination.<sup>70</sup> The chance of any one voter casting a decisive vote is vanishingly small no matter how the districts are drawn; beyond that chance, no voter's individual vote is more influential than any other voter's. True, the configuration of districts affects, sometimes decisively, the opportunities available to individual politicians. But no one has a constitutional right to be elected to office, nor to institutional arrangements that will enhance his prospects for getting elected.

The objection to partisan gerrymandering is that one's party is not likely to do as well as it might have under a different configuration of districts. The *Vieth* plurality seems to regard that prospect as violative of the Equal Protection Clause if the detriment to the party's prospects is "extreme," but provides no explanation of what the constitutional difficulty is. Thus, in his discussion of Justice Souter's dissent, Justice Scalia comments, "the test [for identifying an extreme, and thus unconstitutional, gerrymander] ought to identify deprivation of that minimal degree of representation or influence to which a political group is constitutionally entitled."<sup>71</sup> The notion, however, that a political group is "constitutionally entitled" to at least a specified amount of influence—or of representation, if that protean term is understood, as it apparently is here, as something akin to influence—runs contrary to the theory of government embodied in the Constitution. The Constitution was designed on the "republican principle,"<sup>72</sup> assuring that majorities control but that all

<sup>68</sup> 377 U.S. 533 (1964).

<sup>69</sup> See Lowenstein, *Bandemer's Gap*, *supra* note 3, at 69-74.

<sup>70</sup> Justices Stevens and Souter, dissenting in *Vieth*, attempted to treat the case as one involving individual rights. Explaining their position, Heather Gerken states that "[c]onceptualizing the harm as one involving intent—treating an individual differently because of her group membership—is consistent with an individualist understanding of the harm." Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 509 (2004). The trouble with this understanding is that individuals are not treated "differently" in any meaningful sense by a districting plan. It is trivially true that when members of a legislature are elected by districts, individuals are treated differently by being assigned to different districts. In the same trivial sense, Professor Gerken and I would be treated differently if we attended a conference at which the registration lines were divided between surnames from A-K and L-Z. The constitutional significance of "treating an individual differently because of her group membership" comes from being treated better or worse. An individual is neither better nor worse off from being in one equally populated district rather than another. The bad days of "separate but equal" teach us that in certain circumstances the division itself can create an advantage or disadvantage. But there is no implicit superiority or inferiority in being grouped with one's alphabetical neighbors on a registration line or in being placed in the First rather than the Second Congressional District.

In the same article, Professor Gerken offers a trenchant criticism of Justice Stevens' dissent.

<sup>71</sup> 541 U.S. at 297.

<sup>72</sup> THE FEDERALIST NO. 10., at 58 (James Madison) (Heritage Press ed., 1945).



groups have the opportunity to act freely. The Constitution does not implement the republican principle by assuring each group a quota of influence. Rather, it creates a structure (such as the popular election of House members) and guarantees rights (such as the freedom of speech), the combination of which is likely to give all groups the opportunity to compete for influence. The plurality criticizes Justice Souter for failing to specify how much influence will satisfy the minimum, but all the justices, the plurality included, fail to identify any constitutional principle supporting the notion that the Court should be concerning itself with a major political party's degree of influence in the first place.

Justice Scalia is even less helpful when he says that the plurality "do[es] not disagree" with that portion of Justice Stevens' dissent "addressed to the incompatibility of severe partisan gerrymanders with democratic principles."<sup>73</sup> In response to Justice Breyer the plurality concedes that the Constitution creates a "basically democratic form of government" but calls that an "incredibly abstract" starting point that is a "long and impassable distance away" from specific considerations relating to partisan gerrymandering.<sup>74</sup> Surely Justice Stevens' invocation of "democratic principles" is just as abstract and just as far away from specific considerations relating to gerrymandering as is Justice Breyer's invocation of "basically democratic" government. A similar tension exists between Justice Scalia's concession to Justice Stevens that an "excessive injection of politics [into redistricting] is unlawful"<sup>75</sup> and his earlier assertion that the Constitution "clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."<sup>76</sup> How can there be an excessive injection of politics into something that is root-and-branch a matter of politics?

