

TEXAS TWO STEP: THE TEXAS LEGISLATURE'S MID-DECENNIAL  
REDISTRICTING PLAN OF 2003, *LEAGUE OF UNITED LATIN AMERICAN  
CITIZENS V. PERRY*, AND THEIR IMPACT ON THE FUTURE OF THE  
POLITICAL GERRYMANDER.

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I. INTRODUCTION

Texas, known as the “Lone Star State,” is the second largest state in the country, in terms of population and area, and, and if it were a nation, would boast the tenth largest economy in the world.<sup>1</sup> While it is probably more of a perception than reality, Texans are world renown for being mavericks and cowboys. Some even go so far as to say that “everything is bigger in Texas.” Therefore, it should not be surprising that when Texas decided to redistrict, mid-decade, in the summer and fall of 2003, they did it in a “big” way. The 2003 map, orchestrated by former U.S. House Majority Leader Tom Delay, created a six-seat swing from Democrat to Republican in the state’s 32 member delegation.<sup>2</sup> As one redistricting expert has commented, “It is the most masterful, most aggressive plan achieving a partisan outcome that I’ve ever seen.”<sup>3</sup> While the plan was “masterful” in effecting a majority-Republican congressional delegation in Texas, it is also a “masterful” example of the role that politics currently plays in congressional redistricting. No one seriously contends that the plan was enacted for any other reason than for purely partisan objectives. Former Republican Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate, acknowledged that political gain for the Republicans was 110% of the motivation for the plan, that it was the “entire motivation.”<sup>4</sup> Consequently, the issue becomes whether that political

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<sup>1</sup>*Overview of the Texas Economy*, Business and Industry Data Center, available at <http://www.bidc.state.tx.us/overview/2-2te.htm>.

<sup>2</sup>Laylan Copelin, *Supreme Court's Ruling on GOP Map will Echo*, Austin American-Statesman (February 26, 2006) (quoting Steve Bickerstaff, a Texas redistricting expert).

<sup>3</sup>*Id.*

<sup>4</sup>*Session v. Perry*, 298 F.Supp.2d 451, 472 (E.D. Tex 2004).

motivation was excessive enough to constitute a political gerrymander, thus violating the equal protection clause of the Fourteenth Amendment to the Constitution. The United States Supreme Court would decide that issue in *League of United Latin American Citizens v. Perry*.

#### A. History of the Political Gerrymander

From before the very inception of the Republic, Political Gerrymanders were present on the American scene. When the Founders began fashioning a constitution that would govern the United States, they gave state legislatures the power to prescribe the times, places and manner of holding elections for Senators and Representatives.<sup>5</sup> However, the Founders were aware of the practice and were not “blind to the need to locate the power to curb such abuses.”<sup>6</sup> Accordingly, the Founders granted Congress the power to “make or alter” such regulations from time to time.<sup>7</sup> While Congress possesses plenary power to regulate elections, it has rarely chosen to do so.<sup>8</sup> Because of the history of partisan influence on the drawing of legislative districts and a lack of Congressional action to curb such partisan influences, the federal judiciary has been asked to play a role in curbing partisan abuses.<sup>9</sup> Whether the judiciary has the power and ability to adjudicate such disputes is as unclear today as it was when the Constitution was written. To address the impact of *Perry* on the future of the political gerrymander, it is necessary to briefly discuss the background of the political gerrymander and the Supreme Court’s previous jurisprudence on the issue.

#### Background of the Political Gerrymander:

The political gerrymander is, as Justice Scalia has remarked, “not new to the American scene.”<sup>10</sup> In the United States, one scholar traces the practice of “political gerrymandering” back to the Colony of Pennsylvania in the 18<sup>th</sup> century, where several counties conspired to solidify the political power of the city of Philadelphia.<sup>11</sup> The term “gerrymandering” was coined in 1812, when a Massachusetts redistricting plan designed to benefit the party of Gov. Elbridge Gerry resulted in a district that a political cartoonist

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<sup>5</sup> U.S. Const. art. I, § 4.

<sup>6</sup> *Henderson v. Perry*, 399 F.Supp.2d 756, 761 (E.D. Tex. 2004).

<sup>7</sup> *Id.*

<sup>8</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004).

<sup>9</sup> See generally *Bandemer v. Davis* 478 U.S. 109 (1986); *Vieth*, 541 U.S. 267 (2004); *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594; *Henderson*, 399 F.Supp.2d 756, 761

<sup>10</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 274 (2004).

<sup>11</sup> E. Griffith, *The Rise and Development of the Gerrymander*, 26-28 (1974); see *Vieth*, 541 U.S. at 274.

drew to resemble a salamander.<sup>12</sup> It is defined as “the practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”<sup>13</sup> Gerrymandering is relatively rare in most of the world’s contemporary democracies and is present only in those democracies, like the United States and Great Britain, with one candidate elections in single districts.<sup>14</sup> There are two primary methods that legislature’s use to accomplish political gerrymandering. One form of gerrymandering, “packing,” is to place as many voters of one type into a single district to reduce their influence in other districts.<sup>15</sup> Another form, termed “cracking,” involves spreading out voters of a particular party among many districts—effectively reducing their representation by denying them a sufficiently large voting block in any particular district.<sup>16</sup> When these tactics are used in tandem, gerrymandering can have a dramatic impact because it packs opposition voters into districts they will already win and cracks the remainder among districts where they will constitute a minority.<sup>17</sup> The most immediate effect of gerrymandering is for elections to become less competitive in all districts, particularly packed ones. For example, the deleterious effect of gerrymandering can be illustrated by comparing gerrymandered House districts with non-gerrymandered Senate seats and governorships—fifty percent of all gubernatorial and U.S. Senate elections were competitive in 2002, compared with fewer than ten percent of House seats.<sup>18</sup> Accordingly, the political gerrymander is inextricably intertwined with American democracy and its deleterious effect on the health of American democracy is undisputed.

The Political Question Doctrine and *Bandemer v. Davis*:

The Political Question Doctrine:

As Chief Justice Marbury held in the famous case of *Marbury v. Madison*, “[i]t is emphatically the province and duty of the judicial

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<sup>12</sup> Webster’s New International Dictionary 1052 (2d ed. 1945); *See also* House Research Org., Bill Digest, Tex. H.B. 3, 78th Leg., 3rd C.S. (2003) available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>.

<sup>13</sup> Blacks Law Dictionary 708-09 (8<sup>th</sup> ed. 2004).

<sup>14</sup> Get Cite – but found on <http://en.wikipedia.org/wiki/Gerrymander>.

<sup>15</sup> *Vieth*, 541 U.S. at 287 n. 7.

<sup>16</sup> *Id.* at 287 n.8.

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<sup>18</sup> Richard H. Pildes, *The Supreme Court 2003 Term—Foreward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 63–64 (2004).

department to say what the law is.”<sup>19</sup> However, sometimes the judicial department has no business entertaining a claim of unlawfulness.<sup>20</sup> The political question doctrine states that certain matters are really political in nature and are best resolved by the body politic rather than suitable for judicial review.<sup>21</sup> The main consequence of the political question doctrine is that it renders certain government conduct immune from judicial review.<sup>22</sup> In *Baker v. Carr*, the Supreme Court set forth six independent tests for the existence of a political question. Only two of those tests are applicable in the political gerrymandering context. First, a political question exists when there is a “textually demonstrable constitutional commitment of the issue to a coordinate political department.”<sup>23</sup> For example, the Supreme Court has held that the procedures used in Senate impeachment proceedings are political questions because the Constitution vests the Senate with the “sole authority” to conduct such proceedings.<sup>24</sup> In political gerrymandering cases, one might argue that the Constitution vests Congress with the sole authority to “make or alter” such districting regulations promulgated by the States. Accordingly, such political gerrymandering claims are to be resolved by Congress, not the Courts. The second, and most important test in political gerrymandering cases, is that a political question exists when there are “a lack of judicially discoverable and manageable standards for resolving [the dispute].”<sup>25</sup> Judicial action must be governed by a standard and, if no such standard exists, then the courts have no business adjudicating the dispute.<sup>26</sup> As will be discussed, the Court has had a difficult time deciding whether such “discoverable and manageable standards” exist in political gerrymandering claims.

*Bandemer v. Davis*: Political Gerrymander Claims are Judiciable:

From the ratification of the United States Constitution until *Bandemer v. Davis*, the Supreme Court never directly addressed whether or not the claim of unconstitutional political gerrymander presents a judiciable controversy or a nonjusticiable political question.<sup>27</sup> In *Bandemer*, the Indiana

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<sup>19</sup> *Marbury v. Madison*, 2 L.Ed. 60 (1803).

