Rules, the New Standards: Partisan Gerrymandering and Judicial Manageability After Vieth v. Jubelirer

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Introduction

Since the United States Supreme Court articulated the six factors comprising political questions in Baker v. Carr, legal commentators have predicted that the doctrine would not endure. The last four decades have largely vindicated such predictions, as the Court has seldom applied the political question doctrine, even in instances that many commentators believe cry out for its application. This infrequent deployment has prompted some observers to conclude that the doctrine is all but dead. In Vieth v. Jubelirer, however, a four-Justice plurality dusted off the second prong of the political question doctrine, urging that courts should not adjudicate partisan gerrymandering disputes due to the absence of "judicially manageable stan-

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2 See, e.g., Robert G. McCloskey, Foreword: The Reapportionment Case, 76 Harv. L. Rev. 54, 59 (1962) ("[W]e may legitimately wonder whether the [political question] doctrine . . . will now have a very lively future, for its viability as an aid to a policy of judicial self-restraint would seem to have diminished considerably."); Robert B. McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich. L. Rev. 645, 656 (1963) ("It has already been noted that the Court so stated, at the level of simple assertion, that standards are not lacking. If that proposition is in fact true, as claimed, then this aspect of the 'political question' problem vanishes.").

3 The few instances in which the Court has invoked the political question doctrine include Nixon v. United States, 506 U.S. 224, 229, 237 (1993) (finding a political question in the context of a judicial impeachment because of a textual commitment to another branch of government), and Gilligan v. Morgan, 413 U.S. 1, 11 (1973) (finding a political question to be present in judicial review of the Ohio National Guard action that resulted in the shooting of four students).


5 Rachel E. Barkow, More Supreme than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237, 317 (2002) ("The demise of the political question doctrine is part and parcel of this larger trend of refusing to accord interpretive deference to the political branches."); Peter H. Schuck, The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 Colum. L. Rev. 1325, 1327 (1987) ("Baker seemed to inter the 'political question' objection to adjudicating cases like Bandemer."); Mark V. Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, 80 N.C. L. Rev. 1203 passim (2002).

Whether Vieth signals the return of the political question doctrine, or merely its decennial invocation, the case merits attention in light of the plurality’s opinion, which transforms the requirement for judicially manageable standards into a requirement for judicially manageable rules. This erosion is significant because genuine standards represent the Court’s most viable path to meaningful judicial oversight of partisan gerrymandering.

The distinction between rules and standards enjoys a long lineage, extending at least as far back as the early 1930s. The debate over form, as this distinction is often characterized, has manifested itself in most fields of legal inquiry and, more recently, has entered the field of election law. Accord-

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7 Id. at 305–06. The term “judicially manageable standards” is derived from Justice Brennan’s well-known articulation of the political question doctrine in Baker:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multiform pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). Although one might contend that the quest for “judicially discoverable and manageable standards” contains two distinct steps, the Court has—even at the inception—collapsed discoverability and manageability into one inquiry, as Baker v. Carr itself uses the term “judicially manageable standards” to describe the second prong of the political question doctrine. Id. at 223. Accordingly, this Article will use the term “judicially manageable standards” in place of “judicially manageable and discoverable standards.”

8 This does not, of course, mean that rules cannot satisfy the requirement for “judicially manageable standards.” As I will discuss further, Baker’s call for “standards” represents the “floor”—rather than the “ceiling”—required for adjudication.

9 An exploration of the myriad advantages of judicial oversight of partisan gerrymanders lies beyond the scope of this Article. Suffice it to say, I assume here that such oversight is indeed beneficial.

10 Roscoe Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 482–85 (1933) (describing rules as “precepts attaching a definite detailed legal consequence to a definite, detailed state of facts,” and standards as “general limits of permissible conduct to be applied according to the circumstances of each case. . . . The significant thing is the standard, to be applied, not absolutely as in [the] case of a rule, but in view of the facts of each case.”). In addition to rules and standards, Pound also described legal directives as “principles,” “conceptions,” and “doctrines.” Id.


ingly, the virtues and vices of rules and standards have become familiar.\textsuperscript{12} Although rules have the advantage of notifying actors about the consequences of particular actions and engendering uniformity and stability, they have the drawback of being difficult to formulate and potentially lead to excessive rigidity. Conversely, although standards afford decision makers flexibility and individualization, they create a degree of indeterminacy and uncertainty. To be sure, rules and standards are not strictly dichotomous, but rather fall along a continuum, ranging from pure rules at one extreme to pure standards at the other.\textsuperscript{13} Despite difficulty in drawing clear distinctions, it is worth maintaining the distinction between the two types of legal directives because the choice between the two will often have profound consequences.\textsuperscript{14}

It is more than a little odd, then, for Justice Scalia—a man who has well-developed notions about the benefits of rules and the costs of standards\textsuperscript{15}—to use the terms synonymously in his Vieth plurality opinion. In his discussion of "judicially manageable and discoverable standards," Justice Scalia writes: "It is the power to act in the manner traditional for English and American courts. One of the most obvious limitations imposed by that requirement is that judicial action must be governed by standard, by rule."\textsuperscript{16} That last sentence is nothing less than staggering. Although the Court often prefers to issue its legal directives as rules in the voting rights context,\textsuperscript{17} cert-


Rules and standards are rarely "pure." Even the canonical rule of a speed limit contains some exceptions and is therefore merely "rule-like" rather than a pure rule. In order to avoid affixing "-like" to the end of these terms, this Article refers to "rule-like" legal directives as "rules" and "standard-like" legal directives as "standards."

\textsuperscript{14} See Frederick Schauer, The Convergence of Rules and Standards, 2003 N.Z. L. REV. 303, 305 (maintaining that there is a difference between rules and standards); cf. Baird v. Bd. of Supervisors, 33 N.E. 827, 833 (N.Y. 1893) ("We have no trouble whatever in detecting the difference between noon and midnight, but the exact line of separation between the dusk of evening and the darkness of advancing night is not so easily drawn.").


\textsuperscript{17} See Thornburg v. Gingles, 478 U.S. 30, 46 (1986) (developing a mechanical three-part test for lower courts to determine whether section 2 of the Voting Rights Act has been violated); McNeil v. Springfield Park Dist., 851 F.2d 937, 942 (7th Cir. 1988) (interpreting Gingles to mean that "[the creation of preconditions—a choice of clear rules over muddy efforts to discern equity—shields the courts from meritless claims and ensures that clearly meritorious claims will survive summary judgment"); see also Samuel Issacharoff et al., The Law of Democracy 769–70 (rev. 2d ed. 2002) (considering whether Gingles "is . . . yet another manifestation of the
tainly nothing requires that it do so. Instead, genuine standards should suffice to render a case justiciable. By criticizing judicially manageable standards for being standards rather than rules, Justice Scalia placed the Court’s advocates of judicial intervention in partisan gerrymanders on the defensive. Congress and state legislatures could theoretically address partisan gerrymanders, but the practice’s lengthy history indicates that self-regulation is unlikely to arise in the near future. If meaningful judicial oversight of redistricting is to become a reality—thereby ensuring that the ideals of representative government are not subordinated to sheer partisan power—a majority of the Court must learn to stop worrying about discovering a nonexistent magic rule and learn to love (or at least become comfortable with) relying on standards.

This erosion of the distinction between bright-line rules and more flexible standards has pernicious consequences, as the Court will almost certainly reject the rules available to the judiciary to rein in partisan gerrymanders. By failing to insist that standards as well as rules can be judicially manageable, proponents of judicial intervention have significantly reduced the potential for meaningful regulation of partisan gerrymanders. Although partisan gerrymandering claims remain justiciable for the moment, justiciability will likely remain a mere abstraction unless courts insist that actual standards satisfy the judicially manageable standards requirement. In the realm of partisan gerrymandering, in short, form not only follows function; form is function.

Part I offers a brief overview of the Supreme Court’s resolution of Vieth. Part II explores how the Court’s opinions in Vieth reveal distinct cleavages over the specificity with which legal directives are announced to qualify as judicially manageable standards. Part III examines the genesis of the judicially manageable standards requirement and concludes that the Court’s issuance of genuine standards rather than rules can satisfy this requirement. Part IV contends that the transformation of judicially manageable standards into rules is significant because it threatens to prevent judicial oversight of partisan gerrymanders from becoming attainable rather than aspirational. The available rules that the Court could select to address partisan gerrymandering are either unlikely to be adopted or unlikely to place a meaningful check on partisan redistricting schemes. In other words, the choice (at least initially) is between standards or no oversight at all. Part V examines Vieth’s implications for judicial oversight of race-conscious redistricting schemes.