Possibly, the plurality's statements to the effect that "extreme" partisanship in redistricting offends the Constitution—statements such as, "[t]he central problem is determining when political gerrymandering has gone too far"<sup>77</sup>—are meaningless concessions, either made for tactical purposes (perhaps to attract a stray vote to the plurality) or made thoughtlessly. More likely they should be taken seriously, as they help to explain Justice Scalia's shoddy treatment of *Bandemer*. If the only question about *Bandemer* is its manageability, then the assertion that its unmanageability is demonstrated by showing that the lower courts have applied it consistently is risible—so risible that it is difficult to suppose Justice Scalia and his colleagues in the plurality could believe it. But, if

<sup>73</sup> 541 U.S. at 292.

<sup>74</sup> *Id.* at 299 (internal quotations omitted).

<sup>75</sup> *Id.* at 293 (emphasis omitted).

<sup>76</sup> *Id.* at 285.

<sup>77</sup> *Id.* at 296.

the plurality believes that “excessive” partisan gerrymanders committed by one major party against another are constitutionally offensive, their discussion of *Bandemer* may be seen in a different light. Like the lower court judges who experienced more consternation than puzzlement,<sup>78</sup> the plurality justices believe that a proper standard *ought* to result in voiding some partisan gerrymanders that occur in the normal course of politics.<sup>79</sup> That would account for Justice Scalia’s complaint that under *Bandemer*, “districting plans were . . . upheld despite allegations of extreme partisan discrimination, bizarrely shaped districts, and disproportionate results.”<sup>80</sup> As has already been pointed out, that should have been no occasion for surprise, because under *Bandemer* such allegations fail to state a constitutional violation in a case pitting one major party against the other. At bottom, the plurality’s real objection to *Bandemer* was not its failure to set a workable standard, but disagreement with the standard *Bandemer* set.

If, according to the plurality, partisan gerrymandering is unconstitutional when it goes “too far,” the problem of the gap between the standard applied to a plan and the constitutional principles on which the standard rests, arises once again.<sup>81</sup> That gap is not eliminated by the plurality’s conclusion that courts have proven unable to implement a standard condemning plans that go “too far.” The question still hovers, what makes a plan that goes “too far” unconstitutional? Ironically, the plurality seems quite aware of the significance of the gap in its criticism of the dissenters, as when it chides Justice Souter for proposing a test without an adequate explanation of “what he is testing *for*.”<sup>82</sup> It is as great a fallacy—or almost as great—to conclude that a test is impossible without specifying what one would like to test *for*. All the justices in *Vieth* start with the assumption that “extreme partisanship”—partisanship that goes “too far”—is unconstitutional. The fundamental difference among them is whether courts are capable of determining that a particular districting plan is too extreme. None of them attempts to close the gap between their starting assumption and the principles of the Constitution. Nor could they. That starting assumption is not only unmoored to

<sup>78</sup> See *supra*, text accompanying note 38.

<sup>79</sup> One writer, in a nicely-turned phrase, observes that for the plurality, “the justiciability problem is epistemological, not ontological.” Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 495 (2004).

<sup>80</sup> 541 U.S. at 280-81.

<sup>81</sup> Mitchell Berman assumes he can develop satisfactory doctrine for constitutional challenges to partisan gerrymandering without bridging the gap, i.e., without concerning himself with what it is about partisan districting that violates the Constitution. See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 783 (2005). Although aspects of Professor Berman’s project can be admired for their ingenuity, the enterprise seems to me to be hollow.

