

BREYER, J., dissenting

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 BREYER, dissenting.

The use of purely political considerations in drawing district boundaries is not a “necessary evil” that, for lack of judicially manageable standards, the Constitution inevitably must tolerate. Rather, pure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political “gerrymandering” will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. And sometimes when that is so, courts can identify an equal protection violation and provide a remedy. Because the plaintiffs could claim (but have not yet proved) that such circumstances exist here, I would reverse the District Court’s dismissal of their complaint.

The plurality focuses directly on the most difficult issue before us. It says, “[n]o test—yea, not even a five-part test—can possibly be successful unless one knows what he is testing *for*.” *Ante*, at 28 (emphasis in original). That is true. Thus, I shall describe a set of circumstances in which the use of purely political districting criteria could conflict with constitutionally mandated democratic requirements—circumstances that the courts should “test for.” I shall then explain why I believe it possible to find

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applicable judicially manageable standards. And I shall illustrate those standards.

I

I start with a fundamental principle. “We the People,” who “ordain[ed] and establish[ed]” the American Constitution, sought to create and to protect a workable form of government that is in its “principles, structure, and whole mass,” basically democratic. G. Wood, *The Creation of the American Republic, 1776–1787*, p. 595 (1969) (quoting W. Murray, *Political Sketches, Inscribed to His Excellency John Adams 5* (1787)). See also, *e.g.*, A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 14–15 (1948). In a modern Nation of close to 300 million people, the workable democracy that the Constitution foresees must mean more than a guaranteed opportunity to elect legislators representing equally populous electoral districts. *Reynolds v. Sims*, 377 U. S. 533, 568 (1964); *Kirkpatrick v. Preisler*, 394 U. S. 526, 530–531 (1969); *Karcher v. Daggett*, 462 U. S. 725, 730 (1983). There must also be a method for transforming the will of the majority into effective government.

This Court has explained that political parties play a necessary role in that transformation. At a minimum, they help voters assign responsibility for current circumstances, thereby enabling those voters, through their votes for individual candidates, to express satisfaction or dissatisfaction with the political status quo. Those voters can either vote to support that status quo or vote to “throw the rascals out.” See generally *McConnell v. Federal Election Comm’n*, 540 U. S. ____ (2003) (slip op., at 81); *California Democratic Party v. Jones*, 530 U. S. 567, 574 (2000); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n*, 518 U. S. 604, 615–616 (1996). A party-based political system that satisfies this minimal condition encourages democratic responsibility. It facilitates

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the transformation of the voters' will into a government that reflects that will.

Why do I refer to these elementary constitutional principles? Because I believe they can help courts identify at least one abuse at issue in this case. To understand how that is so, one should begin by asking why single-member electoral districts are the norm, why the Constitution does not insist that the membership of legislatures better reflect different political views held by different groups of voters. History, of course, is part of the answer, but it does not tell the entire story. The answer also lies in the fact that a single-member-district system helps to assure certain democratic objectives better than many "more representative" (*i.e.*, proportional) electoral systems. Of course, single-member districts mean that only parties with candidates who finish "first past the post" will elect legislators. That fact means in turn that a party with a bare majority of votes or even a plurality of votes will often obtain a large legislative majority, perhaps freezing out smaller parties. But single-member districts thereby diminish the need for coalition governments. And that fact makes it easier for voters to identify which party is responsible for government decisionmaking (and which rascals to throw out), while simultaneously providing greater legislative stability. Cf. C. Mershon, *The Costs of Coalition: Coalition Theories and Italian Governments*, 90 *Am. Pol. Sci. Rev.* 534 (1996) (noting that from 1946 to 1992, under proportional systems "almost no [Italian] government stayed in office more than a few years, and many governments collapsed after only a few months"); Hermens, *Representation and Proportional Representation*, in *Choosing an Electoral System: Issues and Alternatives* 15, 24 (A. Lijphart & B. Grofman eds. 1984) (describing the "political paralysis which had become the hallmark of the Fourth Republic" under proportional representation). See also Duverger, *Which is the Best*

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Electoral System? in Choosing an Electoral System, *supra*, at 31, 32 (arguing that proportional systems “preven[t] the citizens from expressing a clear choice for a governmental team,” and that nonproportional systems allow voters to “choose governments with the capacity to make decisions”). This is not to say that single-member districts are preferable; it is simply to say that single-member-district systems and more-directly-representational systems reflect different conclusions about the proper balance of different elements of a workable democratic government.

If single-member districts are the norm, however, then political considerations will likely play an important, and proper, role in the drawing of district boundaries. In part, that is because politicians, unlike nonpartisan observers, normally understand how “the location and shape of districts” determine “the political complexion of the area.” *Gaffney v. Cummings*, 412 U. S. 735, 753 (1973). It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense. See, *e.g.*, Persily, In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 Harv. L. Rev. 649, 678, and nn. 94–95 (2002) (recounting the author’s experience as a neutral court-appointed boundary drawer, in which the plan he helped draw moved an uninhabited swamp from one district to another, thereby inadvertently disrupting environmental projects that were important to the politician representing the swamp’s former district).