I. The Fractured Opinions in Vieth v. Jubelirer

In the wake of the 2000 decennial census, shifts in the distribution of the national population determined that Pennsylvania would lose two of its twenty-one congressional seats.\(^{18}\) Although slightly more Pennsylvania residents were registered as Democrats than Republicans,\(^{19}\) Pennsylvania Republicans controlled the governorship and both houses of the state legislature.\(^{20}\) Accordingly, Republicans controlled the redistricting process.\(^{21}\) Presidential adviser Karl Rove, Senator Rick Santorum, and House Speaker Dennis Hastert (among other national figures) exerted pressure on the state's elected officials to redistrict its remaining nineteen congressional seats in a pro-Republican manner as an act of retribution for what they perceived as pro-Democratic districting schemes enacted elsewhere.\(^{22}\) State officials complied, producing a plan that was intended to elect as many Republican officials as possible.\(^{23}\)

Three Pennsylvania registered Democrats challenged the redistricting plan and alleged several constitutional violations, including a partisan gerrymandering claim and a one person, one vote claim.\(^{24}\) Initially, the three-judge district court panel dismissed all of the claims except for the equipopulational—one person, one vote—charge.\(^{25}\) Following an evidentiary hearing, the court held that Pennsylvania's redistricting scheme contravened the one person, one vote principle and enjoined the plan's implementation.\(^{26}\) Pennsylvania then tinkered with the plan to bring it into line with strict equipopulational ideals, but did nothing to alter the lines that afforded the Republican party a statewide advantage.\(^{27}\) Applying the standard articulated in *Davis v. Bandemer*\(^{28}\) as interpreted in *Badham v. Eu*,\(^{29}\) the district court panel issued a per curiam opinion dismissing the partisan gerrymandering claim because the plaintiffs failed to allege "facts indicating that they have been shut out of the political process and, therefore, they cannot establish an actual discriminatory effect on them."\(^{30}\)

A severely fractured Supreme Court affirmed the district court's dismissal.\(^{31}\) Justice Scalia wrote the opinion for a four-Justice plurality that found


\(^{19}\) *Id.* at 536 (“Of voters registered with one of the two major parties, 53.6% are registered Democrats and 46.4% are registered Republicans.”).

\(^{20}\) *Id.* at 535 n.3.

\(^{21}\) See *id.* at 535.

\(^{22}\) See *id.*

\(^{23}\) See *id.*

\(^{24}\) *Id.* at 541–47.

\(^{25}\) *Id.* at 549.


\(^{28}\) *Davis v. Bandemer*, 478 U.S. 109, 139 (1986) (“[T]he racial minorities asserting the successful equal protection claims had essentially been shut out of the political process.”).

\(^{29}\) *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988), *aff'd* 488 U.S. 1024 (1989) (“There are no allegations that California Republicans have been ‘shut out’ of the political process.”).

\(^{30}\) *Vieth*, 241 F. Supp. 2d at 485 (quoting *Vieth*, 188 F. Supp. 2d at 547).

partisan gerrymandering cases nonjusticiable due to the absence of judicially manageable standards. In opposition to the plurality opinion, four Justices produced three dissenting opinions that offered three distinct standards—a spectacle that provoked one commentator to liken the standards to contestants in a beauty pageant. Justice Kennedy found neither the plurality opinion nor any of the dissenting opinions attractive. Accordingly, Justice Kennedy split the difference by holding that, although partisan gerrymandering claims remain justiciable, judicial intervention is predicated upon the discovery of manageable standards. Despite the widespread hope that the grant of certiorari signaled forthcoming judicial intervention, the partisan gerrymandering landscape does not now look terribly different from the regime established by Bandemer.

Justice Scalia begins the plurality opinion by noting that partisan gerrymandering has a long—if not exactly distinguished—history in the United States. After establishing the historical pedigree of partisan gerrymanders, Justice Scalia turns his attention to the familiar language of the political question doctrine as articulated by Baker. In particular, Justice Scalia contends that the absence of successful lawsuits challenging partisan gerrymanders in the eighteen years since Bandemer indicates that the second component of Baker v. Carr cannot be satisfied: “[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable and that Bandemer was wrongly decided.” Because he finds judicially manageable standards unobtainable, Justice Scalia contends that the Court should overturn Bandemer and deem claims of partisan gerrymandering nonjusticiable political questions.

Writing in dissent, Justice Stevens concurs with the plurality that the second of Baker’s six prongs is the relevant precedent. “At issue in this case,” Justice Stevens writes, “is Baker’s second test—the presence or absence of

32 See id. at 305–06. Chief Justice Rehnquist, Justice O’Connor, and Justice Thomas joined Justice Scalia’s opinion. Id. at 271.
34 See Vieth, 541 U.S. at 308–11 (Kennedy, J., concurring in judgment).
35 See id. at 316–17.
36 See, e.g., Linda Greenhouse, Court to Hear Case on Congressional Redistricting, N.Y. TIMES, June 28, 2003, at A10 (reporting that the Court’s decision to hear Vieth could indicate that it was prepared to give Bandemer teeth).
37 Vieth, 541 U.S. at 274 (plurality opinion) (“Political gerrymanders are not new to the American scene.”). But see id. at 337 n.29 (Stevens, J., dissenting) (criticizing the plurality’s historical treatment of political gerrymandering if that history is “intended to suggest that the vintage of an invidious practice . . . should insulate it from constitutional review” (citation omitted)); cf. Morton J. Horwitz, The Conservative Tradition in the Writing of American Legal History, 17 AM. J. LEGAL HIST. 275, 281 (1973) (“The main thrust of lawyer’s legal history, then, is to pervert the real function of history by reducing it to the pathetic role of justifying the world as it is.”).
38 Vieth, 541 U.S. at 277–78 (plurality opinion); see supra note 7.
39 Vieth, 541 U.S. at 281.
40 Id. (“To think that this lower court jurisprudence has brought forth ‘judicially discernible and manageable standards’ would be fantasy.”).
41 Id. at 321 (Stevens, J., dissenting).
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. Justice Stevens proposes importing the standards devised in the racial gerrymandering context to the regulation of partisan gerrymandering as well. Drawing on Easley v. Cromartie, the latest in the Shaw line of cases, Justice Stevens suggests that courts should invalidate districts in which partisan advantage was the "predominant" organizing mechanism in districting. He argues that the two lines of cases share underlying concerns, writing: "[T]he critical issue in both racial and political gerrymandering cases is the same: whether a single non-neutral criterion controlled the districting process to such an extent that the Constitution was offended."

Justice Souter’s dissent begins by contending that courts “have not gone from theoretical justiciability to practical administrability” because of Bandemer’s high threshold for proving an injury. By Justice Souter’s lights—and history bears him out on this point—neither of the two major political parties in the United States could demonstrate the systematic exclusion spread over a long period of time that Bandemer demands to legitimate a claim of partisan gerrymandering. After jettisoning Bandemer’s standard, Justice Souter then dedicates the overwhelming remainder of his dissent to advancing a five-part burden-shifting test that attempts to reveal whether a state has intentionally diluted the votes of some citizens by impermissibly taking into account party identification. Once a plaintiff has met these requirements, the burden would shift to the state to demonstrate that its districting scheme was not driven by strictly partisan considerations. The plan would avoid invalidation only by demonstrating that nonpartisan concerns animated the district in question.