<sup>82</sup> 541 U.S. at 297 (emphasis in original). For additional examples, see *supra*, note 13.

the Equal Protection Clause or any other constitutional provision—it runs contrary to the Constitution,

The Constitution eschews primary reliance on “exterior provisions” for controlling abuses of power.<sup>83</sup> As James Madison wrote in *Federalist No. 51*, each department of government should have a “will of its own.”<sup>84</sup> Nor does the Constitution abjure self-interest on the part of elected officials. To the contrary, it *relies* on self-interest—“personal motives”—to assure that “[a]mbition [will] be made to counteract ambition.”<sup>85</sup> “The interest of the man,” Madison writes, “must be connected with the constitutional rights of the place.”<sup>86</sup> In short, the Constitution does not try to prevent political competition from going “too far.” It *depends* on competition to preserve the balanced structure of government.

This is not to deny that it is possible for competition to produce imbalance. *Bandemer* allowed for that possibility. Groups treated as pariahs—groups such as African Americans in the South until the mid-1960s—are excluded from the competitive system and therefore cannot protect their rights or advance their interests. Extreme and inertial malapportionment arguably prevented political competition from restoring an imbalance that developed over time. That partisan gerrymandering between the major parties can create similar problems under present or foreseeable circumstances is extremely improbable at least, but *Bandemer* allows even for that possibility. Beyond such possibilities, the Constitution harnesses self-interest to preserve vigorous competition. As it happens, competition between the major parties is flourishing in today’s America as strongly as it ever has. As for partisan gerrymanders, far from being devices that stifle competition, they are *instruments* of competition. They are the outgrowth of the “interest of the man [or, we might add, party, being] . . . connected with the constitutional rights of the place.”<sup>87</sup>

It does not follow that opponents of a particular districting plan speak incoherently or against the constitutional structure when they claim that a districting plan is “too extreme” or “excessive” or “goes too far.” What does follow from my argument is that these are political, not constitutional claims. Taxes may be “excessive,” the Patriot Act may be “too extreme,” and prison sentences may go “too far”—or some in the polity may think so. Those are perfectly legitimate and no doubt plausible views, but they are not constitutional arguments.

<sup>83</sup> THE FEDERALIST NO. 51., at 346 (James Madison) (Heritage Press ed., 1945).

<sup>84</sup> *Id.* at 347.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 347-48.

<sup>87</sup> *Id.* at 348.

Consider the opening passage of Justice Breyer's dissenting opinion in *Vieth*:

The use of purely political considerations in drawing district boundaries is not a "necessary evil" that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political "gerrymandering" will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when that is so, courts can identify an equal protection violation and provide a remedy.<sup>88</sup>

It appears that the entire Court more or less agrees with all but the last sentence of that quotation. The plurality disagrees with the last sentence and Justice Kennedy is not sure. But their difficulty with the last sentence is a denial of its practicality, not a difference in principle.

Suppose we adapt the passage, changing only the subject—from gerrymandering to taxation:

The use of high taxes in fiscal policy is not a "necessary evil" that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, high taxation often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes "confiscatory" taxation will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when this is so, courts can identify an equal protection violation and provide a remedy.

I daresay that all the members of the Court and the great majority of other Americans would agree with all but the last sentence of that passage—though, of course, we would differ over when taxation becomes confiscatory and harmful, just as opponents of gerrymandering differ over the kinds of plans they find offensive. But when Justice Breyer's passage is rewritten to deal with taxation, the last sentence becomes not only controversial but jarring. The same would be true if the paragraph dealt with environmental regulation, public utility rate setting, or hundreds of additional, easily imagined issues.

Any government policy could be "excessive." Our Constitution sets up a political system that its framers hoped and two centuries of experi-

<sup>88</sup> 541 U.S. at 355 (Breyer, J. dissenting).

ence pretty well confirm tends to control excess before it becomes truly destructive. It does not do that by authorizing the courts to decide that taxes are too high, that environmental regulations are too far-reaching, or that agricultural subsidies are too generous. The intuition held by many, that partisan districting plans are sometimes excessive, is as legitimate as the view held by others that the minimum wage is excessive. Neither belief justifies the conclusion that the policy in question violates the Constitution.