<sup>20</sup> *Vieth*, 541 U.S. at 277.

<sup>21</sup> John E. Nowak & Ronald D. Rotunda, *Constitutional Law*, 121, Sixth Edition (2000).

<sup>22</sup> *Id.*

<sup>23</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Vieth*, 541 U.S. at 277.

<sup>24</sup> See generally *Nixon v. United States*, 506 U.S. 224 (1993).

<sup>25</sup> *Baker*, 369 U.S. at 217; *Vieth*, 541 U.S. at 277–278.

<sup>26</sup> *Vieth*, 541 U.S. at 277–278.

<sup>27</sup> Bernard Grofman, *Political Gerrymandering and the Courts*.

Legislature reapportioned the state district lines according to the 1980 census.<sup>28</sup> At that time, Republicans controlled the state House, Senate and governorship and composed a redistricting plan that favored Republicans.<sup>29</sup> In early 1982, suit was filed by Indiana Democrats alleging that the 1981 reapportionment plans constituted a political gerrymander intended to disadvantage Democrats and violated their right, as Democrats, to equal protection under the Fourteenth Amendment.<sup>30</sup> A plurality of the Supreme Court, led by Justice White, carefully examined prior decisions and noted that while many of the Court's prior decisions "indicate the nonjudiciability of political gerrymander cases," the Court was "not bound by those decisions."<sup>31</sup> Furthermore, applying the political question doctrine enunciated in *Baker*, the Plurality concluded that "disposition of this question does not involve us in a matter more properly decided by a coequal branch of government. There is no risk of foreign or domestic disturbance, and in light of our cases since *Baker*, we are not persuaded that there are no judicially manageable standards by which political gerrymander cases are to be decided."<sup>32</sup> The Plurality noted that when *Baker* was decided, the manageable standard of "one person, one vote" had not been developed.<sup>33</sup> Therefore, even though the Court couldn't presently come up with a particular standard, that should not prevent them from holding that such claims are judiciable.<sup>34</sup> Accordingly, the Plurality held that "the claim is that each political group in a State should have the same chance to elect representatives of its choice as any other political group. The issue is one of representation, and we decline to hold that such claims are never judiciable."<sup>35</sup>

Holding that political gerrymander cases are judiciable, the Plurality then held that in order to succeed on their claims, the plaintiffs must prove both "intentional discrimination against an identifiable political group and

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<sup>28</sup> *Bandemer v. Davis*, 478 U.S. 109, 114 (1986).

<sup>29</sup> *Id.* at 114-15.

<sup>30</sup> *Id.* at 115.

<sup>31</sup> *Id.* at 121.

<sup>32</sup> *Id.* at 123. *See also* *Vieth v. Jubelirer*, 541 U.S. 267, 278-279 (stating that "[t]he clumsy shifting of the burden of proof for the premise (the Court was "not persuaded" that standards do not exist, rather than "persuaded" that they do) was necessitated by the uncomfortable fact that the six-justice majority could not discern what the judicially discernable standards might be.")

<sup>33</sup> *Id.* at 123.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 124.

an actual discriminatory effect on that group.”<sup>36</sup> As for the “intent” requirement, the Plurality acknowledged that “as long as redistricting is done by a legislature” it should be easy to prove that the intent of the legislature was motivated by politics.<sup>37</sup> The “effect” requirement, however, was much harder to satisfy. Importantly, a group’s power is not unconstitutionally diminished by the simple fact that an apportionment scheme “makes winning elections more difficult.”<sup>38</sup> The *Bandemer* Plurality held that in order to recover, it must be shown that, taking into account a variety of historic factors and projected election results, the group had been “denied its chance to effectively influence the political process.”<sup>39</sup> The Court acknowledged that this is “of necessity a difficult inquiry,” and determined, based on the facts of this case, that the *Bandemer* plaintiffs did not show that they had been denied an opportunity to effectively influence the political process.”<sup>40</sup>

Quite frankly, the *Bandemer* decision is remarkable only for its extreme lack of clarity. While it is hard to ascertain anything of value from the decision, it does illustrate three points. First, six members of the Court held, although somewhat clumsily, that political gerrymandering claims are justiciable.<sup>41</sup> A majority clearly rejected the argument that such claims are political questions, thus enabling judicial review.<sup>42</sup> Second, it is clear that the Court is bitterly divided on a standard to be used in adjudicating such claims. Four members of the Court, a plurality, held that the Constitution is not violated by a political gerrymander unless one political party is “essentially shut out of the political process.”<sup>43</sup> But, as one commentator has illustrated, political parties are never completely shut out of the political process.<sup>44</sup> Even after the most egregious political gerrymanders, parties can still raise funds, put up candidates, advertise, make speeches.<sup>45</sup> Accordingly, it is hard to imagine any scenario where a partisan

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<sup>36</sup> *Id.* at 127.

<sup>37</sup> *Id.* at 129.

<sup>38</sup> *Id.* at 132.

<sup>39</sup> *Id.* at 132–33.

<sup>40</sup> *Id.* at 134, 143.

<sup>41</sup> *Id.* at 125.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 132–133.

<sup>44</sup> Jeffrey Tobin, *The Great Election Grab: When Does Gerrymandering Become a Threat to Democracy?* *The New Yorker* (12-08-2003).

<sup>45</sup> *Id.*

gerrymander can be found to violate the constitution under the plurality's logic. Finally, it became clear that the failure of the Court to clearly enunciate a set of standards left intermediate appellate courts with little guidance in adjudicating such claims. In fact, after *Bandemer* was decided the *Congressional Quarterly* commented that it gave "disgruntled political groups a hunting license for redistricting plans they dislike, but left them in the dark as to how to bag one."<sup>46</sup> In all of the cases involving the most common form of political gerrymandering, relief was denied by lower courts.<sup>47</sup>

Political Gerrymandering Revisited: *Vieth v. Jubelirer*:

In 2004, the United States Supreme Court once again addressed whether or not political gerrymandering claims present a judiciable case or controversy. In *Vieth*, the 2000 census showed that Pennsylvania was entitled to only 19 representatives in Congress, a decrease of 2 from the previous delegation.<sup>48</sup> Following the Census results, the Pennsylvania Legislature, dominated by Republicans, began drawing up a new districting map.<sup>49</sup> Following pressure by the Republican National Committee, the Pennsylvania Legislature adopted a partisan redistricting plan that benefited Republican candidates.<sup>50</sup> The plaintiff's in *Vieth*, registered Democrats, brought suit to enjoin implementation of the districting map, arguing, that the act constituted a political gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>51</sup> At the United States Supreme Court, all of the justices agreed, at least in principal, that "an excessive injection of politics" into the redistricting process "is unlawful," but sharply disagreed on whether or not political gerrymandering claims are judiciable.<sup>52</sup> A plurality of the Supreme Court, led by Justice Antonin Scalia, held that "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them. . . political gerrymandering claims are non-judiciable."<sup>53</sup> While agreeing

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<sup>47</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 279–280 (2004).

<sup>48</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 272 (2004).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 293. But, a plurality concluded that it was impossible to determine how much political influence was "too much." *Id.*

<sup>53</sup> *Id.* at 281 (Justice Scalia, with whom Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas joined).

with the plurality that the plaintiff's claims in *Vieth* were non-judicial, Justice Kennedy, in joining the plurality opinion, refused to conclude that all future political gerrymandering claims would be non-judicial.<sup>54</sup> Justice Kennedy wrote, "[t]here are . . . weighty arguments for holding cases like these to be non-judicial; and those arguments may prevail in the long run. In my view, however, the arguments are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander."<sup>55</sup> Moreover, Justice Kennedy was concerned that "if the courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner would grow."<sup>56</sup> The four more liberal members of the Court, including Justice's Stevens, Souter, Ginsberg, and Breyer, dissented from the plurality opinion and concluded that political gerrymandering claims are judicial. However, interestingly enough, the four dissenters came up with three different standards with which to evaluate political gerrymandering claims.<sup>57</sup> As the plurality explained, the mere fact that the four dissenters came up with three different standards "goes a long way to establishing that there is no constitutionally discernable standard."<sup>58</sup> While Justice Kennedy and a plurality of the court concluded, in *Vieth*, that political gerrymandering claims are currently non-judicial, Justice Kennedy and the four dissenters left open the possibility that, in some circumstances, claims of "excessive" political gerrymandering may be judicial in the future.<sup>59</sup> Accordingly, *Vieth* only confused this area of the law and left lower courts with no guidance in how to adjudicate political gerrymandering claims.<sup>60</sup>

The Texas Redistricting Experience:

Redistricting in 2001:

After the federal decennial census of 2000 was released in March 2001, Texas became entitled to thirty-two seats in Congress.<sup>61</sup> This consisted of a

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<sup>54</sup> *Id.* at 306 (Kennedy, J., concurring).

