SUPREME COURT OF THE UNITED STATES

No. 02–1580

RICHARD VIETH, NORMA JEAN VIETH, AND SUSAN FUREY, APPELLANTS *v.* ROBERT C. JUBELIRER, PRESIDENT OF THE PENNSYLVANIA SENATE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[April 28, 2004]

JUSTICE KENNEDY, concurring in the judgment.

A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process. The Court is correct to refrain from directing this substantial intrusion into the Nation's political life. While agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed, and while understanding that great caution is necessary when approaching this subject, I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.

When presented with a claim of injury from partisan gerrymandering, courts confront two obstacles. First is the lack of comprehensive and neutral principles for drawing electoral boundaries. No substantive definition of fairness in districting seems to command general assent. Second is the absence of rules to limit and confine judicial intervention. With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.

That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. See *Shaw* v. *Reno,* 509 U. S. 630 (1993). Politics is quite a different matter. See *Gaffney* v. *Cummings,* 412 U. S. 735, 752 (1973) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it").

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

The object of districting is to establish "fair and effective representation for all citizens." *Reynolds* v. *Sims,* 377 U. S. 533, 565–568 (1964). At first it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights. The lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue.

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

In this case, we have not overcome these obstacles to determining that the challenged districting violated appellants' rights. The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept. Even if the novelty of the proposed principle were accompanied by a convincing rationale for its adoption, there is no obvious way to draw a satisfactory standard from it for measuring an alleged burden on representational rights. The plurality demonstrates the shortcomings of the other standards that have been considered to date. See *ante*, at Parts III and IV (demonstrating that the standards proposed in *Davis* v. *Bandemer,* 478 U. S. 109 (1986), by the parties before us, and by our dissenting colleagues are either unmanageable or inconsistent with precedent, or both). I would add two comments to the plurality's analysis. The first is that the parties have not shown us, and I have not been able to discover, helpful discussions on the principles of fair districting discussed in the annals of parliamentary or legislative bodies. Our attention has not been drawn to statements of principled, well-accepted rules of fairness that should govern districting, or to helpful formulations of the legislator's duty in drawing district lines.

Second, even those criteria that might seem promising at the outset (*e.g.*, contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not. For example, if we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political

party over another. See *Gaffney*, *supra*, at 753 ("District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely"); see also R. Bork, The Tempting of America: The Political Seduction of the Law 88–89 (1990) (documenting the author's service as a special master responsible for redistricting Connecticut and noting that his final plan so benefited the Democratic Party, albeit unintentionally, that the party chairman personally congratulated him); M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1000–1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions).

The challenge in finding a manageable standard for assessing burdens on representational rights has long been recognized. See Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory? 33 UCLA L. Rev. 1, 74 (1985) ("[W]hat matters to us, and what 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"). The dearth of helpful historical guidance must, in part, cause this uncertainty.

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

so in many instances. A determination by the Court to deny all hopes of intervention could erode confidence in the courts as much as would a premature decision to intervene.

Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering. The plurality's conclusion that absent an "easily administrable standard," *ante*, at 21, the appellants' claim must be nonjusticiable contrasts starkly with the more patient approach of *Baker* v. *Carr,* 369 U. S. 186 (1962), not to mention the controlling precedent on the question of justiciability of *Davis* v. *Bandemer, supra*, the case the plurality would overrule. See *ante*, at 37.

In *Baker* the Court made clear that the more abstract standards that guide analysis of all Fourteenth Amendment claims sufficed to assure justiciability of a one-person, one-vote claim. See 369 U. S., at 226.

> "Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Ibid.*

The Court said this before the more specific standard with which we are now familiar emerged to measure the burden nonequipopulous districting causes on representational rights. See *Reynolds,* 377 U. S., at 565–568 (concluding that "[s]ince the achieving of fair and effective representation for all citizens is concededly the basic aim

of legislative apportionment" a legislature's reliance on other apportionment interests is invalid arbitrary and capricious action if it leads to unequal populations among districts). The plurality's response that in *Baker* this Court sat in review only of a nonjusticiability holding is wide of the mark. See *ante*, at 35. As the plurality itself instructs: Before a Court can conclude that it "has [any] business entertaining [a] claim," it must conclude that some "judicially enforceable righ[t]" is at issue. *Ante*, at 7. Whether a manageable standard made the right at issue in *Baker* enforceable was as much a necessary inquiry there as it is here. In light of *Baker* and *Davis* v. *Bandemer*, which directly address the question of nonjusticiability in the specific context of districting and of asserted violations of the Fourteenth Amendment, the plurality's further survey of cases involving different approaches to the justiciability of different claims cannot be thought controlling. See *ante*, at 33–34.

Even putting *Baker* to the side—and so assuming that the existence of a workable standard for measuring a gerrymander's burden on representational rights distinguishes one-person, one-vote claims from partisan gerrymandering claims for justiciability purposes—I would still reject the plurality's conclusions as to nonjusticiability. 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. That is, the different treatment of claims otherwise so alike hinges entirely on proof that no standard could exist. This is a difficult proposition to establish, for proving a negative is a challenge in any context.