Is there any basis for assuming that partisan districting is restricted by the Constitution more than other controversial policies? If we look first at the text of the Constitution, the answer is clearly negative. All but congressional districting is left entirely to the states; congressional districting is also left to state legislatures, though subject to congressional oversight.<sup>89</sup> The Supreme Court has found in the Constitution a protection of individual voting rights that precludes the creation of malapportioned districts, but as has been shown, partisan districting, no matter how "extreme," does not implicate individual voting rights.<sup>90</sup> The Constitution imposes no other substantive restrictions on redistricting.

Even less can one argue that the Constitution should be understood to prohibit "extreme" partisanship because excess is peculiarly harmful in the case of districting. The opposite is true. Partisan gerrymandering works at the margin. So do party politicians, which is why they find redistricting a subject of abiding interest. For the ordinary citizen, the shifting of a few legislative seats is a matter of small consequence.<sup>91</sup> Genuinely confiscatory taxation would be much more destructive to our country and its form of government than any gerrymander could possibly be, no matter how outrageous some may find it. The same would be true of extreme excess in almost any significant policy domain, in comparison to districting.

Some may claim districting is different from other policy domains, because of the conflict of interest inherent in incumbent politicians protecting their own careers.<sup>92</sup> Aside from the claim's irrelevance to con-

<sup>89</sup> See U.S. CONST. art. I, § 4.

<sup>90</sup> See *supra* notes 69-70 and accompanying text.

<sup>91</sup> To be sure, a voter may have a partisan interest in a swing of a few seats. The detriment for one group of voters would be offset by the benefit for their opponents. Election law presumably is neutral regarding partisan swing between the parties.

<sup>92</sup> See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 626 (2002) (arguing that even if, as he seems to concede, the empirical case is weak that redistricting is a major element in incumbents' electoral advantage, districting by incumbents is still objectionable because "district lines are manipulated for the purpose of protecting incumbents from effective challenge").

gressional districting, which is not enacted by members of Congress,<sup>93</sup> it is singularly naive. A premise underlying much contemporary study of legislative politics is that *all* legislative conduct is motivated solely by the desire for reelection.<sup>94</sup> Few if any observers would agree with the proposition thus strongly stated, but no one doubts that the motive for reelection is a major influence in virtually all legislative policymaking.<sup>95</sup> Some legislation, popularly called pork-barrel legislation, is universally recognized as largely if not entirely motivated by political advantage. Pork-barrel legislation is wasteful and its indirect effects—for example, when its distortions adversely affect military preparedness—can be far more harmful than anything that might flow from a partisan gerrymander. The harm of pork is widely recognized, but no one says that if pork goes “too far” it is unconstitutional, nor that it would be if only we had a way of distinguishing “excessive” pork from moderate pork.

Pork is harmful. Although we cannot eliminate it, we rely on political action to keep it under tolerable control. It is not unconstitutional. The harm from a partisan gerrymander performed by one major party against the other is not nearly as clear as the harm from pork and there is no apparent way in which “excessive” major-party gerrymandering offends the Constitution. In *Bandemer* and *Vieth*, numerous members of the Supreme Court have assumed that it does, but while many of them have proposed specific “standards” for measuring gerrymanders against the Constitution—none, however, that has yet enlisted the support of more than two members of the Court—none has been able to bridge the gap to explain what constitutional principle is violated by partisan gerrymandering. The gap is bridgeable only in the case of the *Bandemer* plurality opinion, because their standard limits itself to situations in which there really are cognizable constitutional principles at stake. Ordinary gerrymandering between the major parties does not implicate such principles.

<sup>93</sup> It is true that House members often have considerable influence over the drawing of district lines. That does not differentiate them from any other interest group with considerable influence over legislation affecting its members.