More important for present purposes, the role of political considerations reflects a surprising mathematical fact. Given a fairly large state population with a fairly large congressional delegation, districts assigned so as to be perfectly random in respect to politics would translate a small shift in political sentiment, say a shift from 51% Republican to 49% Republican, into a seismic shift in the

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makeup of the legislative delegation, say from 100% Republican to 100% Democrat. See M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1002 (1998) (suggesting that, where the state population is large enough, even randomly selected compact districts will generally elect *no* politicians from the party that wins fewer votes statewide). Any such exaggeration of tiny electoral changes—virtually wiping out legislative representation of the minority party—would itself seem highly undemocratic.

Given the resulting need for single-member districts with nonrandom boundaries, it is not surprising that “traditional” districting principles have rarely, if ever, been politically neutral. Rather, because, in recent political memory, Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs and sometimes rural areas, geographically drawn boundaries have tended to “pac[k]” the former. See *ante*, at 20–21 (plurality opinion) (citing *Davis v. Bandemer*, 478 U. S. 109, 159 (1986) (O’CONNOR, J., concurring in judgment)); Lowenstein & Steinberg, The Quest for Legislative Districting in the Public Interest: Elusive or Illusory? 33 UCLA L. Rev. 1, 9 (1985) (explaining that the “‘formal’ criteria . . . do not live up to their advance billing as ‘fair’ or ‘neutral’”). Neighborhood or community-based boundaries, seeking to group Irish, Jewish, or African-American voters, often did the same. All this is well known to politicians, who use their knowledge about the effects of the “neutral” criteria to partisan advantage when drawing electoral maps. And were it not so, the iron laws of mathematics would have worked their extraordinary volatility-enhancing will.

This is to say that traditional or historically-based boundaries are not, and should not be, “politics free.” Rather, those boundaries represent a series of compro-

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mises of principle—among the virtues of, for example, close representation of voter views, ease of identifying “government” and “opposition” parties, and stability in government. They also represent an uneasy truce, sanctioned by tradition, among different parties seeking political advantage.

As I have said, reference back to these underlying considerations helps to explain why the legislature’s use of political boundary drawing considerations ordinarily does *not* violate the Constitution’s Equal Protection Clause. The reason lies not simply in the difficulty of identifying abuse or finding an appropriate judicial remedy. The reason is more fundamental: Ordinarily, there simply is no abuse. The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as maintaining relatively stable legislatures in which a minority party retains significant representation.

II

At the same time, these considerations can help identify at least one circumstance where use of purely political boundary-drawing factors can amount to a serious, and remediable, abuse, namely the *unjustified* use of political factors to entrench a minority in power. By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By *unjustified* entrenchment I mean that the minority’s hold on power is purely the result of partisan manipulation and not other factors. These “other” factors that could lead to “justified” (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on

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traditional (geographic, communities of interest, etc.) districting criteria.

The democratic harm of unjustified entrenchment is obvious. As this Court has written in respect to popularly-based electoral districts:

“Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.” *Reynolds*, 377 U. S., at 565.

Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and these democratic values are dishonored.

The need for legislative stability cannot justify entrenchment, for stability is compatible with a system in which the loss of majority support implies a loss of power. The need to secure minority representation in the legislature cannot justify entrenchment, for minority party representation is also compatible with a system in which the loss of minority support implies a loss of representation. Constitutionally specified principles of representation, such as that of two Senators per State, cannot justify entrenchment where the House of Representatives or similar state legislative body is at issue. Unless some other justification can be found in particular circumstances, political gerrymandering that so entrenches a minority party in power violates basic democratic norms

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and lacks countervailing justification. For this reason, whether political gerrymandering does, or does not, violate the Constitution in other instances, gerrymandering that leads to entrenchment amounts to an abuse that violates the Constitution's Equal Protection Clause.

III

Courts need not intervene often to prevent the kind of abuse I have described, because those harmed constitute a political majority, and a majority normally can work its political will. Where a State has improperly gerrymandered legislative or congressional districts to the majority's disadvantage, the majority should be able to elect officials in statewide races—particularly the Governor—who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner. And where a State has improperly gerrymandered congressional districts, Congress retains the power to revise the State's districting determinations. See U. S. Const., Art. I, §4; *ante*, at 5–7 (plurality opinion) (discussing the history of Congress' "power to check partisan manipulation of the election process by the States").