<sup>55</sup> *Id.* at 309 (Kennedy, J., concurring).

<sup>56</sup> *Id.* at 312 (Kennedy, J., concurring).

<sup>57</sup> *Id.* at 292.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 292, 306, 317, 343, 355.

<sup>60</sup> See *Henderson v. Perry*, 399 F.Supp.2d 756, 760–762 (E.D. Tex. 2004).

<sup>61</sup> House Research Org., Bill Digest, Tex. H.B. 3, 78th Leg., 3<sup>rd</sup> C.S. (2003), available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>; See also *Session v. Perry* 298 F.Supp.2d 451, 457 (E.D. Tex. 2004).



gain of two seats from the previous census and necessitated the drawing of new district lines.<sup>62</sup> Under the United States Constitution and the Texas law, the Legislature is the department that is constitutionally responsible for apportioning the State into federal congressional districts.<sup>63</sup> When the Legislature does not act to implement a new redistricting plan, citizens may sue, and then it is up to the judiciary to determine an appropriate redistricting scheme to comply with the Constitution's one-person, one vote requirement.<sup>64</sup> When it came time for the Legislature to apportion the districts during the 77th State Legislature in 2001, the Republican Party controlled both the state Senate and the Governorship, but the Democratic Party still controlled the State House of Representatives.<sup>65</sup> Consequently, due to partisan strife in the chamber, the 77th State Legislature failed to adopt a redistricting plan.<sup>66</sup> Shortly thereafter, various voters and office holders filed lawsuits in state and federal court challenging the districting of Texas' congressional seats.<sup>67</sup> The lawsuits were consolidated into *Balderas v. Texas* before a three-judge panel in United States District Court for the Eastern District of Texas.<sup>68</sup> The *Balderas* court deferred proceedings in federal court to give the state courts an opportunity to adopt an acceptable plan.<sup>69</sup> A Travis County state district court issued a congressional redistricting plan, but the Texas Supreme Court held that the district court's plan was unconstitutional because the court had adopted a plan without giving the parties an opportunity for a meaningful hearing.<sup>70</sup> When the state

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<sup>62</sup> *Session v. Perry*, 298 F.Supp.2d 451, 457 (E.D. Tex. 2004).

<sup>63</sup> U.S. Const. amend. XIV, § 2; *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001).

<sup>64</sup> *Del Rio*, 67 S.W.3d at 91; *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2606 (2006).

<sup>65</sup> *League of United Latin American Citizens v. Perry* 126 S.Ct. at 2606 (2006).

<sup>66</sup> *Session* 298 F.Supp at 457; *See generally* *Balderas v. Texas*, 2001 U.S. Dist. LEXIS 25740 (E.D. Tex., Nov. 14, 2001). Republican Governor Rick Perry declined to call a special session of the Texas Legislature, thus leaving the constitutionally required Congressional Reapportionment entirely up to the Courts. House Research Org., Bill Digest, Tex. H.B. 3, 78th Leg., 3<sup>rd</sup> C.S. (2003), available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>; *League of United Latin American Citizens v. Perry* 126 S.Ct. at 2628 (2006)(Stevens J., concurring in part, dissenting in part).

<sup>67</sup> *Balderas v. Texas*, 2001 U.S. Dist. LEXIS 25740, 25747 (E.D. Tex., Nov. 14, 2001).

<sup>68</sup> *Id.* at 25747-48.

<sup>69</sup> *Id.*

<sup>70</sup> House Research Org., Bill Digest, Tex. H.B. 3, 78th Leg., 3<sup>rd</sup> C.S. (2003), available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>. *See also* *Perry v. Del Rio*, 67 S.W.3d 239 (Tex. 2001).

court efforts failed, the *Balderas* court recognized that the Texas' existing congressional districts were "unconstitutionally malportioned" and undertook the duty to prepare a new districting map.<sup>71</sup> The *Balderas* Court started with a blank map of Texas, drew in the existing districts protected by the Voting Rights Act, located the new districts where the population growth that produced them had occurred, and then applied neutral criteria of "compactness, contiguity, and respecting county and municipal boundaries."<sup>72</sup> Utilizing these "neutral districting principles," the court felt that it had created a map that was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state."<sup>73</sup> The November 2002 elections, predicated on the *Balderas* map (Plan 1151C), generated a congressional delegation with fifteen Republicans and seventeen Democrats.<sup>74</sup> The judge-drawn map resulted in a majority-democratic congressional delegation even though the Republicans continued to gain strength in the state. In those same elections, Republicans gained control of the Texas House of Representatives and therefore, had unified control of the state government.<sup>75</sup>

#### Redistricting in 2003:

In the November 2002 elections, Republicans gained control of the Texas House of Representatives for the first time in 130 years.<sup>76</sup> With unified control of state government, the Republicans began pushing for a new congressional district map during the Regular Session of the 78th Legislature.<sup>77</sup> The Legislature purported to adopt a new plan during the 2003 regular session, but their efforts failed because Democratic House members, by absenting themselves, denied a quorum.<sup>78</sup> After the

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<sup>71</sup> *Balderas* 2001 U.S. Dist. LEXIS at 25749-50; Session 298 F.Supp. at 458.

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<sup>73</sup> *Balderas* 2001 U.S. Dist. LEXIS (explaining that "the court must draw a redistricting plan according to 'neutral districting factors,' including, inter alia, compactness, contiguity, and respecting county and municipal boundaries"); Session, 298 F.Supp. at 458.

<sup>74</sup> Session, 298 F.Supp at 458. See also *League of Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2629 (2006) (Stevens J., concurring in part, dissenting in part) ("...Republicans were not able to capitalize on the advantage that the *Balderas* plan had provided them. A number of Democratic incumbents were able to attract the votes of ticket-splitters, and thus won elections in some districts that favored Republicans.")

<sup>75</sup> See *Id.*

<sup>76</sup> George Kuempel & Christy Hoppe, "Hold on Statehouse Complete: Craddick Expected to Replace Laney as House Speaker," *The Dallas Morning News* (November 7, 2002).

<sup>77</sup> See Session, 298 F.Supp.2d 451, 458.

<sup>78</sup> *Id.*

redistricting efforts failed, Governor Rick Perry called the Legislature into a special session for the purpose of adopting a new congressional districting plan.<sup>79</sup> During the first special session, the Texas House of Representatives approved a new congressional map, but the Senate failed to approve it because its “two-thirds” supermajority rule effectively permitted the Democrats to block a vote.<sup>80</sup> Shortly after the first special session of the legislature lapsed, Lieutenant Governor Dewhurst announced that he would suspend the operation of the two-thirds rule in any future special session considering congressional redistricting legislation.<sup>81</sup> Governor Rick Perry once again called the Legislature into a second special session but, once again, the Senate was unable to adopt a plan because Democratic members of the Senate left the state and denied a quorum necessary for Senate action.<sup>82</sup> Consequently, the Legislature adjourned without enacting new congressional districts.<sup>83</sup> Finally, on September 9, 2003, Governor Rick Perry called a third special session of the 78th Legislature for the purpose to consider legislation relating to congressional redistricting.<sup>84</sup> Although Democratic legislators again attempted to prevent the formation of a quorum, when a lone Senate Democrat returned to Texas, a quorum was present and the Legislature passed a congressional redistricting plan, Plan 1374C.<sup>85</sup> The congressional plan was signed by Governor Rick Perry on October 13, 2003 and went into effect on January 11, 2004.<sup>86</sup> In the subsequent 2004 Congressional elections, Republicans captured twenty one congressional seats and the Democrats captured eleven of those seats.<sup>87</sup>

*League of United Latin American Citizens v. Perry* and its impact on the future of the Political Gerrymander:

Background:

Shortly after the passage of Plan 1374C, numerous parties filed suit in

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

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<sup>83</sup> House Redistricting Committee Report, Bill Analysis, Tex. H.B. 3, 78th Leg., 3<sup>rd</sup> C.S. (2003), available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>.

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

<sup>85</sup> *Id.*; *Session*, 298 F.Supp.2d at 458; *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2630 (2006)(Steven J., concurring in part, dissenting in part).