<sup>94</sup> The seminal work is DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (2d ed. 2004).

<sup>95</sup> Even Mayhew did not believe desire for reelection could explain all congressional behavior. See *id.* at 141-158. Another classic of contemporary political science begins with the premise that members of Congress are motivated by the desire for reelection, advancement within Congress, and policy influence. RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 1 (1973).

#### IV. THE LAW AFTER *VIETH*

If we want to know what the law is now, we must begin with Justice Kennedy's opinion. The first question is whether Justice Scalia is correct when he says:

What are the lower courts to make of [Justice Kennedy's opinion]? We suggest that they must treat it as a reluctant fifth vote against justiciability at district and state-wide levels—a vote that may change in some future case but that holds, for the time being, that this matter is nonjusticiable.<sup>96</sup>

If this characterization of Justice Kennedy's opinion were correct, then partisan gerrymandering claims would be nonjusticiable in federal courts, for now at least. It would be the duty of the lower federal courts to refuse to hear such claims.

Unfortunately, Justice Scalia's construction of Justice Kennedy's opinion is probably incorrect. The closest Justice Kennedy comes to addressing the question directly is his statement that "the arguments [for nonjusticiability] are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander."<sup>97</sup> That statement is not inconsistent with Justice Scalia's reading that the issue is currently nonjusticiable. Justice Scalia could understand Justice Kennedy to be simply opening up the possibility that at some time in the future the issue might become justiciable again. Partisan gerrymandering would "now" be barred, but not necessarily all "future claims," namely those occurring after the future date on which the Court might again rule the issue to be justiciable. That reading, however, seems less natural, or at least no more so, than understanding Justice Kennedy to mean that "future" claims—meaning any that arise after today—are not "now" barred. The word "all" presents problems for this reading, but in context that word is probably a recognition that most such claims are likely to be unsuccessful. The rest of the concurrence seems, in a halting and hesitating way, to contemplate future litigation. If so, that tips the scales decisively in favor of the second interpretation.

If Justice Kennedy's opinion preserves the justiciability of gerrymandering claims, it nevertheless determinedly avoids any reading of the Constitution that can or does give guidance as to what might make a partisan gerrymander unconstitutional. Justice Kennedy even seeks—contrary to the most basic notion of *stare decisis*—to prevent the fact that relief was denied to the Pennsylvania plaintiffs from being used as a datum in constructing an account of the constitutional principles affect-

<sup>96</sup> 541 U.S. 267, 305 (2004).

<sup>97</sup> *Id.* at 309.

ing gerrymandering. “[I]f a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights,” Justice Kennedy wrote, “we could conclude that appellants’ evidence states a provable claim.”<sup>98</sup> Despite this statement, *Vieth* should count as a precedent holding that a challenge in circumstances like those of the Pennsylvania case is without merit, because what the Court decides, not what the Justices’ opine, is the precedent.<sup>99</sup> Nevertheless, the single datum consisting of the ruling against the *Vieth* plaintiffs gives little guidance for the decision of future cases and Justice Kennedy’s opinion simply points to the *absence* of a standard on which he is willing to base his ruling.

Justice Kennedy’s position is irresponsible for reasons well-stated by Justice Scalia:

The first thing to be said about Justice Kennedy’s disposition is that it is not legally available. The District Court in this case considered the plaintiffs’ claims *justiciable* but dismissed them because the standard for unconstitutionality had not been met. It is logically impossible to affirm that dismissal without either (1) finding that the unconstitutional-districting standard applied by the District Court, or some other standard that it *should* have applied, has not been met, or (2) finding (as we have) that the claim is nonjusticiable. Justice Kennedy seeks to affirm “[b]ecause, in the case before us, we have no standard.” But it is *our* job, not the plaintiffs’, to explicate the standard that makes the facts alleged by the plaintiffs adequate or inadequate to state a claim. We cannot nonsuit *them* for our failure to do so.<sup>100</sup>

Justice Kennedy thus acted irresponsibly, perhaps unprecedentedly so.<sup>101</sup> The result is an interesting puzzle: where do we stand now? I wish to pursue the question in an old-fashioned way, by asking not what the Court will do in the future but, rather, what is the law now? That should be the question asked by lower court judges presented with parti-

<sup>98</sup> *Id.* at 314.