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42 Id.
43 Id. at 334–36.
45 Vieth, 541 U.S. at 336 (Stevens, J., dissenting) (“The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great a role in the districting process. . . . [P]artisanship [can] be a permissible consideration in drawing district lines, so long as it does not predominate.”).
46 Id.
47 See id. at 344–45 (Souter, J., dissenting). Justice Ginsburg joined Justice Souter’s dissent. Id. at 343. Justice White, writing only for a plurality, wrote in Bandemer that “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.” Davis v. Bandemer, 478 U.S. 109, 132 (1986) (plurality opinion).
48 Vieth, 541 U.S. at 345.
49 Id. at 347–50. First, a plaintiff would need to “identify a cohesive political group to which he belonged,” usually a Democrat or Republican. Id. at 347. Second, a plaintiff would need to demonstrate that his district largely disregarded traditional districting principles. Id. at 347–48. Third, a plaintiff would need to demonstrate that this deviation of traditional districting principles was implemented in a way that could have an electoral impact because of the political identification of residents. Id. at 349. Fourth, a plaintiff would need to create a hypothetical district that would undo the partisan gerrymandering effect. Id. Fifth, the plaintiff would need to demonstrate actual intent to have a partisan effect on electoral districting. Id. at 350.
50 See id. at 351.
51 Id. at 351–52.
Unlike the dissenting opinions by Justices Stevens and Souter, which concern themselves with individual districts, Justice Breyer's proposed standard would permit judges to assess the validity of statewide districting schemes.\textsuperscript{52} Justice Breyer also parts from his dissenting colleagues in conceiving judicial intervention as engendering majoritarian rule, rather than protecting political minorities.\textsuperscript{53} Justice Breyer opens his discussion of \textit{Vieth} by contending that partisan gerrymandering—when taken to extremes—has the effect of short-circuiting democracy.\textsuperscript{54} Instead of a five-part test, Justice Breyer proposes a standard that would allow judges to intervene in districting disputes in order to address the “unjustified entrenchment” of political parties.\textsuperscript{55} In an effort to define these central terms, Justice Breyer writes: “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.”\textsuperscript{56} What makes this entrenchment “unjustified,” according to Justice Breyer, is that “the minority’s hold on power is purely the result of partisan manipulation.”\textsuperscript{57} Justice Breyer closes by parrying the plurality's contention that the sheer number of proposals advanced by the dissenters illustrates that no judicially manageable standards exist.\textsuperscript{58}

Authoring \textit{Vieth}'s controlling opinion, Justice Kennedy ensures that the status quo would prevail—at least for the moment.\textsuperscript{59} Justice Kennedy begins by noting that partisan gerrymandering claims raise thorny questions for two central reasons.\textsuperscript{60} First, districting principles that appear neutral often have nonneutral effects.\textsuperscript{61} Second, manageable standards that would limit judicial intervention have proven exceedingly elusive.\textsuperscript{62} These concerns prompt Justice Kennedy to support the plurality's affirmation of the district court's dismissal.\textsuperscript{63} Despite acknowledging the difficulties associated with adjudicating alleged injuries arising from partisan gerrymanders, Justice Kennedy breaks ranks with the plurality by refusing to foreclose altogether the possibility of arriving at a judicial remedy: “That no such standard has emerged in this case

\textsuperscript{52} See id. at 358–59 (Breyer, J., dissenting).
\textsuperscript{53} Id. at 360–61.
\textsuperscript{54} Id. at 355.
\textsuperscript{55} Id. at 365.
\textsuperscript{56} Id. at 360.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 368. One might also note that \textit{Baker} calls for “judicially manageable standards,” not the discovery of a single standard. It is hardly a logical non sequitur to suggest that multiple standards are capable of directing judicial intervention.
\textsuperscript{59} Id. at 306 (Kennedy, J., concurring in judgment).
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 306, 308–09; see also Daniel H. Lowenstein & Jonathan Steinberg, \textit{The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?}, 33 UCLA L. REV. 1, 74 (1985) (“[W]hat we think matters to almost all Americans when district lines are drawn, is how the fortunes of the parties and the policies the parties stand for are affected. When such things are at stake there is no neutrality. There is only political contest.”).
\textsuperscript{62} \textit{Vieth}, 541 U.S. at 307–08 (Kennedy, J., concurring in judgment).
\textsuperscript{63} Id. at 313 (“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.”).
rather than relying exclusively upon the Fourteenth Amendment's Equal Protection Clause to find judicially manageable standards, Justice Kennedy suggests that the First Amendment might be a more apposite place to locate standards required to distinguish permissible party considerations from impermissible ones.65

II. Manageability: From Standards to Rules

This Part explores the significant variations among the Justices regarding the specificity of legal directives necessary to satisfy the judicially manageable standards requirement. I first examine how Justice Scalia's plurality opinion elevates the requirement for standards into a requirement for rules and demonstrates that his criticisms of the standards offered in the dissenting opinions amount to little more than faulting standards for being insufficiently rule-like. Next, I contend that the plurality opinion collapses an ostensibly procedural inquiry into a merit-based inquiry. Finally, this Part grapples with Justice Kennedy's controlling concurrence, asserting that his hybrid approach combining the First and Fourteenth Amendments could well present the Court with the fresh start that it desperately needs in locating a true standard to rein in partisan gerrymandering.

Justice Scalia's transformation of the requirement for judicially manageable standards into a requirement for judicially manageable rules extends well beyond his lone interchangeable use of the terms ("by standard, by rule")66 and pervades the plurality opinion. Attempting to distinguish previous voting rights cases that the Court has found justiciable, Justice Scalia contends that judicially manageable standards are undiscoverable because the Court cannot articulate another legal directive with the precision of the one person, one vote rule.67 Justice Scalia asserts that "the easily administrable standard of population equality adopted by Wesberry and Reynolds enables judges to decide whether a violation has occurred (and to remedy it)" with little effort or mystery.68 By contrast, Justice Scalia writes, partisan gerrymandering "require[s] judges to decide whether a districting system will produce a statewide majority for a majority party [that] casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon."69 The problem with Justice Scalia's analysis is that one person, one vote is as close to a pure rule as the judiciary

64 Id. at 311 ("Relying on the distinction between a claim having or not having a workable standard of that sort involves a difficult proof: proof of a categorical negative.").
65 Id. at 314 ("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.").
66 Id. at 278 (plurality opinion).
67 See id. at 290. This point brings to mind John Hart Ely's quip about the benefits of the equipopulation principle: "[A]dministrability is its long suit, and the more troublesome question is what else it has to recommend it." JOHN HART ELY, DEMOCRACY AND DISTRUST 121 (1980).
68 Vieth, 541 U.S. at 290 (plurality opinion).
69 Id.
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could possibly articulate in the voting rights context.\(^7\) Compared to the one person, one vote rule’s mathematical precision, it is no wonder that the contemplation of less concrete standards causes Justice Scalia to feel adrift at sea.\(^7\)

Justice Scalia’s assessment of the dissenters’ proposed methods for invalidating partisan gerrymandering plans can be best understood as criticizing their standards for not being rules. Consider Justice Scalia’s criticisms of Justice Souter’s standard:

While this five-part test seems eminently scientific, upon analysis one finds that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards: How much disregard of traditional districting principles? How many correlations between deviations and distribution? How much remedying of packing or cracking by the hypothetical district? How many legislators must have had the intent to pack and crack—and how efficacious must that intent have been (must it have been, for example, a sine qua non cause of the districting, or a predominant cause)?\(^7\)

Justice Scalia’s litany of questions can actually be reduced to a single query: Why won’t Justice Souter provide mathematical formulations to firm up his test?\(^7\) Although he praises one aspect of Justice Breyer’s proposal as “seem[ing] refreshingly categorical,” Justice Scalia also attempts to demonstrate that the imprecision of the “unjustified entrenchment” standard makes it judicially unmanageable.\(^7\) Justice Scalia skeptically inquires whether 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).”\(^7\) Contrary to Justice Scalia’s intimations, however, none of the proposed standards would afford lower courts untrammeled discretion. To criticize standards for containing ambiguity is rather like criticizing the sun

\(^7\) Even that quintessential “rule” has some exceptions, including the larger deviations that are permitted in state elections than federal elections.

\(^7\) Justice Scalia’s skepticism about locating judicially manageable standards for partisan gerrymandering finds an analogue in early commentary after the Court handed down Baker. Indeed, one redoubtable commentator expressed such concerns in terms that precisely presaged Justice Scalia’s seafaring metaphor. See McCloskey, supra note 2, at 70 (“[I]t must be urged that a price is paid for each judicial venture into uncharted and unchartable seas, whether or not an analogue can be found in past or present judicial behavior.”); see also Gray v. Sanders, 372 U.S. 368, 388 (1963) (Harlan, J., dissenting) (“It was of course imponderables like these that lay at the root of the Court’s steadfast pre-Baker v. Carr refusal to enter the political thicket.” (citation and quotation omitted)). This comparison underscores that initial uncertainty in the judicial realm sometimes proves overstated and the imponderable becomes ponderable. To extend (or perhaps sink) the sea metaphor, the waters prove considerably calmer than they appear from the shore.

\(^7\) Vieth, 541 U.S. at 296 (plurality opinion).

\(^7\) See id. Of course, if Justice Souter were to offer specific numbers as guidelines, Justice Scalia would have the option of criticizing him for acting as a legislator rather than a judge.