<sup>86</sup> Bill Actions for Tex. H.B. 3, 78th Leg., 3<sup>rd</sup> C.S. (2003), available at <http://www.capital.state.tx.us>.

<sup>87</sup> *Henderson v. Perry*, 399 F.Supp.2d 756, 764 (E.D. Tex. 2005).

federal court challenging Plan 1374C on the grounds that it violated § 2 of the Voting Rights Act and that it constituted an unconstitutional political gerrymander.<sup>88</sup> A three judge federal district court panel, consisting of Judges Higginbotham, Ward and Rosenthal, rejected these challenges.<sup>89</sup> The plaintiff's appealed the district court's decision in *Session* and the United States Supreme Court remanded for reconsideration in light of the *Vieth* decision.<sup>90</sup> On remand from the United States Supreme Court, the District Court for the Eastern District of Texas, in *Henderson v. Perry*, again rejected all challenges to the constitutionality of Plan 1374C.<sup>91</sup>

*Henderson v. Perry*: The District Courts Analysis on Remand:

In addressing whether Plan 1374C constituted a political gerrymander, the *Henderson* court made two opening observations. First, the court discussed the difficulty of adjudicating political gerrymandering claims. The court began its opinion by stating, “[t]he light offered by *Vieth* is dim, and the search for a core holding is elusive. This observation is not a criticism, but. . . recognition that *Vieth* reflects the long and twisting historical narrative of political gerrymanders in the United States.”<sup>92</sup> The court thoughtfully noted that Article 1, Section 4 of the United States Constitution gave the legislatures of each state authority to prescribe “the Times, Places and Manner of holding Elections for Senators and Representatives” and that the Founders gave Congress the explicit authority to supervise the conduct of the states by enabling them to “make or alter” such regulations.<sup>93</sup> The court continued, “this explicit placement in the Congress of the power to supervise the authority granted to the states, coupled with the difficulty faced by judges of divining rules or standards adequate to distinguish a judicial decision involving issues of partisanship

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<sup>88</sup> *Session*, 298 F.Supp.2d at 457.

<sup>89</sup> *Id.* See also *Id.* at 515-517 (Ward, J., concurring in part, dissenting in part) (stating that while he agreed with the court's dismissal of the political gerrymandering claims, the “state action in this case unlawfully dilutes the strength of the Latino voters residing in former District 23.”)

<sup>90</sup> *Session*, 398 F.Supp.2d 451, vacated and remanded 543 U.S. 941 (2004).

<sup>91</sup> *Henderson v. Perry*, 399 F.Supp.2d 756, 758 (E.D. Tex. 2004) (holding, “[u]ltimately, we adhere to our earlier judgment that there is no basis for us to declare the plan invalid.”).

<sup>92</sup> *Henderson*, 399 F.Supp.2d at 760. The *Henderson* court also stated, “[t]he most recent chapter in this history of partisan influence upon the drawing of legislative districts involves the federal judiciary's effort to play the role it claimed for itself in *Davis v. Bandemer*. Judicial reluctance to surrender this role is understandable....At bottom is a concern that the power to draw lines is inadequately checked, an implicit accusation that the political process is inadequate to the task.” *Id.* at 760-761.

<sup>93</sup> U.S. Const. art. I, § 4. *Id.* at 761.

in redistricting from a legislative act, has to date left the courts in the indefensible position of undertaking a task they cannot perform.”<sup>94</sup> In other words, the lack of standards with which to adjudicate such claims has rendered judicial review nearly impossible.

Second, the court explicitly expressed its frustration with the Supreme Court’s lack of guidance on the proper way to adjudicate political gerrymandering claims. The court observed that the Supreme Court could, “make an honest case of *Bandemer* by either setting a standard or concluding that the issue was not justiciable.”<sup>95</sup> By refusing to enunciate a standard with which such claims can be adjudicated, the Supreme Court has left the lower courts confused about how to adjudicate such claims and, consequently, a vast majority of all cases have declined to strike down redistricting plans as an illegal partisan gerrymander.<sup>96</sup> Furthermore, the court stated that it “remain[ed] wary of employing metrics to determine how much is too much partisan motive or effect in redistricting.”<sup>97</sup>

After making these opening observations, the *Henderson* court again reviewed the record, pursuant to the remand, to determine, in light of *Vieth*, whether a “workable standard” with which to adjudicate political gerrymandering claims has emerged in this case.<sup>98</sup> First, the plaintiffs contended that sorting voters for the sole purpose of gaining partisan advantage can serve no rational or legitimate purpose. This approach focuses solely on “voluntary” legislative redistricting—where the legislature purports to replace a valid extant plan.<sup>99</sup> When the legislature acts voluntarily to replace a valid plan, the plaintiffs’ argue, the sole motivation of the legislature is for partisan gain. The approach would tolerate involuntary redistricting because efforts to gain a partisan advantage do not constitute the sole reason for the undertaking. The court flatly rejected these arguments: “[t]he fact that the Texas legislature’s redistricting plan replaced the court-drawn plan put into place after the 2000

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<sup>94</sup> *Henderson*, 399 F.Supp.2d at 761.

<sup>95</sup> *Id.* at 762.

<sup>96</sup> *Id.* at 761. See generally, *O’Lear v. Miller*, 222 F.Supp.2d 850 (E.D. Mich); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp 1022 (D. Md. 1994); *Terrazas v. Slangle*, 821 F.Supp 1162 (W.D. Tex. 1993); *Pope v. Blue*, 809 F.Supp. 392 (W.D. N.C. 1992).

<sup>97</sup> *Henderson*, 399 F.Supp.2d at 372.

<sup>98</sup> *Id.* (“We can only fairly read the remand to suggest that the Justice providing the fifth vote sees the possibility of a workable standard emerging from this case, the rejected allegations of the complaint in *Vieth* aside.”).

<sup>99</sup>

census does not make the legislative plan invalid in light of *Vieth* because it was “solely” motivated by political motivation. . . . [t]he *Vieth* plurality rejected the “sole” motivation test as a basis for measuring when partisan influences on redistricting are impermissibly excessive. Although *Vieth* did not involve mid-cycle redistricting to replace an existing plan, there is no constitutional or statutory prohibition on mid-decade redistricting.”<sup>100</sup> Furthermore, the approach advocated by the plaintiffs, that redistricting mid-decade is per se unconstitutional, is insufficient because it discounts the possibility that “there may be rational justifications for attempting to redistrict.”<sup>101</sup> For example, the court noted that “it is not clear that acting to *undo* a perceived disadvantage imposed previously by an opposing party is irrational in the sense that it admits of no salutary or constitutionally acceptable result.”<sup>102</sup> In 1991, the Democratically controlled state legislature enacted a map cited as “an extreme example of what one party can do in drawing a redistricting map to the detriment of another.”<sup>103</sup> As the *Henderson* court then pointed out, the 2001 court drawn map “perpetuated much of this [Democratic party] gerrymander” and the practical effect of the court’s effort was to leave the 1991 Democratic Party gerrymander largely in place.<sup>104</sup> For these reasons, the court found that the plaintiff’s contentions on remand are “conspicuous for want of any measure of substantive fairness, on that can sort plans as ‘fair or unfair’ by something other than a judge’s vision of how the judiciary ought to work. . . .”<sup>105</sup> Accordingly, the *Henderson* court rejected the claims of the plaintiffs.

After the *Henderson* court rejected the plaintiff’s political gerrymandering claims, the plaintiff’s appealed the decision to the United States Supreme Court. The appellants in LULAC contend that the 2003 Redistricting plan is an unconstitutional partisan gerrymander. First, the appellants’ implicitly argue that an equal protection challenge to a political gerrymander does present a justiciable case or controversy.<sup>106</sup> Furthermore,

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<sup>100</sup> *Id.* at 766.

<sup>101</sup> *Id.* at 767.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 767.

<sup>104</sup> *Id.* at 768.

<sup>105</sup> *Id.* at 770.

<sup>106</sup> *League of United Latin American Citizens v. Perry* 126 S.Ct. 2594, 2607 (2006). I say “implicitly” because, while a plurality in *Vieth* held that such claims are nonjusticiable, Justice Kennedy, along with 4 other members of the Court, disagreed with the plurality’s logic. Appellants do not argue justiciability at the Supreme Court, thus they assume that such cases are

they advocate two separate theories/standards with which to adjudicate political gerrymandering claims. First, the appellants claim that a decision to effect mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection and the First Amendment because it serves no legitimate purpose and burdens one group because of its political opinions and affiliation.<sup>107</sup> Second, the appellants' argue that mid-decade redistricting for exclusively partisan purposes violates the one-person, one-vote requirement.<sup>108</sup> Along with the appellants' theories, some of the *amici* advocate a "symmetry" standard to measure partisan bias. The United States granted certiorari to determine the validity of the appellants political gerrymandering claims.