<sup>99</sup> See generally Daniel Hays Lowenstein, “Too Much Puff”: Persuasion, Paternalism, and Commercial Speech, 56 U. CIN. L. REV. 1205, 1237-47 (1988) (arguing for inductive rather than deductive reasoning from judicial precedents).

<sup>100</sup> 541 U.S. at 301.

<sup>101</sup> I am not using “irresponsible” as an all-purpose pejorative and do not suggest that because Justice Kennedy’s opinion is unusually and perhaps uniquely irresponsible, it is therefore unusually or uniquely harmful. I use the term more precisely to assert that Justice Kennedy failed to carry out his most elemental responsibility as a judge, to decide the case under the law.



san gerrymandering cases. My surprising conclusion is that *Bandemer v. Davis* is still the law. Surprising, because it seems fairly clear from the *Vieth* opinions that no Justice then on the Court agreed with *Bandemer*. But I am proceeding on the premise that the law is not a prediction of what the nine Justices will say in a future case nor a psychological inquiry into what they want, but what can fairly be gleaned from the decisions they have already issued. As Justice Scalia has written in the context of statutory interpretation, "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . It is the *law* that governs, not the intent of the lawgiver."<sup>102</sup> Justice Scalia's point is more compelling as applied to judicial decisions. If, as Justice Scalia has maintained, a judge is not a "representative" in the ordinary sense of that word,<sup>103</sup> part of the reason is that the rule of law requires that the judge's personal desires be no proper part of his decision-making.<sup>104</sup> Precedent consists of what the Court has decided supplemented by the Justices' explanations, not the Justices' subjective preferences. It is the proper function of the lower court judge to observe the Court's holdings, not to predict what the individuals on the Court are likely to do.

What, then, is the state of the law after *Vieth*? The status quo when *Vieth* was decided was defined by *Bandemer*. *Bandemer*'s first point was that partisan gerrymandering claims are justiciable. As we have seen, the *Vieth* plurality's view, based on its reading of Justice Kennedy's concurrence, is that the justiciability portion of *Bandemer* has been overruled. For reasons stated above, that view appears to be mistaken.<sup>105</sup> The practical question is, what should the lower courts do when partisan gerrymandering plaintiffs walk through the courtroom door, as the justiciability ruling of *Bandemer*, undisturbed by *Vieth*, permits them to do. Probably most people think the lower courts should do one of two things, each of which I shall argue against.

The first is to follow a variant of Justice Scalia's assertion that for all practical purposes, Justice Kennedy's vote is a vote against justiciability. This approach is based on the plausible reading of the concurrence that until the skies open up and a new gospel on gerrymandering is

<sup>102</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997).

<sup>103</sup> See *Chisom v. Roemer*, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting).

<sup>104</sup> Among political theorists, the propriety of legislators acting on the basis of their own wills is more controversial. Cf. Edmund Burke, *Speech to the Electors of Bristol*, in LOWENSTEIN & HASEN, *supra* note 2 at 11-12 (inaugurating a debate on the subject that has endured for over two centuries).