\(^7\) Id. at 299–300.

\(^7\) Id. at 299.
for emitting heat. Put simply, standards by their very nature contain some measure of indeterminacy.

Justice Scalia's preference for rules over standards manifests itself in Vieth on topics ranging from the doctrinal to the historical and the literary. With respect to the doctrinal, Justice Scalia takes Justice Stevens to task for using First Amendment cases to illustrate how party affiliation may sometimes constitute an illicit consideration. "What cases such as Elrod v. Burns require is not merely that Republicans be given a decent share of the jobs in a Democratic administration," Justice Scalia writes, "but that political affiliation be disregarded." With respect to history and literature, Justice Scalia criticizes Justice Kennedy's "never-say-never" approach to identifying judicially manageable standards by contending: "When it has come to determining what areas fall beyond our Article III authority to adjudicate, this Court's practice, from the earliest days of the Republic to the present, has been more reminiscent of Hannibal than of Hamlet." It is occasionally better to be assertive and wrong, in Justice Scalia's mind, than contemplative and right.

Justice Scalia's trumpeting of rules hardly comes as a surprise. Shortly after joining the Court, Justice Scalia dedicated the Holmes Lecture at Harvard Law School to espousing a theory of the rule of law as "a law of rules." In that lecture, Justice Scalia confessed to having a youthful flirtation with the flexibility of standards before settling down with the precision and certainty of rules. "When I was in law school, I was a great enthusiast for this approach—an advocate of both writing and reading the 'holding' of a decision narrowly, thereby leaving greater discretion to future courts," Justice Scalia wrote. "Over the years, however—and not merely the years since I have been a judge—I have found myself drawn more and more to the opposite view." Although acknowledging that a totality of the circumstances test may be unavoidable in certain contexts, Justice Scalia urged "that those modes of analysis be avoided where possible; that the Rule of Law, the law of rules, be extended as far as the nature of the question allows." While Justice Scalia's preference for rules fails to astonish, it is genuinely surprising that his Vieth opinion demands rules when the rules themselves permit standards.

The authors of the three dissenting opinions—Justices Stevens, Souter, and Breyer—defend their proposed standards as being judicially manageable. The three dissenters never expressly criticize Justice Scalia for demanding rule-like precision, but each dissenting opinion offers explanations

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76 See id. at 294.
77 Id. (citation omitted).
78 Id. at 302.
79 See Scalia, supra note 15, at 1179 ("There are times when even a bad rule is better than no rule at all.").
80 See id. at 1175.
81 Id. at 1178.
82 Id.
83 Id.
84 Id. at 1187.
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of how lower courts could meaningfully evaluate partisan gerrymanders by implementing the proposed standards. Rather than attempting to make their standards resemble rules, each dissenter freely acknowledges the qualitative determinations necessary in evaluating partisan gerrymandering claims. "[T]he issue is one of how much is too much," Justice Souter writes, "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." In a similar vein, Justice Stevens notes that the Court does not evaluate racial gerrymandering claims through a lens of absolutes: "[T]he 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." For his part, Justice Breyer indicates that he will rely upon standards rather than rules when he lays out a number of scenarios that explore "unjustified entrenchment" along a continuum.

The dissenters also share a belief that the criticism leveled in Justice Scalia's opinion reveals the plurality's lack of concern with the practice of partisan gerrymandering, rather than any endemic weaknesses in the proposed standards. Indeed, it is difficult to understand the plurality's invocation of the political question doctrine in Vieth as anything other than a merits-based inquiry masquerading as a procedural one. As Justice Souter writes, defending his standard against the plurality's charge of imprecision, "[T]his objection is more the reliable expression of the plurality's own discouragement than the description of an Achilles heel in my suggestion." Justice Stevens closes his dissent by leveling a similar charge: "What is clear is that it is not the unavailability of judicially manageable standards that drives today's decision. It is, instead, a failure of judicial will to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially." If the Court finds judicial standards unmanageable with respect to partisan gerrymandering, it may put into jeopardy much of the Court's constitutional interpretation. After all, the Court commonly

86 Id. at 334–39 (Stevens, J., dissenting); id. at 345–52 (Souter, J., dissenting); id. at 365–67 (Breyer, J., dissenting).
87 Id. at 335 (Stevens, J., dissenting); id. at 344 (Souter, J., dissenting); id. at 365–67 (Breyer, J., dissenting).
88 Id. at 344 (Souter, J., dissenting).
89 Id. at 335 (Stevens, J., dissenting) (citations omitted). Justice Stevens's use of the term "per se" underscores that judicially manageable standards need not be rules.
90 Id. at 365–67 (Breyer, J., dissenting). Justice Breyer also signals his willingness to endure the necessary ambiguity of standards by acknowledging: "I do not claim that the problem of identification and separation is easily solved, even in extreme instances. But courts can identify a number of strong indicia of abuse." Id. at 365.
91 See id. at 354 (Souter, J., dissenting); id. at 341 (Stevens, J., dissenting).
92 Id. at 354 (Souter, J., dissenting).
93 Id. at 341 (Stevens, J., dissenting).
94 Martin H. Redish, Judicial Review and the "Political Question," 79 Nw. U. L. Rev. 1031, 1047 (1985) ("[A]ny constitutional provision can be supplied with working standards of interpretation. To be sure, those standards often will not clearly flow from either the language or history of the provision, but that fact does not distinguish them from many judicial standards invoked every day. If we were really to take seriously the 'absence-of-standards' rationale, then we
molds broad and often vague language into intelligible (if not necessarily rigid) constitutional guidelines for lower courts to implement.

As one might expect from a decision split 4-1-4, the 1 in question embodies some competing notions about the crucial question that prevented either of the 4s from becoming a 5. To be sure, Justice Kennedy’s controlling opinion in Vieth largely endorses the potential manageability of standards, but the opinion also contains some inchoate endorsement of the justiciability concerns advanced by the plurality. Early in his opinion, Justice Kennedy uses language focusing on precision, a term usually associated with the advocacy of rules. Reminiscent of Justice Scalia’s plurality opinion, Justice Kennedy also uses the terms “rules” and “standards” interchangeably in at least one portion of his opinion. Shortly after he expresses concern over “the absence of rules to limit and confine judicial intervention,” Justice Kennedy writes, “Suitable standards for measuring this burden . . . are critical to our intervention.” The internal tension displayed in Justice Kennedy’s opinion might be best captured by his plea for locating “principled, well-accepted rules of fairness.”

Justice Kennedy’s endorsement of standards is far from full throated. Towards the end of his concurrence, Justice Kennedy veers back toward the rules direction and expresses concern about the ability of courts to separate permissible and impermissible redistricting schemes. He writes, “[C]ourts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive. Excessiveness is not easily determined.” As Justice Kennedy’s opinion persists, however, he ultimately embraces (or at least does not spurn) the traditional notion of judicially manageable standards. One can most strongly detect Justice Kennedy’s willingness to adjudicate partisan gerrymandering claims without the aid of a rule by his ruminations on the possibility of locating standards within the First Amendment and importing them into the traditional Fourteenth Amendment analysis. The First Amendment, of course, is where rules go

would once again be proving considerably more than most of us had intended, for a substantial portion of all constitutional review is susceptible to the same critique.”; see also id. at 1060 (“The so-called ‘absence-of-standards’ rationale borders on the disingenuous, because the Supreme Court has never been at a loss to decipher roughly workable standards for the vaguest of constitutional provisions when it so desires.”).

95 See Vieth, 541 U.S. at 306, 308-09 (Kennedy, J., concurring in judgment).
96 Id. at 306 (“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.”); cf. HART & SACKS, supra note 10, at 155 (beginning their discussion of rules and standards by noting that “[t]he most precise form of authoritative general direction may conveniently be called a rule,” (emphasis supplied))
97 See Vieth, 541 U.S. at 307-08 (Kennedy, J., concurring in judgment).
98 Id.
99 Id. at 308.
100 See id. at 316.
101 Id.
102 See id. at 317 (acknowledging his willingness to fashion relief if “workable” standards emerge).
103 Id. at 314-15 (“The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party’s voters for reasons of ideology,
to die. As he closes his opinion, however, it seems increasingly clear that he believes judicially manageable standards can be satisfied by actual standards. "If workable standards do emerge to measure these burdens," Justice Kennedy concludes, "courts should be prepared to order relief."