Justiciability, Take Three:

Whether political gerrymandering claims present a justiciable case or controversy or a non-justiciable political question has been a source of controversy for years. As discussed in Part II.B., in *Bandemer v. Davis*, six members of the Supreme Court held that claims of political gerrymandering are properly justiciable under the Equal Protection Clause.<sup>109</sup> However, the Court failed to enunciate clear standards with which such claims could be properly adjudicated by lower courts.<sup>110</sup> Accordingly, "*Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress."<sup>111</sup> In 2004, the Court again had the opportunity to address whether or not political gerrymandering claims present a justiciable case or controversy. In *Vieth v. Jubelirer*, a plurality of the Supreme Court held that since there are "no judicially discernable and manageable standards for adjudicating political gerrymandering claims, political gerrymandering claims are nonjusticiable and. . .*Bandemer* was wrongly decided."<sup>112</sup> However, a majority of the court, led by Justice Kennedy, refused to expressly overrule *Bandemer*.<sup>113</sup> Accordingly, *Vieth* failed to unequivocally address whether or not such claims present a justiciable controversy.

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justiciable even though there is vigorous disagreement over that issue. *Id.* at 2607; *See also Id.* at 2652 (Roberts, J. concurring in part, dissenting in part).

<sup>107</sup> *Id.* at 2609.

<sup>108</sup> *Id.* at 2611.

<sup>109</sup> *Davis v. Bandemer*, 478 U.S. 109, 123 (1986).

<sup>110</sup> *Vieth v. Jubelirer* 541 U.S. 267, 279 (2004).

<sup>111</sup> *Id.* at 279, 282, 284.

<sup>112</sup> *Id.* at 281 (Scalia, J., joined by Justices Rehnquist, O'Connor, and Thomas).

<sup>113</sup> *Id.* at 306 (Kennedy, J., concurring).

In *League of United Latin American Citizens v. Perry*, the Court was once again presented with the opportunity to determine whether political gerrymandering claims present a justiciable case or controversy. However, while acknowledging that the justiciability of political gerrymandering claims has produced disagreement, Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, chose not to revisit the justiciability issue.<sup>114</sup> This decision seems to have been motivated, at least in part, by the fact that the issue was not argued in this case and a majority of the Court has never held that such claims present a nonjusticiable political question.<sup>115</sup> Instead, they decided to examine whether the appellants' offer the court a manageable measure of fairness with which to adjudicate partisan gerrymander claims.<sup>116</sup> The Court, however, was not unanimous in this respect. The new members of the Court, Chief Justice Roberts and Justice Alito, did not take a position on whether or not a challenge to a political gerrymander presents a justiciable case or controversy because "it [had] not been argued in these cases."<sup>117</sup> Accordingly, their position on the issue of justiciability is not entirely clear. Justice's Scalia and Thomas' position, on the other hand, is crystal clear. Consistent with their position in *Vieth*, both would have held that "claims of unconstitutional political gerrymandering do not present a justiciable case or controversy."<sup>118</sup> Justice Scalia sharply criticized Justice Kennedy's opinion for concluding that the appellants' "failed to state a claim" because he never articulated what the elements of such a claim consist of.<sup>119</sup> In his view, this "was not an available disposition on appeal" and the Court should either conclude that the claim is non-justiciable and dismiss it, or else promulgate a standard and measure appellant's claim against it.<sup>120</sup> As has been noted by a sundry of lower courts since the *Bandemer* decision was first decided, the Court again disposed of the appellants' claim in a way that "provides no guidance to lower court judges and perpetuates a cause of action with no discernable

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<sup>114</sup> *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2607 (2006); *see also Vieth*, 541 U.S. at 281; *Bandemer*, 478 U.S. at 123.

<sup>115</sup> *Perry*, 126 S.Ct. at 2607.

<sup>116</sup> *Id.* *But see id.* at 2647 (Souter, J., concurring in part, dissenting in part) (Justice Souter, with whom Justice Ginsberg joined, sees "nothing to be gained by working through these cases.").

<sup>117</sup> *Id.* at 2652 (Roberts, C.J., concurring in part, dissenting in part).

<sup>118</sup> *Id.* at 2663 (Scalia, J., concurring in part and dissenting in part).

<sup>119</sup> *Id.* at 2663 (Scalia, J., concurring in part, dissenting in part).

<sup>120</sup> *Id.*



content.”<sup>121</sup> Accordingly, *Perry* did little to change the result reached in *Vieth*: five members of the Court still hold that political gerrymandering claims present a justiciable case or controversy. After implicitly holding that political gerrymandering claims are justiciable, Justice Kennedy and other members of the Court proceeded to examine whether appellants’ claims offer the Court a “manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”<sup>122</sup>

The Evolution of a ‘Manageable, Reliable Measure of Fairness’?

Introduction:

Five members of the Supreme Court have never agreed on a “manageable, reliable measure of fairness” with which to adjudicate political gerrymandering claims.<sup>123</sup> As previously discussed, a plurality of the Court in *Vieth*, led by Justice Scalia, held the *Bandemer* intent and effects test was unworkable and that no judicially manageable and workable standards for adjudicating political gerrymandering claims have ever emerged.<sup>124</sup> Consequently, the judiciary should not adjudicate such disputes and should leave such disputes to the other branches of government.<sup>125</sup> Another plurality of the Court, Justices Stephens, Breyer, Ginsburg, and Souter, held that such claims are justiciable, but they could not agree on a single workable standard with which to adjudicate them.<sup>126</sup> Justice Kennedy, the deciding fifth vote, concurred in the judgment with Justice Scalia and the plurality, but was extremely reticent to overrule

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 2607 (Justice Kennedy delivered the opinion of the Court, but his analysis of the Appellants’ claims was not joined by any other members of the Court.

<sup>123</sup> See discussion *Infra* Part II. See generally *Bandemer v. Davis*, 478 U.S. 109 (1986); *Vieth*, 541 U.S. 267 (2004).

<sup>124</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004) (“Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application.”). “The lower courts were set wandering in the wilderness for 18 years not because the *Bandemer* majority thought it was a good idea, but because five justices could not agree upon a single standard, and because the standard the plurality proposed turned out not to work.” *Id.* at 303.

<sup>125</sup> *Id.* at 306, 275. The Court stated that “[i]t is significant that the Framers provided a remedy for such practices in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to ‘make or alter’ those districts if it wished.”

<sup>126</sup> *Id.* at 292 (“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 discernable standard.”).

*Bandemer*. In his concurrence, Justice Kennedy wrote, “[t]here are . . . weighty arguments for holding cases like these to be non-judicial; and those arguments may prevail in the long run. In my view, however, the arguments are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander.”<sup>127</sup> Kennedy continued, “[i]f workable standards do emerge to measure these burdens, however, the courts should be prepared to order relief.”<sup>128</sup> In other words, Justice Kennedy has adopted a “wait and see” approach—namely, that such claims are presently non-justiciable, but a standard might evolve in the future which will enable the Courts to adjudicate the disputes. Accordingly, as the *Henderson* court eloquently explained, the “light offered by *Vieth* is dim.” It merely stands for the proposition that five members of the Court are willing to adjudicate such claims, even though they can’t agree on a particular standard.<sup>129</sup> Since Justice Kennedy is the pivotal fifth and deciding vote, *Vieth* suggests that it is up to him to determine if and when an acceptable standard emerges.<sup>130</sup> *Perry* provided such an opportunity. As discussed in Part IV. A., appellants, and the *amici*, proffer three standards which they believe are manageable, reliable standards of fairness with which to adjudicate political gerrymandering claims. I will address the Court’s resolution of these two claims in turn.

Mid-Decade Redistricting is Per-Se Unconstitutional:

Justice Kennedy’s Take:

Justice Kennedy, writing for himself, addressed the appellants’ first political gerrymander theory. Appellants’ claim that a decision to effect mid-decennial redistricting, when solely motivated by partisan objectives, violates the equal protection clause and First Amendment because it serves no legitimate purpose and burdens one group because of their associational

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<sup>127</sup> *Id.* at 310 (Kennedy, J., concurring).

<sup>128</sup> *Id.* at 317 (Kennedy, J., concurring).