<sup>105</sup> I know of no published commentary that agrees with the plurality's interpretation of Justice Kennedy's concurring opinion.

revealed for one and all to see (or, at least, for Justice Kennedy to see), Justice Kennedy will vote against any gerrymandering claim. The lower court therefore would not rule the action nonjusticiable, but as a practical matter would decline to entertain it. This is probably what Michael Carvin and Louis Fisher have in mind when they say that “political gerrymandering claims are effectively dead.”<sup>106</sup> Even if federal courts generally take this approach, it will not necessarily be the end of the story. James Gardner has suggested that plaintiffs can seek relief in state courts, which will therefore have an opportunity to develop standards that might eventually satisfy a majority on the Supreme Court.<sup>107</sup> Professor Gardner’s suggestion might turn out to be a correct prediction, but it cannot be a correct prescription for what ought to happen. State and federal judges are both obliged to follow the law. When they are interpreting the federal Constitution there can be only one correct law for them to follow, no matter how uncertain it may be. There is plainly no majority in *Vieth* for any approach to gerrymandering cases that does not include Justice Kennedy, and his opinion provides no affirmative basis for ruling that all partisan gerrymandering claims are dead.

The second approach is to affirm that lower court judges can and should devise whatever standards they fancy. This is pretty much what the dissenting justices in *Vieth* seemed to think they had a license to do. Indeed, it is inevitable for anyone who favors judicial review of partisan gerrymandering without confronting and bridging the gap, that is, the missing connection between applicable constitutional principles and the standards being applied. Under this approach, a thousand flowers will bloom and, sooner or later, one may smell sweet enough to win the approval of a majority of the Supreme Court. This approach is contrary to the rule of law. Judges do not have license to make up solutions to social problems, perceived or actual, and impose them on the citizenry. That is the legislative function. “Standards” applied by courts should be based on an interpretation of the law. In the present context, the relevant statements of the law are the constitutional text and the relevant Supreme Court opinions.

As we have seen, the constitutional text has little to say about partisan gerrymandering, except that it is a matter for state legislatures, subject to congressional oversight in the case of districting for the House of Representatives. There are, of course, two Supreme Court precedents of

<sup>106</sup> Carvin & Fisher, *supra* note 58, at 4.

<sup>107</sup> See James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643 (2004). Richard Hasen takes a more cautious approach, suggesting that plaintiffs will not and should not win partisan gerrymandering claims until an “emerging social consensus” forms around the issue. See Richard Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth*, 3 ELECTION L.J. 626, 642 (2004).

significance, *Bandemer* and *Vieth*. Everyone agrees that Justice Kennedy's opinion is pivotal to *Vieth*. But Justice Kennedy explicitly says that he discerns no standard at present. He explicitly does *not* set forth a standard for a lower court to employ. True, he suggests a broader constitutional value from which a gerrymandering standard should be derived. In doing so, he at least attempts to solve the problem of what I have called *Bandemer's* and *Vieth's* gaps.

The trouble is, his only constitutional principle is "fairness." Two problems arise. One is the principle's basis in an erroneous analysis of *Reynolds v. Sims*.<sup>108</sup> Initially Justice Kennedy correctly cites *Reynolds* for the proposition that "fair and effective representation" is the *object* of redistricting. Later he slips into the common error that fairness is a constitutional right. That is a *non sequitur* and a misreading of *Reynolds*.<sup>109</sup> Accordingly, the constitutional principle to which Justice Kennedy wishes to moor a standard is not a constitutional principle at all. The second problem, which Justice Kennedy freely acknowledges, is that "fairness" is much too vague a standard to be of practical use.

It appears, then, that the pivotal opinion in *Vieth* abstains from providing guidance to the lower courts. There are no doubt judicial opinions so vague or poorly crafted that, like dead stars, they emit no light. Justice Kennedy's opinion in *Vieth* is worse. True, he claims that he is applying the standard of the Fourteenth Amendment,<sup>110</sup> but he follows that claim with a recognition that his Fourteenth Amendment standard is entirely contingent on a non-existent "subsidiary standard."<sup>111</sup> By insisting that cases must be decided on the basis of a standard that he cannot and will not enunciate, his opinion operates less like a dead star that fails to emit light and more like a black hole, whose gravitational pull actively prevents any light from escaping.