Although early academic commentary on Vieth has largely criticized Justice Kennedy's ruminations on the possibility of locating standards under the First Amendment as misguided, his suggestion could help to reshape the Court's voting rights jurisprudence in a sorely needed fashion. Admittedly, criticism of Justice Kennedy's opinion is not completely unwarranted; there is nothing intrinsically more appropriate about the First Amendment than the Fourteenth Amendment as a repository of judicially manageable standards. Nonetheless, one can locate some doctrinal justification for Justice Kennedy's invocation of the First Amendment in Vieth. Shifting the inquiry's focus could prompt the Court to adopt a structural rather than an individual-rights approach to political gerrymandering cases. In particular, the line of cases recognizing the right to "freedom of association" may come to be viewed as offering statewide protection to political parties that have been weakened by partisan redistricting practices. Under such a scheme, party members could contend that statewide redistricting plans deny them the amount of representation that they would otherwise receive if partisan interests had not influenced redistricting efforts. By using the First Amendment alongside the Fourteenth Amendment, Justice Kennedy suggests a hybrid approach that might capture the nature of the harm inflicted by parti-
san gerrymandering more accurately. That harm, after all, affects groups of voters rather than individuals because partisan gerrymanders have "the purpose and effect of burdening a group of voters' representational rights."110 Rather than interpreting Justice Kennedy's suggestion as merely the latest ipse dixit in the voting rights cases, one could easily view Justice Kennedy's suggestion as laying the groundwork for a more robust and pragmatic view of voting rights injuries.111

Even assuming that using the First Amendment has no doctrinal advantage, Justice Kennedy's proposed shift from an individual-rights framework to a structural framework would nonetheless retain a vitally important virtue in regulating partisan gerrymanders: giving the Court a fresh start. Indeed, the Court has sorely needed a new approach since it tentatively declared that partisan gerrymandering claims were justiciable in Bandemer nearly twenty years ago.112 Although most legal commentators have criticized Bandemer for insufficiently detailing what kind of partisan scheme would render a gerrymander unconstitutional, this critique misses the mark. The principal problem with Bandemer is not that the plurality's minimal effort to propose a standard resulted in an unhelpfully vague legal directive (although ideally, it could have been much more precise). Rather, the main shortcoming of Bandemer's standard was that it simply made it too difficult for lower courts to trigger a finding of unconstitutionality.

Under this view, Bandemer set the bar too high for either of the nation's two major political parties to prove consistent degradation. Although all of the Justices in Vieth recommend discarding Bandemer, one could craft an argument that the much-maligned case actually announced a standard that could be interpreted as judicially manageable.113 Evaluated on a standard of predictability, for instance, litigants know that courts will almost certainly uphold districting schemes. More important, the lower courts' refusal—or unwillingness—to use Bandemer to strike down districting plans does not in-

110 Vieth, 541 U.S. at 314 (Kennedy, J., concurring in judgment) (emphasis supplied). The Court has adopted such a hybrid approach in two cases cited in Justice Kennedy's opinion. See Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 222–29 (1989) (relying upon Anderson's test to invalidate a California statute that sought to prohibit political parties from endorsing candidates during primary contests); Anderson, 460 U.S. at 805–06 (relying upon the First Amendment and the Due Process Clause of the Fourteenth Amendment to invalidate an Ohio statute that required presidential candidates to file statements of candidacy more than seven months before the election because the state's interest in such a rule was outweighed by the associational interests of voters); cf. Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 HARV. L. REV. 1665, 1666–67 (2001) (articulating an "aggregate rights" theory of voting rights in which "the individual injury at issue cannot be proved without reference to the status of the group as a whole").

111 Cf. Davis v. Bandemer, 478 U.S. 109, 170–71 (1986) (Powell, J., concurring in part and dissenting in part) (suggesting that the harm of partisan gerrymandering is based on an injury to a group because it is groups of voters, not individuals, who elect representatives).

112 See id. at 125, 127 (White, J.).

113 Daniel Lowenstein, Bandemer's Gap: Gerrymandering and Equal Protection, in POLITICAL GERRYMANDERING AND THE COURTS 64 (Bernard Grofman ed., 1990) (arguing that the fact that Bandemer generated no violations does not necessarily render it unmanageable).
dicate, as Justice Scalia maintains, that the standard has achieved nothing.\textsuperscript{114} The very threat of judicial intervention created by \textit{Bandemer} may have helped to constrain partisan-inclined actors responsible for establishing district lines.\textsuperscript{115} One should not take the argument too far, however, for hanging swords must descend at least occasionally to be perceived as constraining factors. Yet no one can doubt that partisan gerrymandering and bipartisan gerrymandering practices would intensify further still if the courts announced that anything goes in redistricting.\textsuperscript{116}

Starting anew would allow the Court to lower the impossibly high threshold of \textit{Bandemer} and articulate a standard that would permit lower courts to invalidate egregious instances of partisan redistricting. Admittedly, if the standard affords lower courts a large amount of discretion, redistricting plans that exhibit similar regard for partisan consideration could well lead to judicial results that are difficult to reconcile. The main fear behind a standard that is too loosely articulated, of course, is that lower-court judges who have insufficient guidance will (perhaps unconsciously) permit their own partisan affiliations to impact their determinations of whether a redistricting plan is permissible. The last thing that the nation needs, of course, is a series of \textit{Bush v. Gores} in miniature. After an initial period of some uncertainty, however, two developments will serve to justify a potential brief patch of volatility. First, the Court will have an opportunity to select from competing standards suggested by lower courts. Accordingly, it can choose a standard that provides the judiciary with enough guidance to minimize discretion. This pattern—a period of uncertainty, followed by the Court’s articulation of a clearer legal directive—is precisely what occurred in section 2 litigation during the period between the Voting Rights Act’s reauthorization in 1982 and \textit{Thornburg v. Gingles}\textsuperscript{117} four years later. Second, and more important, partisan actors that establish redistricting schemes will have strong incentives to draw district lines in a way designed to avoid invalidation from the

\textsuperscript{114} See Vieth, 541 U.S. at 306 (plurality opinion) (describing the post-\textit{Bandemer} period as “eighteen years of essentially pointless litigation”).


\textsuperscript{116} For an insightful argument about the distinct anticompetitive evils of bipartisan gerrymandering or “sweetheart” gerrymandering, see Samuel Issacharoff, \textit{Gerrymandering and Political Cartels}, 116 Harv. L. Rev. 593, 598–99 (2002). But see Nathaniel Persily, \textit{In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders}, 116 Harv. L. Rev. 649, 650 (2002) (contending that bipartisan gerrymanders lend themselves to proportional representation through the creation of “safe districts”). Although states recently altered the custom of redistricting only once decennially, no state has (yet) abandoned contiguity as a districting requirement. It is well worth considering whether the Court would feel compelled to intervene if a districting scheme resembled a paint-by-numbers sketch.

\textsuperscript{117} \textit{Thornburg v. Gingles}, 478 U.S. 30, 48–51 (1986) (announcing a mechanical three-part test to determine whether a cognizable claim of vote dilution has occurred).
A meaningful threat of invalidation—something *Bandemer* never realized—represents perhaps the most effective means of prompting actors to police themselves and internalize judicial standards. Partisan officials will be loath to invite invalidation of redistricting schemes and thereby threaten incumbencies.119

Although Justice Scalia contends in *Vieth* that *Bandemer* has achieved little more than tying up the courts with adjudicating fruitless claims,120 his assessment is misguided for two important reasons. First, far less litigation has occurred than Justice Scalia suggests. Indeed, as Justice Stevens points out in dissent, the amount of partisan gerrymandering litigation since *Bandemer* has far from overwhelmed the capacities of the federal judiciary.121 Second, as is suggested above, if the Court were to embrace an actual standard, it could—somewhat counterintuitively—serve to decrease litigation because of elected officials’ wariness of judicial intervention. To the limited extent that *Bandemer* increased the amount of partisan gerrymandering litigation, it may have done so not because of the existence of a standard but because that standard was never utilized to invalidate a districting scheme. If courts had invalidated even a few partisan gerrymanders, the authentic threat of invalidation may have frightened redistricting bodies into establishing less aggressive redistricting schemes.