<sup>129</sup> *Id.* at 301. However, as Justice Scalia eloquently and emphatically points out, the “wait and see” option argued by Justice Kennedy is “not legally available.” *Id.* “[i]t 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.” *Id.* (emphasis in original). “We must either enunciate the standard that causes us to agree or disagree with that merits judgment, or else affirms that the claim is beyond our competence to adjudicate.” *Id.* at 304.

<sup>130</sup> This is necessarily so because Justice Kennedy is the only member of the Court who has not conclusively decided whether a standard exists or whether one does not. In other words, Justice Kennedy is the “swing vote.”

beliefs.<sup>131</sup> The “mid-decennial” nature of the redistricting differentiates *Perry* from *Vieth* because the Pennsylvania legislature acted in the context of a required decennial redistricting, whereas the Texas Legislature voluntarily replaced a valid, court drawn plan.<sup>132</sup> Because Texas had no constitutional obligation to act, there is little question that the sole purpose of the legislature was to gain a partisan advantage.<sup>133</sup> Accordingly, the appellants’ advocate a presumption of invalidity when a mid-decade plan is adopted solely for partisan motivations, thus “the courts need not inquire about, nor the parties prove, the discriminatory effects of partisan gerrymandering.”<sup>134</sup> While Justice Kennedy acknowledges the conceptual simplicity of the appellants’ proposed test, he finds the appellants’ case for adopting the test unconvincing.

First, Justice Kennedy addressed appellants’ argument that the legislature’s “sole motivation” was for partisan gain. While the legislature “does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority,” partisan aims did not guide every line it drew.<sup>135</sup> The contours of some district lines were based on more mundane and local interest and a number of the line-drawing requests by Democratic state legislators were honored.<sup>136</sup> Furthermore, as the Court has acknowledged, “[e]valuating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous, even when the actor is an individual performing a discrete act. When the actor is a legislature and the act is a composite of manifold choices, the task can be even more daunting.”<sup>137</sup> Accordingly, appellants’ proposed “presumption of invalidity” falls short because partisan gain is not necessarily the “sole intent” of the legislature.

Second, even if partisan gain was the “sole motivation” for the decision to replace the court-drawn map, Justice Kennedy held that a successful claim attempting to identify unconstitutional acts of partisan gerrymander must “show a burden, as measured by a reliable standard, on the complainants’ representational rights.”<sup>138</sup> Because, just as Justice Stevens

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<sup>131</sup> *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2609 (2006).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*; see also *Session v. Perry*, 298 F.Supp.2d 451, 472–73 (E.D. Tex. 2004).

<sup>137</sup> *Id.* (citing *Hartman v. Moore*, 126 S.Ct. 1695, 1703–1704 (2006)).

<sup>138</sup> *Id.* at 2610 (“Even setting this skepticism aside, a successful claim attempting to identify

held in his dissent in *Vieth*, “just as race can be a factor in, but cannot dictate the outcome of, the districting process, so too can partisanship be a permissible consideration in drawing district lines. . . .”<sup>139</sup> To prevail, the appellants must proffer a standard which would identify how much partisan motivation is “too much.” Under this line of thought, Justice Kennedy found that appellants’ theory failed for three main reasons. First, notwithstanding the appellants’ arguments to the contrary, the sole-intent standard is no more compelling simply because it is a “mid-decade” redistricting plan.<sup>140</sup> Justice Kennedy emphasized that neither the Constitution nor the Court’s case law indicate that there is anything “inherently suspect about a legislature’s decision to replace mid-decade a court ordered plan with one of it’s own.”<sup>141</sup> Because the Constitution vests redistricting responsibilities primarily with the state legislatures and Congress, a legislatively enacted plan should be preferable to one drawn by the courts.<sup>142</sup> Second, Justice Kennedy stated that the imposition of such a rule providing for presumptive invalidity of mid-decade plans would be inherently irrational. Appellants’ theory would allow a highly effective partisan gerrymander that coincided with decennial redistricting to receive less scrutiny than a solely partisan, mid-decade plan. Accordingly, “[a] test that treats these two similarly effective power plays in such different ways does not have the reliability that appellants ascribe to it.”<sup>143</sup> Furthermore, one deleterious effect of appellants’ plan could be to encourage partisan excess at the outset of the decade.<sup>144</sup> If mid-decade redistricting was severely restricted, opposition legislators would have every incentive to prevent passage of a plan and try their luck with a court.<sup>145</sup> Finally, Plan 1374C is markedly different and fairer than the one challenged in *Vieth* because it resulted in a party balance “more congruent to statewide party

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unconstitutional partisan gerrymandering must do what appellants’ sole motivation theory expressly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights.”)

<sup>139</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 336 (2004) (Stevens, J., dissenting).

<sup>140</sup> *Perry*, 126 S.Ct. at 2610.

<sup>141</sup> *Id.* As Kennedy stated earlier in his opinion, “to prefer a court-drawn plan to a legislature’s replacement would be contrary to the ordinary and proper operation of the political process.” *Id.* at 2608–2609.

<sup>142</sup> *Id.* at 2608.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 2611.

<sup>145</sup> *Id.*

power.”<sup>146</sup> Justice Kennedy stated that “a congressional plan that more closely reflects the distribution of state party power seems less likely a vehicle for partisan discrimination than one that entrenches an electoral minority.”<sup>147</sup> For all these reasons, Justice Kennedy came to the conclusion that the “sole-intent” test advocated by the appellants did not demonstrate a burden, measured by a reliable standard, on their representational rights.

Justice Stevens and Breyer:

Justices Stevens and Breyer disagreed with Justice Kennedy’s cursory rejection of the appellants’ claims. First, Justice Stevens argues that the United States Constitution protects citizens from discrimination based upon political affiliation and the “singular intent to maximize partisan advantage” is, in itself, an improper criterion. Second, he argues that the presence of midcycle redistricting, for any reason, raises a fair inference that partisan objectives played a major role in the process and that identifying this motive is a readily manageable judicial task. Finally, even if a singular intent to maximize partisan advantage is insufficient, as Justice Kennedy concludes, Plan 1374C did burden the complainants’ representational rights. Consequently, they would hold that Plan 1374C, in its entirety, violated the equal protection clause and would have directed the district court to reinstate the court-drawn map.<sup>148</sup>

Justice Stevens first establishes that a “singular intent to maximize partisan advantage” does violate the United States Constitution. The First Amendment’s protection of citizens from official retaliation based on political affiliation and the Fourteenth Amendment’s prohibition against invidious discrimination limit the State’s power to rely exclusively on partisan preferences in drawing district lines.<sup>149</sup> Any decision to redraw district boundaries, like any other state action that affects the electoral process, must serve some legitimate governmental purpose.<sup>150</sup> Consequently, a purely partisan desire to minimize or cancel out the voting strength of political elements of the voting population serves no such purpose, thus violating the Constitutional obligation to govern impartially.<sup>151</sup> If the sole intent of the Texas Legislature was to “minimize

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<sup>146</sup> *Id.* at 2610.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2626 (Stevens, J. concurring in part, dissenting in part); *Id.* at 2652 (Breyer, J., concurring in part, dissenting in part).

<sup>149</sup> *Id.* at 2634.

<sup>150</sup> *Id.* at 2627.

<sup>151</sup> *Id.* Justice Stevens does admit, however, that “legislatures will always be aware of politics

the strength of Texas Democrats,” Justice Stevens argues, then the plan cannot withstand constitutional scrutiny.<sup>152</sup>

With these broad principles in mind, Justice Stevens focuses on whether it is possible to determine the “sole intent” of the Texas Legislature in enacting the plan.<sup>153</sup> This issue, Justice Stevens argues, is quite different from the one encountered in *Vieth*. In *Vieth* the plaintiffs challenged a statewide plan that was promulgated in response to a legal obligation to redistrict (involuntary redistricting). In that context, there are a multitude of “granular” decisions that are made during redistricting and, consequently, there were no manageable standards to govern whether the predominant motivation underlying the entire map was solely political.<sup>154</sup> In *Perry*, on the other hand, the Texas Legislature was under no legal compulsion to enact a plan.<sup>155</sup> Although Justice Stevens agreed with Justice Kennedy that “the Constitution places no *per se* ban on midcycle redistricting,” he argues that a legislature’s voluntary decision to do so makes the judicial task of identifying the legislature’s motive easier than it would otherwise be.<sup>156</sup> Furthermore, he argues that “[i]t is undeniable that identifying the motive for making that basic decision is a readily manageable task.”<sup>157</sup>

After concluding that ascertaining the legislature’s motive in enacting a mid-decennial plan is a “readily manageable task,” Justice Stevens examined the record and concludes that the sole intent of the legislature was to gain a partisan advantage. First, he notes that the District Court unambiguously found that the sole purpose behind the enactment of Plan 1374C was a desire to maximize partisan advantage.<sup>158</sup> Second, he states that “it is perfectly clear that there is more than ample evidence to support such a finding.”<sup>159</sup> While Justice Kennedy states that other mundane

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and that we must tolerate some consideration of political goals in the redistricting process.” *Id.* at 2641–2642. However, when it is shown that the legislature’s predominant motive in drawing district lines was to disadvantage a particular political group, that political group’s constitutional rights have been violated. *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 2631.