The pivotal opinion abstains, then, not as a matter of degree but categorically, from providing guidance to the lower courts. This does not open the door to lower court judges to attempt any standard that may recommend itself as workable, regardless of constitutional grounding. *Vieth* provides no affirmative basis for rejecting partisan gerrymandering claims.<sup>112</sup> Nor does it provide any basis for the recognition of a partisan gerrymandering claim, under any facts whatever. Something cannot be replaced by nothing. I use "nothing" here, not to refer to a negative rule,

<sup>108</sup> 377 U.S. 533 (1964).

<sup>109</sup> For discussion of this widely misused phrase from *Reynolds v. Sims*, see Lowenstein, *Bandemer's Gap*, *supra* note 3, at 72-73.

<sup>110</sup> 541 U.S. at 313-14.

<sup>111</sup> *Id.* at 314.

<sup>112</sup> Except in cases that are factually indistinguishable from *Vieth*. However, in the absence of any explanation of what the basis for a constitutional claim would be, there is no basis for deciding whether the facts of a case are distinguishable from those of *Vieth*.

such as nonjusticiability or what I have called the null standard, namely a flat rule that partisan gerrymandering does not violate the Constitution. "Something" (*Bandemer*) could have been replaced by "nothing" in the sense of such a negative rule. But the "nothing" of *Vieth* is an absence of any such negative rule, such as that offered by the *Vieth* plurality, as well as of positive rules such as those offered by the *Vieth* plaintiffs and dissenters or that contained in the *Bandemer* plurality opinion. *Bandemer* was in effect when *Vieth* came to the Court. *Bandemer* was something, and the outcome in *Vieth*, thanks to Justice Kennedy, was nothing. Not having been replaced, *Bandemer* is still binding precedent.

There is another surprising point in favor of this already surprising conclusion. *Bandemer*, correctly understood, is consistent with Justice Kennedy's fairness standard.<sup>113</sup> Redistricting used against a pariah group that is facing widespread discrimination in the political process could be unfair, in a manner easily cognizable within our constitutional tradition. Gerrymandering so powerful that it truly blocked effective majority rule decade after decade, as malapportionment was believed by many to do in the 1950s and early 1960s, could be held unfair in a manner sanctioned by *Baker* and *Reynolds* even if, as I believe, it is a fantastic notion. On the other hand, to say that a Democratic or Republican gerrymander of the sort we have become accustomed to in the past two centuries deprives anyone of "fair and effective representation" in any fundamental sense is at best a controversial and highly contestable proposition.

### CONCLUSION

The title of this article asks whether the Supreme Court has gone from bad to worse on partisan gerrymandering. My answer is that it has not, because its starting point, *Bandemer*, was not bad but good. Admittedly obscure, it had nevertheless been correctly understood without exception in districting cases by lower courts, who far from finding it unmanageable, applied it with remarkable consistency. No one on the Court currently has a good word to say for *Bandemer*, but because of Justice Kennedy's extraordinarily irresponsible opinion, the Court has failed to formally overrule *Bandemer*. I am not predicting the lower courts will so rule, but am claiming they would be correct to do so. The Supreme Court could do a lot worse than to swallow its pride and restore *Bandemer* to its former place.

But the more fundamental task before the Court the next time it revisits partisan gerrymandering will be to bridge the gap between con-

<sup>113</sup> This does not obviate the point that Justice Kennedy is incorrect to treat fairness as a constitutional mandate.

stitutional principles and standards for deciding particular cases. I believe the correct way to bridge the gap is to recognize squarely that partisan gerrymandering between the major parties—no matter how “extreme,” no matter how “excessive,” no matter how “far” it goes—is not unconstitutional. That kind of gerrymandering will undoubtedly rouse the ire of those whose ox is gored. It may, in the eyes of some, be contrary to the public interest. It will probably bore and be ignored by most people. But whatever people think of it, the response to a gerrymander is a policy question to be resolved politically, not by judicial decree unsupported by any constitutional principle more substantial than the distaste of individual judges.