### III. Judicial Conceptions of Standards as Manageable Legal Directives Since Baker v. Carr

The term “judicially manageable standards”122 has been the subject of some contestation since it was first coined in *Baker v. Carr* in 1962. On its face, the term contains more than a little ambiguity. As with *Brown v. Board of Education*’s sphinx-like directive to end segregation with “all deliberate speed,”123 the phrase simultaneously pulls in opposing directions. The first part of the term, “judicially manageable,” suggests precision and certainty, notions normally associated with rules. Conversely, the last word, “standards,” conveys a tolerance for flexibility and open-endedness. Although Justice Brennan’s phrase has been criticized for its ambiguity, this Part seeks to demonstrate that the Court has understood the term to mean that genuine standards—rather than exclusively rules—would suffice to render a dispute beyond the scope of the political question doctrine.

Adding to this lexicographical uncertainty, Justice Brennan’s majority opinion in *Baker* simply assumed the presence of standards without offering any indication of where one might locate them.124 “Judicial standards under

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118 Cf. Ortiz, supra note 115, at 688–89 (arguing that legislators will respond to the threat of invalidation accompanied by a court-imposed remedy on individuals).
119 Pildes, supra note 115, at 67–68 (arguing that precisely this self-policing dynamic emerged in the Shaw line of cases).
121 See id. at 326 n.14 (Stevens, J., dissenting) (noting that, on average, only three or four cases have been filed annually since *Bandemer*).
124 See *Baker*, 369 U.S. at 226.
the Equal Protection Clause are well developed and familiar," Justice Bren-
nan wrote, "and it has been open to courts since the enactment of the Four-
teenth Amendment to determine, if on the particular facts they must, that a
discrimination reflects no policy, but simply arbitrary and capricious ac-
tion."125 Commentators have vehemently criticized Brennan for assuming
rather than explaining this nondiscriminatory standard; they have been
equally critical of Justice Brennan's assumption that such questions were jus-
ticiable under the Equal Protection Clause but not under the Guaranty
Clause.126

Beyond Justice Brennan's phraseology and simple assertion of stan-
dards, moreover, the Court implemented the term "judicially manageable
standards" in a manner that seemed to undermine the idea that genuine stan-
dards (rather than rules) would permit judicial intervention. Following
closely on the heels of the amorphous principles of Baker, the Court an-
nounced the one person, one vote rule in Wesberry v. Sanders127 and Reyn-
olds v. Sims.128 By quickly replacing a call for standards with the one person,
one vote rule, the Court invited confusion regarding the specificity required
of legal directives to render a matter judicially manageable. Indeed, Justice
Scalia's plurality opinion in Vieth draws on precisely this history to contend
that the Court cannot identify judicially manageable standards to regulate
partisan gerrymandering.129

Despite the somewhat confounding terminology and early history of ju-
dicially manageable standards, however, inquiries into the language and
progeny of Baker indicate that the presence of standards would be sufficient
to avoid transforming a legal dispute into a political question. Tellingly, Just-
ice Brennan's majority opinion in Baker revealed a distinct usage of the
term "standard," as he employed it throughout the opinion in a fashion that

125 Id.
126 See Alexander M. Bickel, The Supreme Court and Reapportionment, in REAPPORTION-
MENT IN THE 1970s 62 (Nelson W. Polsby ed., 1971) (contending that Brennan's assertion of
standards was "at best a shot in the dark, an arrow wafted skyward in the hope that some appro-
riate target might find it, and, at worst, an evasion of the problem"); Hasen, supra note 11, at
1477 (contending that Justice Brennan's assertion "was true only if taken to an unhelpful level of
abstraction"); Pamela S. Karlan & Daryl J. Levinson, Why Voting Is Different, 84 CAL. L. REV.
1201, 1201 (1996) (writing of Brennan's assertion, simply, "He was wrong.").

Despite this criticism, it is important to note that Justice Brennan faced real constraints in
Baker v. Carr in light of Justice Frankfurter's majority opinion in Colegrove v. Green, 328 U.S.
549 (1946), a case that found apportionment cases to be nonjusticiable under the Guaranty
Clause. For a perceptive piece analyzing the consequences of adjudicating apportionment cases
under the Equal Protection Clause rather than the Republican Form of Government Clause,
U.S. CONST. art. IV, § 4, see Michael W. McConnell, The Redistricting Cases: Original Mistakes
and Current Consequences, 24 HARV. J.L. & PUB. POL'Y 103 (2000). For adumbrations of Mc-
Connell's argument, see Robert G. Dixon, Jr., Apportionment Standards and Judicial Power, 38
NOTRE DAME L. REV. 367, 397 (1963) ("As a guide to meaningful standards which will be politi-
cally realistic, will minimize federal interference, and will allow some play in the joints and some
state diversification in representation systems tailored to local conditions, the equal protection
clause is woefully inappropriate.").
129 Vieth v. Jubelirer, 541 U.S. 267, 303–04 (plurality opinion).
permits flexibility. Conversely, Brennan used the term "rule" in *Baker* only twice, both times in a fashion suggestive of a categorical directive. Furthermore, Justice Clark's concurring opinion in *Baker* also contradicted the notion that bright-line rules had to follow closely on the heels of the justiciability determination: "No one... contends that mathematical equality among voters is required by the Equal Protection Clause. But certainly there must be some rational design to a State's districting. The discrimination here does not fit any pattern—as I have said, it is but a crazy quilt." Admittedly, Justice Frankfurter's dissent at times uses the terms "rule" and "standard" interchangeably, but one should not permit the dissent's imprecise usage of these terms to undermine the majority and concurring opinions' deliberate usage.

The Court's development of its voting rights jurisprudence since the early 1960s, moreover, strengthens the notion that *Baker* does not require the articulation of rules. Justice White's controlling opinion on justiciability in *Bandemer* should have erased any lingering doubt about whether standards alone could prevent a dispute from being deemed a political question. In *Bandemer*, Justice White, who joined the Court shortly after it issued *Baker* and before it decided *Wesberry* and *Reynolds*, found that the Court need not adjudicate partisan gerrymandering claims with the precision of a one person, one vote requirement in order to deem them justiciable. Although "the type of claim that was presented in *Baker v. Carr* was subsequently resolved in this Court by the formulation of the 'one person, one vote' rule," Justice White wrote, "[t]he mere fact... that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented here are nonjusticiable." Justice White continued, noting that *Baker* was not predicated on the discovery of a rule: "The one person, one vote principle had not yet been developed when *Baker* was decided. At that time, the Court did not rely on the potential for such a rule in finding justiciability."

The Court's jurisprudence regarding race-conscious redistricting also belies the notion that judicially manageable standards must be quickly followed by concrete rules. In the *Shaw* line of cases, for instance, although the Court

130 See, e.g., *Baker*, 369 U.S. at 211 ("There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." (citations omitted)).

131 See *id.* at 215 (discussing the political question doctrine as applicable to Indians, Brennan writes, "[T]here is no blanket rule."); *id.* at 224 (using the term "rule" in a parenthetical to describe an actual rule).

132 *Id.* at 258 (Clark, J., concurring).

133 *Id.* at 305-06 (Frankfurter, J., dissenting) ("[A]pparently at the recommendation of the Boundary Commission for England, the twenty-five percent standard was eliminated as too restrictive in 1947, and replaced by the flexible provision that constituencies are to be as near the electoral quota as practicable, a rule which is expressly subordinated both to the consideration of special geographic conditions and to that of preserving local boundaries.").


135 *Id.*

136 *Id.*
articulated several standards for separating permissible racial classifications from impermissible ones, none of these standards approached a rule-like test. Indeed, in *Miller v. Johnson*, the most recent iteration of the race-conscious redistricting cases, the Court announced a “predominant factor” standard, which is designed to invalidate districts where race is the most prominent driving force in the creation of a district.\(^{137}\) Moreover, in *Georgia v. Ashcroft*,\(^{138}\) the Court permitted the creation of multiple “influence districts” (rather than “majority-minority districts”) without defining what percentage of racial minorities would constitute a sufficiently large amount to qualify as an “influence district” for the purpose of “retrogression” in interpreting section 5 of the Voting Rights Act of 1965.\(^{139}\) In sum, neither of these cases announces a judicial rule to guide lower courts, but the Court nevertheless resisted designating the matters political questions.