That no such standard has emerged in this case should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution. Allegations of unconstitutional bias in appor-

tionment are most serious claims, for we have long believed that "the right to vote" is one of "those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.,* 304 U. S. 144, 153, n. 4 (1938). If a State passed an enactment that declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles," we would surely conclude the Constitution had been violated. If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive. This possibility suggests that in another case a standard might emerge that suitably demonstrates how an apportionment's *de facto* incorporation of partisan classifications burdens rights of fair and effective representation (and so establishes the classification is unrelated to the aims of apportionment and thus is used in an impermissible fashion).

The plurality says that 18 years, in effect, prove the negative. *Ante*, at 37 ("Eighteen years of essentially pointless litigation have persuaded us"). As JUSTICE SOUTER is correct to point out, however, during these past 18 years the lower courts could do no more than follow *Davis* v. *Bandemer*, which formulated a single, apparently insuperable standard. See *post*, at 3 (dissenting opinion). Moreover, by the timeline of the law 18 years is rather a short period. In addition, the rapid evolution of technologies in the apportionment field suggests yet unexplored possibilities. Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months. See, *e.g., Larios* v. *Cox*, 305 F. Supp. 2d 1335 (ND Ga. 2004). Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an

unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.

If suitable standards with which to measure the burden a gerrymander imposes on representational rights did emerge, hindsight would show that the Court prematurely abandoned the field. That is a risk the Court should not take. Instead, we should adjudicate only what is in the papers before us. See *Baker*, 369 U. S., at 331 (Harlan, J., dissenting) (concluding that the malapportionment claim "should have been dismissed for 'failure to state a claim upon which relief can be granted'" because "[u]ntil it is first decided to what extent [the] right [to apportion] is limited by the Federal Constitution, and whether what [a State] has done or failed to do . . . runs afoul of any such limitation, we need not reach the issues of 'justiciability' or 'political question'").

Because, in the case before us, we have no standard by which to measure the burden appellants claim has been imposed on their representational rights, appellants cannot establish that the alleged political classifications burden those same rights. Failing to show that the alleged classifications are unrelated to the aims of apportionment, appellants' evidence at best demonstrates only that the legislature adopted political classifications. That describes no constitutional flaw, at least under the governing Fourteenth Amendment standard. See *Gaffney,* 412 U. S., at 752. As a consequence, appellants' complaint alleges no impermissible use of political classifications and so states no valid claim on which relief may be granted. It must be dismissed as a result. See Fed. Rule Civ. Proc. 12(b)(6); see also *Davis* v. *Bandemer,* 478 U. S., at

134.

The plurality thinks I resolve this case with reference to no standard, see *ante*, at 32–33, but that is wrong. The Fourteenth Amendment standard governs; and there is no doubt of that. My analysis only notes that if a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants' evidence states a provable claim under the Fourteenth Amendment standard.

Though in the briefs and at argument the appellants relied on the Equal Protection Clause as the source of their substantive right and as the basis for relief, I note that the complaint in this case also alleged a violation of First Amendment rights. See Amended Complaint ¶48; Juris. Statement 145a. 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. See *Elrod* v. *Burns,* 427 U. S. 347 (1976) (plurality opinion). Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. See *id.,* at 362. "Representative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party* v. *Jones,* 530 U. S. 567, 574 (2000). As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the

purpose and effect of burdening a group of voters' representational rights.

The plurality suggests there is no place for the First Amendment in this area. See *ante*, at 25. The implication is that under the First Amendment any and all consideration of political interests in an apportionment would be invalid. *Ibid.* ("Only an equal protection claim is before us in the present case—perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting"). That misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest. Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters.

Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause. The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications. This works where race is involved since classifying by race is almost never permissible. It presents a more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose. That question can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlaw-

ful burdens. The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. The analysis allows a pragmatic or functional assessment that accords some latitude to the States. See *Eu* v. *San Francisco County Democratic Central Comm.,* 489 U. S. 214 (1989); *Anderson* v. *Celebrezze,* 460 U. S. 780 (1983).

Finally, I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed, the Court seems to acknowledge it is not. See *ante*, at 23 ("We do not disagree with [the] judgment" that "partisan gerrymanders [are incompatible] with democratic principles"); *ante*, at 24 (noting that it is the case, and that the plurality opinion assumes it to be the case, that "an *excessive* injection of politics [in districting] is *un*lawful"). This is all the more reason to admit the possibility of later suits, while holding just that the parties have failed to prove, under our "well developed and familiar" standard, that these legislative classifications "reflec[t] *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U. S., at 226. That said, courts 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. Consider these apportionment schemes: In one State, Party X controls the apportionment process and draws the lines so it captures every congressional seat. In three other States, Party Y controls the apportionment process. It is not so blatant or egregious, but proceeds by a more subtle effort, capturing less than all the seats in each State. Still, the total effect of Party Y's effort is to capture more new seats than Party X captured. Party X's gerrymander was more egregious. Party Y's gerrymander was more subtle. In my view, however, each is culpable.

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The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment, "'We are in the business of rigging elections.'" J. Hoeffel, Six Incumbents Are a Week Away from Easy Election, Winston-Salem Journal, Jan. 27, 1998, p. B1 (quoting a North Carolina state senator).

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