<sup>154</sup> *Id.* at 2632.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 399, 341 (1960)).

<sup>158</sup> *Id.*; see also *Session v. Perry*, 298 F.Supp.2d at 472.

<sup>159</sup> *Id.* (stating “[t]his evidence includes: (1) testimony from state legislators; (2) procedural irregularities described above that accompanied the adoption of Plan 1374C, including the targeted abolition of the long standing two-thirds rule, designed to protect the rights of the

interests played a part in the redistricting, Justice Stevens holds that these facts “are not relevant” because of the partisan objective in adopting the plan in the first place.<sup>160</sup> Finally, even the State itself has conceded that “[t]he overwhelming evidence demonstrated that partisan gain was the motivating force behind the decision to redistrict in 2003.”<sup>161</sup> Accordingly, the record, in Justices Stevens and Breyer’s opinion, clearly establishes a purely partisan objective for the adoption of the plan. Since the record establishes a “purely partisan objective” in enacting Plan 1374C, there is no need to discuss standards that would guide Justices to determine how much partisan influence is too much—“deciding that 100% is too much is not only a manageable decision, but. . .an obviously correct one.”<sup>162</sup> Justice Stevens then concludes that the plan violates the equal protection clause of the Fourteenth Amendment as an unconstitutional partisan gerrymander.

After espousing his view that the plan was solely partisan motivated and should be held unconstitutional, Justice Stevens responded to Justice Kennedy’s argument that “even if legislation was enacted based solely on a desire to harm a politically unpopular minority, this fact is insufficient. . .absent proof that the legislation did in fact burden the ‘complainants’ representative rights.”<sup>163</sup> In this case, Justice Stevens argues that the record supports the conclusion that Plan 1374C imposes a severe statewide burden on the ability of Democratic voters to influence the political process.<sup>164</sup> First, Justice Stevens argues that Plan 1374C has a “discriminatory effect in terms of the opportunities it offers the two principal political parties in Texas.”<sup>165</sup> Using the symmetry standard rejected by Justice Kennedy, Justice Stevens shows that Republicans would have an advantage in a significant majority of seats even if the statewide

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minority party, in the Texas Senate; (3) Plan 1374C’s significant departures from the neutral districting criteria of compactness and respect for county lines; (4) the plan’s excessive deviations from prior districts, which interfere with the development of strong relationships between Members of Congress and their constituents; and (5) the plain’s failure to comply with the Voting Rights Act.” *Id.*

<sup>160</sup> *Id.* at 2633 n.3.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 2633 n. 4.

<sup>163</sup> *Id.* at 2635. While Justice Stevens responded to this “additional requirement” imposed by Justice Kennedy, he does not agree that it is necessary to prove a unconstitutional partisan gerrymander. *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 2336.

vote were equally distributed between Republicans and Democrats.<sup>166</sup> Thus, it demonstrates that Plan 1374C is inconsistent with the symmetry standard, “a measure social scientists use to assess partisan bias. . .”<sup>167</sup> Furthermore, even though Justice Kennedy faults the standard for failing to provide how much partisan bias is too much, Stevens argues that it would be an eminently manageable standard for the Court to conclude that deviations over 10% from symmetry create a prima facie case of an unconstitutional gerrymander.<sup>168</sup> Or, alternatively, the Court could conclude that “a significant departure from symmetry is one relevant factor in analyzing whether, under the totality of the circumstances, a districting plan is an unconstitutional partisan gerrymander.”<sup>169</sup> Second, Justice Stevens argues that Plan 1374C lessens the influence Democratic voters are likely to be able to exert over Republican lawmakers.<sup>170</sup> In establishing this fact, he notes that “[w]hen a district is obviously created solely to effectuate the perceived common interests of one [political] group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.”<sup>171</sup> Consequently, the plan reduces the likelihood that Republican representatives elected from these districts will act vigorously for the rights of Democratic voters that reside in the district.<sup>172</sup> Finally, Justice Stevens states that the cumulative effect of the gerrymander will make it more difficult for Democrats to recruit strong candidates and mobilize voters.<sup>173</sup> For all of these reasons, Stevens concludes that, in terms of both its intent and effect, Plan 1374C violates the “sovereign’s duty to govern impartially” and constitutes an unconstitutional partisan gerrymander.<sup>174</sup>

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<sup>166</sup> *Id.* at 2637.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 2638 n.9.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 2639.

<sup>171</sup> *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

<sup>172</sup> *Id.* Justice Stevens explains, “[b]y creating 19-22 safe Republican seats, Plan 1374C has already harmed Democrats because, as explained above, it significantly undermines the likelihood that Republican lawmakers from those districts will be responsive to the interests of their Democratic constituents.” *Id.* at 2640.

<sup>173</sup> *Id.* at 2640.

<sup>174</sup> *Id.* at 2641. However, it is worth noting that Justice Stevens laid out 8 objective factors that could be used to evaluate whether a particular redistricting plan is an unconstitutional political gerrymander: (1) the number of people who have been moved from one district to another, (2) the number of districts that are less compact than their predecessors, (3) the degree to which the new



Justice Souter and Ginsberg:

Justice Souter, with whom Justice Ginsberg joined, concurred in part and dissented in part. First, Justice Souter joined Justice Kennedy in rejecting the appellants' "one person, one-vote" challenge to Plan 1374C based solely on the mid-decade timing and in "preserving the principal that partisan gerrymandering can be recognized as a violation of equal protection."<sup>175</sup> However, Justice Souter did not agree with Justice Kennedy's examination of the appellants' claims. He sees "nothing to be gained by working through these cases on the standard [he] would have applied in *Vieth*, because here, as in *Vieth*, we have no majority for any single criterion of impermissible gerrymander."<sup>176</sup> While this statement is certainly an accurate representation of the Court's current status, it is unexpected because Justice Souter, less than two years ago, advocated a "fresh start" by proposing a standard loosely based on the Court's Title VII jurisprudence.<sup>177</sup> Apparently, Justice Souter has abandoned this "fresh start" and now realizes that the Court, for the time-being, is hopelessly deadlocked on the issue. Until a consensus can be reached, Justice Souter would treat the "broad issue of gerrymander" like an improvident grant of certiorari.<sup>178</sup> In closing, he adds two thoughts for the future. First, he does not share Justice Kennedy's "seemingly flat rejection of any test of

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plan departs from other neutral districting criteria, including respect for communities of interest and compliance with the Voting Rights Act; (4) the number of districts that have been cracked in a manner that weakens an opposition party incumbent; (5) the number of districts that include two incumbents from the opposite party (6) whether the adoption of the plan gave the opposition party, and other groups, a fair opportunity to have input into the redistricting process; (7) the number of seats that are likely to be safe seats for the dominant party; and (8) the size of the departure in the new plan from the symmetry standard. *Id.* at 2641 n. 11. It is also interesting to note that even if Justice Stevens did not hold that Plan 1374C was unconstitutional in its entirety, he would still hold that the "cracking of District 24..." was unconstitutional. *Id.* at 2641 (Stevens, J., concurring in part, dissenting in part).

<sup>175</sup> *Id.* at 2647.

<sup>176</sup> *Id.*

<sup>177</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 346 (2004) (Souter, J., dissenting) (holding, "I would therefore preserve *Davis's* holding that political gerrymandering is a justiciable issue, but otherwise start anew. I would adopt a political gerrymandering test analogous to the summary judgment standard created in *McDonnell Douglas Corp. v. Green*, calling for a plaintiff to satisfy elements of a prima facie cause of action, at which point the State would have the opportunity not only to rebut the evidence supporting the plaintiff's case, but to offer an affirmative justification for the districting choices, even assuming the proof of the plaintiff's allegations."); *see also id.* at 295.