### IV. The Stakes (or Standing Up for Standards)

Criticizing the transformation of judicially manageable standards into judicially manageable rules is not a matter of mere verbal fastidiousness. Rather, the erosion of the distinction between standards and rules proves dispositive in determining whether courts will intervene to invalidate even the most aggressive partisan gerrymanders. In addressing partisan gerrymandering, the Court could theoretically select either a substantive rule (which would seek to affect the actual conduct of redistricting bodies) or a procedural rule (which would seek to alter the composition of redistricting bodies, what those bodies could consider, and the frequency with which they may redistrict). As a practical matter, however, all of the *Vieth* opinions conceive of judicial intervention as a matter of substance rather than procedure. This Part examines four rules available to the Court and concludes that none is likely to be acceptable to a majority of the Justices. Because the available rules are either unlikely to be palatable to the Court or unlikely to engender profound change in redistricting practices, the judicial choice can largely be understood as one between standards and no judicial oversight at all.

The first major substantive rule that would address partisan gerrymandering would have the Court impose a system of proportional representation. Under such a system, political parties would be unable to prevent a competitive opposing party from capturing a number of seats because the parties would receive seats according to the percentage of votes that they received. Although a number of democratic nations practice proportional representation and some commentators have supported the system,\(^{140}\) the Court has

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139 Id. at 480–89.
consistently expressed hostility toward the idea. Indeed, the Justices view proportional representation as less an idea than an epithet, a slur to be hurled at any electoral plan that strikes them as imprudent. Given the current pariah status of proportional representation, it seems safe to predict that the Court will not adopt such a rule any time in the near future.

The second major substantive rule that would address partisan gerrymandering would see states rid themselves of districting altogether and employ statewide elections. The Court would no longer need to concern itself with how the lines were drawn and instead could simply ensure that no lines divided the state whatsoever. Just as the Court takes a dim view of proportional representation, it is committed to upholding the nation's tradition of electing public officials in single-member districts. Again, waiting for the Court to initiate a rule requiring statewide elections seems quixotic.

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141 See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 288 (2004) (plurality opinion) ("Deny it as appellants may (and do), [their] 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."); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 362 (1997) ("[T]he Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections."); Holder v. Hall, 512 U.S. 874, 912 (1994) (Thomas, J., concurring in judgment) ("In principle, cumulative voting and other non-district-based methods of effecting proportional representation are simply more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of political parties according to race."); Bandemer, 478 U.S. at 130 ("Our cases . . . clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); id. at 144–45 (O'Connor, J., concurring in judgment) ("It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of proportional representation for all political groups. The consequences of this shift will be as immense as they are unfortunate."); City of Mobile v. Bolden, 446 U.S. 55, 122 (1980) (Marshall, J., dissenting) ("The plurality's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement."); Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting) ("Students of the mechanics of voting systems tell us that if all that matters is that votes count equally, the best vote-counting electoral system is proportional representation in state-wide elections. It is just because electoral systems are intended to serve functions other than satisfying mathematical theories, however, that the system of proportional representation has not been widely adopted.").

142 Sanford Levinson memorably dubbed the fixation on proportional representation in the election law field a "brooding omnipresence." Sanford Levinson, Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?, 33 UCLA L. Rev. 257, 257 (1985).

143 Indeed, the support of Justices for single-member districts may be rivaled only by their support for the two-party system. It is a truism that the Supreme Court has no theory of democracy. See Daniel H. Lowenstein, The Supreme Court Has No Theory of Politics—and Be Thank-
Instead of adopting a substantive rule, the Court could adopt a procedural rule that would invalidate redistricting plans that took into account any partisan considerations whatsoever.\textsuperscript{144} In \textit{Vieth}, none of the nine Justices came close to intimating that they would find minimal partisan consideration impermissible or bar elected officials from redistricting bodies.\textsuperscript{145} To the contrary, as discussed above, even the dissenting opinions found that the challenge lay in separating impermissible partisan considerations from permissible ones. Accordingly, the current Court appears unlikely to institute a rule that would outlaw partisan considerations or prohibit elected officials from playing a role in redistricting.\textsuperscript{146}

Another procedural rule—and the only one that seems remotely feasible in the near future—would call for the Court to forbid redistricting efforts that occur more than once per decade. In conjunction with the census, the equipopulational rule requires that states redistrict their congressional seats decennially. Although the census dictates how often states must redistrict, no rule prohibits how frequently states may redistrict. The Texas Republican Party recently broke with the custom of redistricting only once decennially by redrawing district lines mid-decade in an effort to increase its party’s powers.\textsuperscript{147} At least one commentator has recently argued that a procedural rule that limited redistricting to once per decade would have the benefit of introducing uncertainty into the minds of districting officials.\textsuperscript{148} Although it is true that the adoption of a decennial redistricting rule would have some impact on how district lines were drawn, such a rule would likely return the state of partisan gerrymandering to its pre-2000 levels rather than signal anything approaching a sea change. Indeed, a temporal rule would fail to prevent a political party from enacting the most aggressive, self-entrenching partisan gerrymander that it could muster if it predicted that the state was unlikely to undergo destabilizing changes over the next ten years.

\textit{ful for Small Favors, in The U.S. Supreme Court and the Electoral Process} 245, 245–66 (David K. Ryden ed., 2000) (contending that the Court should not make its particular theory of the political process the permanent view of the Constitution). Yet, it appears that at least one tenet of that system is the stability afforded by a two-party system. See, e.g., Bandemer, 478 U.S. at 144–45 (O’Connor, J., concurring in judgment) (extolling the stability of the two-party system).

\textsuperscript{144} Cf. Issacharoff, supra note 116 (suggesting that courts presumptively invalidate redistricting schemes that were created by partisan entities).

\textsuperscript{145} See, e.g., Vieth, 541 U.S. at 307 (Kennedy, J., concurring in judgment) (“A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied.”).

\textsuperscript{146} See Rogers v. Lodge, 458 U.S. 613, 648 (1982) (Stevens, J., dissenting) (“A rule that would invalidate all governmental action motivated by racial, ethnic, or political considerations is too broad.”).


\textsuperscript{148} Adam Cox, \textit{Partisan Fairness and Redistricting Politics}, 79 N.Y.U. L. Rev. 751, 769–76 (2004). Cox does not indicate that the Court is necessarily the institution that is best equipped to announce the decennial rule, but it is clear that he believes that the benefits of such a rule—indeed of who initiated the rule—would be real.
These four rules are not, of course, the only rules that the Court could utilize to address partisan gerrymandering. They are, however, the most readily available rules that would impact the levels of partisan gerrymandering. Because partisan gerrymandering does not lend itself to establishing absolutes without crossing over into legislative activities, proponents of judicial intervention will need to insist upon emphasizing “standards” in at least equal measure to “judicial manageability.” In the partisan gerrymandering context, in sum, we are very likely left with standards or nothing at all.

V. Vieth’s Implications for Race-Conscious Redistricting

Extension of the Court’s rigid conception of manageability with respect to partisan gerrymanders could have potentially far-reaching consequences in other realms of the political process. Taken to its logical conclusion, the plurality’s insistence on rules could have the (presumably) unintended consequence of undermining judicial oversight of race-conscious redistricting. To say that such a result is possible is not, of course, to say that it is likely. More significant than the remote possibility of extending the Vieth plurality’s logic to race are the implications of the race cases for Vieth. Given that racial identification is becoming increasingly complex, and that the Court is unlikely to formally abandon judicial oversight of race-conscious redistricting, it is difficult to escape the conclusion that the Vieth plurality actually conducts a veiled analysis of the merits.

Notably, Vieth’s principal dispute about the specificity required when courts issue legal directives takes place in a minor key with respect to the competing views that Justices have on the similarities between racial identity and party affiliation. Not surprisingly, this debate is at its sharpest in the opinions authored by Justices Stevens and Scalia. For his part, Justice Scalia attempts to cordon off the voting rights cases involving race from those involving partisan gerrymanders, criticizing Justice Stevens’s importation of the “predominant factor” test from Miller into Vieth. “[A] person’s politics is rarely as readily discernible—and never as permanently discernible—as a person’s race,” Justice Scalia writes. “Political affiliation is not an immutable characteristic, but may shift from one election to the next.”

For instance, the Court could decide that the practice of “kidnapping”—where redistricters place two incumbents in one district—was impermissible except when doing so was unavoidable because of a decrease in the overall number of seats. This Article, however, does not seek to examine all of the potential procedural rules that the Court could adopt.

Justices Stevens and Scalia have been opposing forces in the debate over whether to apply standards or rules for well over a decade. See Sullivan, supra note 10, at 88 (“If Justice Scalia leads the charge for rules on the current Court, Justice Stevens is his most consistent, standard-bearing antagonist. Justice Stevens has long favored sliding-scale approaches over categorical rule-bound approaches.”).


Id. But see Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment) (“[W]e are just one race here. It is American.”). Justice Scalia’s plurality opinion in Vieth acknowledges that there is some unmanageability in race, but he does so only implicitly:

Courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation
Although Justice Stevens responds to Justice Scalia by noting that voting behavior is not as mysterious as the plurality suggests, Justice Stevens might also have contended that race is not so neat and readily identifiable in the modern United States. One hardly needs to subscribe to postmodern beliefs about the social constructions of race to understand that racial identity is growing increasingly complex in the United States in at least two tangible ways. First, the census itself now permits individuals of mixed racial heritage to check multiple boxes when describing their racial background. Second, although the Court developed its voting rights jurisprudence to address a racial world that it perceived as almost exclusively black and white, it becomes increasingly difficult with each passing year to ignore that the United States is a multiracial nation. Indeed, a large portion of the fastest-growing ethnic group in the nation forsakes declaring a racial identity altogether. When Justice Scalia contends that Justice Stevens’s proposed remedy is “saying, essentially, that if we can do it in the racial gerrymandering context we can do it here,” proponents of race-conscious redistricting efforts might well invert this point. Using the argument to their advantage, proponents might argue that because the Court cannot develop manageable standards in the partisan gerrymandering context, neither can it do so in the racial context.

Justice Scalia’s bifurcation of racial considerations from party and geographical considerations in redistricting rings hollow because race, party, and geography in the United States are often interwoven. African American voters live disproportionately in urban areas and overwhelmingly support Democratic candidates. To pretend that one can discuss these three classifications discretely belies the modern political reality. “Consider, for example, a legislature that draws district lines with no objectives in mind except com-

to refrain from racial discrimination) is clear; whereas they are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply too much partisanship in districting) which is both dubious and severely unmanageable.

Vieth, 541 U.S. at 286 (plurality opinion).

153 Vieth, 541 U.S. at 338 n.32 (Stevens, J., dissenting) (“The plurality asserts that a person’s politics, unlike her race, is not readily ‘discernible.’ But the assertion is belied by the evidence that the architects of political gerrymanders seem to have no difficulty in discerning the voters’ political affiliation.” (citation omitted)).

154 Ruth La Ferla, Generation E.A.: Ethnically Ambiguous, N.Y. TIMES, Dec. 28, 2003, § 9, at 1 (reporting that nearly seven million people selected more than one racial box during the 2000 census, the first time that doing so was permitted).


156 Vieth, 541 U.S. at 292 (plurality opinion).

pactness and respect for the lines of political subdivisions,” Justice Scalia writes.158 “Under that system, political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a ‘natural’ packing effect.”159 If the Court continues to permit partisan gerrymanders, it could result in a decline in substantive representation for urban black Democratic voters who, because of persistent residential segregation, are particularly vulnerable to redistricting peculiarities.160 Although courts will likely view urban black Democratic voters in Republican-dominated states as losing out because of party affiliation, the long arc of history in the United States indicates that the cause cannot be isolated quite so readily.

Despite this potential for racial unmanageability, the Court is unlikely to declare such matters nonjusticiable political questions and abandon its oversight of race-conscious redistricting schemes altogether. The Court, then, is obviously willing to abide some indeterminacy to adjudicate matters that it views as sufficiently important. Indeed, in Georgia v. Ashcroft,161 the Court moved away from the “nonretrogression” standard articulated in Beer v. United States,162 which saw the creation of “majority-minority districts,” to a still vaguer standard.163 The standard articulated in Ashcroft requires courts to take into account the totality of the circumstances and consider “influence districts” and “coalition districts” in addition to “majority-minority districts” in adjudicating section 5 claims under the Voting Rights Act of 1965.164 It is striking that the four members of the Vieth plurality (accompanied by Justice Kennedy) willingly court unmanageability in Ashcroft but spurn it in Vieth.

Conclusion

Despite the Vieth plurality’s disturbing erosion of the distinction between rules and judicially manageable standards, the Supreme Court nonetheless provided two small but encouraging reasons to suspect that it may invalidate at least some partisan gerrymandering schemes in the near future. First, in Cox v. Larios,165 the Court summarily affirmed a lower court decision invalidating a redistricting plan.166 Although the population disparity was within appellant’s proposed ten percent safe harbor for population devi-

158 Vieth, 541 U.S. at 290 (plurality opinion).
159 Id.
164 Id. at 479–84; see Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973 (2000). The Court’s reliance on the testimony of African American Congressman John Lewis in validating the Georgia plan makes it particularly difficult to determine the precise nature of the standard. See Georgia v. Ashcroft, 539 U.S. at 472. The Court previously articulated such a standard in the 1960s by invoking African American Congressman Adam Clayton Powell’s endorsement of redistricting efforts in Manhattan. See Wright v. Rockefeller, 376 U.S. 52, 53, 58 (1964).
166 Id. at 2806 (Stevens, J., concurring).
Partisan Gerrymandering and Judicial Manageability

Second, in *Henderson v. Perry*, the Court remanded a district court decision upholding a mid-decade redistricting plan and instructed the district court to reconsider the matter in light of *Vieth*. Taken together, *Cox* and *Perry* suggest that the Court may be willing to find that lower courts can indeed evaluate partisan gerrymandering claims that rely upon judicially manageable standards rather than judicially manageable rules.

Heartening as *Cox* and *Perry* are for advocates of judicial intervention, however, it would be mistaken to believe that either of these cases is likely to produce a meaningful check on partisan gerrymanders if the Court does not articulate a standard rather than a rule. Districting bodies intent upon enacting a partisan gerrymander can evade the judicial oversight granted in *Cox* by ensuring that the plan follows the requirements of one person, one vote as closely as practicable. Doing so will surely provide some limitations upon the aggressiveness of partisan gerrymanders, but as the facts of *Vieth* vividly demonstrate, the strict equipopulational requirements of U.S. congressional districts have hardly brought an end to political parties' manipulation of district lines.

Similarly, in *Perry*, if the Court merely validates a rule that would prohibit mid-decade redistricting, it would likely succeed only in returning partisan gerrymandering to the levels that existed before states began attempting to push the temporal envelope in the last few years. Such a result would hardly be occasion to leap for joy. If the Court wants to give teeth to judicial review of redistricting schemes and encourage redistricting bodies to internalize criteria that will prevent egregious partisan gerrymanders, it will

167 *Id.* at 2806-08. Presciently, Justice Powell's opinion in *Bandemer* questioned whether compliance with one person, one vote could inoculate districting plans from partisan gerrymandering claims. *See* *Davis v. Bandemer*, 478 U.S. at 171-72 (Powell, J., concurring in part and dissenting in part).


169 *Id.*; *see* *Session v. Perry*, 298 F. Supp. 2d 451, 457-58, 515 (E.D. Tex) (three-judge court), vacated sub nom. *Henderson v. Perry*, 125 S. Ct. 351 (2004). It seems worth noting that Judge Higginbotham's prevailing lower court opinion in *Perry* suggested that the Supreme Court should develop procedural rules (as opposed to substantive standards) if the judiciary is to continue hearing partisan gerrymandering claims. *Id.* at 475 ("[T]he judiciary must rein in partisan gerrymanders, limitations that focus upon the time and circumstance of partisan line-drawing and less upon the 'some but not too much' genre of strictures offer the best of an ugly array of choices.").

170 *See* *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 534-36 (M.D. Pa. 2002) (three-judge court); *Vieth v. Pennsylvania* 241 F. Supp. 2d 478, 480-82, 484-85 (M.D. Pa. 2003) (three-judge court), aff'd sub nom. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Indeed, the lower court opinions in *Vieth* demonstrate how the magnetism of one person, one vote has arguably made it more difficult to achieve meaningful regulation of voting rights issues that extend beyond equipopulosity. *See supra*, text accompanying notes 24-30. For an argument contending that one person, one vote operates as a limiting principle on the realization (and even the identification) of more robust democratic ideals, see Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Rights Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. Rev. 1411, 1440 (2002) ("The one-person, one-vote principle became a blunderbuss precisely because the Court lacked a sufficiently sophisticated normative theory to make contextual judgments about the health of the political process and to place sensible limits upon the reach of the one-person, one-vote principle.").
need to abandon the relative comfort of rules for the uncertainty, ambiguity, and indeterminacy that necessarily accompany standards. Although a more precise legal directive may emerge over time, the Court's initial step will likely require some flexibility in determining how much partisan consideration amounts to too much.