<sup>178</sup> *Perry*, 126 S.Ct. at 2467.

gerrymander turning on the process followed in redistricting.” While Justice Souter does not elaborate, implicit in this statement is a hope that some standard will evolve which will enable to Court to determine the validity of a partisan gerrymander by evaluating the process that a legislature follows. Second, he disagrees with Justice Kennedy’s seemingly rigid rejection of the symmetry test and refuses to “rule out the utility of a criterion of symmetry as a test” because “interest in exploring this notion is evident.”<sup>179</sup> In this respect, Justice Souter implicitly agrees with Justice Steven’s assessment of the symmetry test’s utility as a factor to be considered in determining whether a plan constitutes an partisan gerrymander. Justice Souter, much like Kennedy, still holds out hope that some standard will evolve and the Court will eventually reach consensus on the issue. In that respect, there now seems to be three members of the Court who take a “wait and see” approach to unconstitutional political gerrymanders.

Symmetry Standard as a Measure for Partisan Bias:

One of the *amici* proposed a symmetry standard that “would measure partisan bias by compare[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote.”<sup>180</sup> Under this theory, the measure of a map’s bias is the extent to which a majority party would fare better than the minority party should their respective share of the vote reverse.<sup>181</sup> Justice Kennedy held that the symmetry standard fails to enunciate a clear and reliable measure of fairness. He wrote, “[e]ven assuming a court could chose reliably among different models of voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.”<sup>182</sup> Fundamentally, he wrote, the proposed standard fails to provide a standard for deciding how much partisan dominance is too much.<sup>183</sup> However, while Justice Kennedy expressed skepticism about this standard, he did not rule out its use “as a factor” in measuring unconstitutional partisanship.<sup>184</sup> He simply held that the “asymmetry standard alone is not a reliable measure.”<sup>185</sup>

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 2610; *see also Id.* at 2637 (Stevens, J., concurring in part, dissenting in part).

<sup>181</sup> *Id.* at 2610.

<sup>182</sup> *Id.* at 2611.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

As explained above, not all of the Justices agree that the symmetry standard lacks utility in determining whether a redistricting plan constitutes an unconstitutional political gerrymander. Justice Stevens, writing for himself, argues that the symmetry standard does provide a clear and reliable measure of fairness. He notes that the symmetry standard is “widely accepted by scholars as providing a measure of partisan fairness in electoral systems.”<sup>186</sup> Therefore, it would be an “eminently manageable standard for the Court to conclude that deviations of over 10% from the symmetry standard create a prima facie case for an unconstitutional gerrymander.”<sup>187</sup> Alternatively, the Court could even conclude that a significant departure from symmetry is one relevant factor in determining whether a districting plan is an unconstitutional political gerrymander.<sup>188</sup> Justice Souter, with whom Justice Ginsburg joined, also disagreed with Justice Kennedy’s seemingly inflexible rejection of the symmetry theory and refused to “rule out the utility of a criterion of symmetry as a test.”<sup>189</sup> Accordingly, while the utility of the symmetry test is unclear, several members of the Court seem ready to utilize it in the future.

Mid-Decade Redistricting for Purely Partisan Purposes is a violation of the one-person, one vote requirement:

The appellants second main theory is that mid-decade redistricting for exclusively partisan purposes violates the “one-person, one vote” requirement.<sup>190</sup> They argue that population variances in legislative districts are tolerated only if they are unavoidable. Because the population of Texas has shifted from the 2000 census, the 2003 redistricting, which relied on that census, created unlawful interdistrict variances.<sup>191</sup> However, the appellants argument was flatly rejected by Justice Kennedy, and two other members of the Court who joined his opinion. Justice Kennedy noted that the appellants concede, as they must, that states operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, thus avoiding the necessity of constant redistricting.<sup>192</sup> However, appellants argue that that fiction should not apply to a plan that a legislature voluntarily enacts mid-decade, because the legislature “unnecessarily

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<sup>186</sup> *Id.* at 2637 (Stevens, J., concurring in part, dissenting in part).

<sup>187</sup> *Id.* at 2638 n. 9.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 2647 (Souter, J., concurring in part, dissenting in part).

<sup>190</sup> *Id.* at 2611.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

creates a population variance when there was no legal compulsion.”<sup>193</sup> Justice Kennedy held, as the district court noted, that this is a test that “turns on the justification for redrawing a plan in the first place.”<sup>194</sup> Accordingly, it merely restates whether it was permissible for the legislature to redraw the districting map and, thus, is unsatisfactory for the reasons that the Court already stated.

Impact of *Perry* on the Future of the Political Gerrymander:

*League of United Latin American Citizens v. Perry* does little to clear up the ambiguities surrounding the future political gerrymandering claims. While the Court was presented with a unique opportunity to clear up confusion generated by prior cases and provide better guidance to lower courts, *Perry* does neither. It does not provide a concrete answer on the justiciability question nor does it promulgate a workable or discernable standard to guide lower courts in their resolution of such claims. At best, it is yet another illustration of how complex the issue is and how divided the Court is on the issue. What *Perry* does do, however, is provide us with some indication of how the Court’s jurisprudence has evolved and where it might end up in the future. First, *Perry* unambiguously stands for the proposition that at least five members of the Court are ready and willing to adjudicate such claims. Justices Kennedy, Stevens, Souter, Ginsberg and Breyer, while acknowledging that “disagreement persists” on the issue of justiciability, agree that the *Bandemer* decision should be upheld.<sup>195</sup> Chief Justice Roberts and Justice Alito, the two newest members of the Court, declined to express their opinion on whether or not such issues are justiciable.<sup>196</sup> Therefore, it is altogether possible, but unlikely given both Justices’ conservative leanings, that there are 7 members of the Court that would hold, in a future case, that claims of political gerrymandering present a justiciable case or controversy. Justices Scalia and Thomas, consistent with their position in *Vieth* and the dissenting opinions in *Bandemer*, believe that issues of political gerrymandering are nonjusticiable political questions.<sup>197</sup> Consequently, it is unlikely that the Court will overrule *Bandemer* in the near future and political gerrymandering claims will, at least theoretically, remain justiciable. Second, *Perry* reinforces what has

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<sup>193</sup> *Id.* at 2611–2612.

<sup>194</sup> *Id.* at 2612.

<sup>195</sup> *Id.* at 2607.

<sup>196</sup> *Id.* at 2652 (Roberts, C.J., concurring in part, dissenting in part).

<sup>197</sup> *Id.* at 2663 (Scalia, J., concurring in part, dissenting in part).

been evident since *Bandemer*: the Court is still unable to agree on a set of acceptable standards with which to adjudicate political gerrymandering claims. Only two members of the Court, Justices Stevens and Breyer, hold that Plan 1374C violated the equal protection clause.<sup>198</sup> Justice Kennedy, the pivotal vote in *Vieth*, rejected the appellants' theories and is apparently still searching for a standard.<sup>199</sup> Justices Souter and Ginsberg, in a somewhat surprising announcement, believe that there is "nothing to be gained by working through these cases" because the court is so divided on the issue.<sup>200</sup> Instead, they seem to adopt the "wait and see" approach advocated by Justice Kennedy.<sup>201</sup> If that is a correct characterization, then there are now three members of the Court who presently see no manageable standard, but hold out hope that one will evolve in the future. Justices Roberts and Alito express very little, except that they agree with Justice Kennedy's determination that the appellants' have not provided the Court with a manageable standard.<sup>202</sup> Lacking any consensus on the issue, it is unlikely that the Court will take up another political gerrymandering claim any time soon. Furthermore, it is also unlikely that lower appellate Courts will successfully adjudicate political gerrymandering claims because there is still no standard promulgated by the Supreme Court which will give them guidance in doing so. Until the Supreme Court promulgates a standard or adopts one, it is likely that political gerrymandering claims will be as futile as they were before *Perry*. Finally, the opinions in *Perry* suggest that there is nothing inherently suspect about mid-decennial redistricting. Justice Kennedy expresses states as much in his opinion and Justices Roberts, Alito, Scalia, Thomas, Souter and Ginsberg impliedly do as well. Consequently, more state legislatures might attempt a Texas-style redistricting.

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<sup>198</sup> *Id.* at 2626 (Stevens, J., concurring in part, dissenting in part); *Id.* at 2652 (Breyer, J., concurring in part, dissenting in part).

<sup>199</sup> *Id.* at 2612.

<sup>200</sup> *Id.* at 2647 (Souter, J., concurring in part, dissenting in part).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 2652 (Roberts, C.J., concurring in part, dissenting in part). Chief Justice Roberts and Justice Alito do not join Kennedy's opinion discussing the appellants' claims, they simply note that appellants have not provided the Court with a reliable standard. *Id.*