Moreover, voters in some States, perhaps tiring of the political boundary-drawing rivalry, have found a procedural solution, confiding the task to a commission that is limited in the extent to which it may base districts on partisan concerns. According to the National Conference of State Legislatures, 12 States currently give "first and final authority for [state] legislative redistricting to a group other than the legislature." National Conference of State Legislatures, Redistricting Commissions and Alternatives to the Legislature Conducting Redistricting (2004), available at <http://www.ncsl.org/programs/legman/redistrict/com&alter.htm> (all Internet materials as visited Mar. 29, 2004, and available in Clerk of Court's case file). A number of States use a commission for congressional

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redistricting: Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington, with Indiana using a commission if the legislature cannot pass a plan and Iowa requiring the district-drawing body not to consider political data. *Ibid.*; Iowa General Assembly, Legislative Service Bureau, Legislative Guide to Redistricting (2000), available at <http://www.legis.state.ia.us/Central/LSB/Guides/redist.htm>. Indeed, where state governments have been unwilling or unable to act, “an informed, civically militant electorate,” *Baker v. Carr*, 369 U. S. 186, 270 (1962) (Frankfurter, J., dissenting), has occasionally taken matters into its own hands, through ballot initiatives or referendums. Arizona voters, for example, passed Proposition 106, which amended the State’s Constitution and created an independent redistricting commission to draw legislative and congressional districts. Ariz. Const., Art. 4, pt. 2, §1 (West 2001). Such reforms borrow from the systems used by other countries utilizing single-member districts. See, e.g., Administration and Cost of Elections Project, Boundary Delimitation (hereinafter ACE Project), Representation in the Canadian Parliament (describing Canada’s independent boundary commissions, which draft maps based on equality of population, communities of interest, and geographic factors), available at www.aceproject.org/main/english/bd/bdy_ca.htm; ACE Project, The United Kingdom Redistribution Process (describing the United Kingdom’s independent boundary commissions, which make recommendations to Parliament after consultation with the public), available at www.aceproject.org/main/english/bd/bdy_gb.htm; G. Gudgin & P. Taylor, Seats, Votes, and the Spatial Organisation of Elections 8 (1979) (noting that the United Kingdom’s boundary commissions are “explicitly neutral in a party political sense”).

But we cannot always count on a severely gerrymandered legislature itself to find and implement a remedy. See *Bandemer*, 478 U. S., at 126. The party that controls

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the process has no incentive to change it. And the political advantages of a gerrymander may become ever greater in the future. The availability of enhanced computer technology allows the parties to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins in the maximum number of districts, with little risk of cutting their margins too thin. See generally Handley, A Guide to 2000 Redistricting Tools and Technology, in *The Real Y2K Problem: Census 2000 Data and Redistricting Technology* (N. Persily ed. 2000); Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 *Stan. L. Rev.* 731, 736 (1998); *ante*, at 4 (SOUTER, J., dissenting). By redrawing districts every 2 years, rather than every 10 years, a party might preserve its political advantages notwithstanding population shifts in the State. The combination of increasingly precise map-drawing technology and increasingly frequent map drawing means that a party may be able to bring about a gerrymander that is not only precise, but virtually impossible to dislodge. Thus, court action may prove necessary.

When it is necessary, a court should prove capable of finding an appropriate remedy. Courts have developed districting remedies in other cases. See, *e.g.*, *Branch v. Smith*, 538 U. S. 254 (2003) (affirming the District Court's injunction of use of state court's redistricting plan and order that its own plan be used until a state plan could be pre-cleared under the Voting Rights Act of 1965); *Karcher*, 462 U. S. 725 (upholding the District Court's holding that a congressional reapportionment plan was unconstitutional); *Reynolds*, 377 U. S., at 586–587 (upholding the District Court's actions in ordering into effect a reapportionment of both houses of the state legislature). See also Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *Texas L. Rev.* 1643, 1688–1690, and nn. 227–233 (1993) (reporting that, in the wake of

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the 1980 census, there were 13 court-ordered plans for congressional redistricting, 5 plans that the courts rejected and returned to state legislatures for redrafting, 7 court-ordered state senate plans, 8 state senate plans rejected and sent back to the state legislatures, 6 court-ordered state house plans, and 9 state house plans sent back for further legislative action—all of which meant that, leaving aside the preclearance provisions of §5 of the Voting Rights Act of 1965, about one-third of all redistricting was done either directly by the federal courts or under courts' injunctive authority (citing cases)). Moreover, if the dangers of inadvertent political favoritism prove too great, a procedural solution, such as the use of a politically balanced boundary-drawing commission, may prove possible.

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

IV

I do not claim that the problem of identification and separation is easily solved, even in extreme instances. But courts can identify a number of strong indicia of abuse. The presence of actual entrenchment, while not always unjustified (being perhaps a chance occurrence), is such a sign, particularly when accompanied by the use of partisan boundary drawing criteria in the way that JUSTICE STEVENS describes, *i.e.*, a use that both departs from traditional criteria and cannot be explained other than by efforts to achieve partisan advantage. Below, I set forth several sets of circumstances that lay out the indicia of abuse I have in mind. The scenarios fall along a contin-

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uum: The more permanently entrenched the minority's hold on power becomes, the less evidence courts will need that the minority engaged in gerrymandering to achieve the desired result.

Consider, for example, the following sets of circumstances. First, suppose that the legislature has proceeded to redraw boundaries in what seem to be ordinary ways, but the entrenchment harm has become obvious. *E.g.*, (a) the legislature has not redrawn district boundaries more than once within the traditional 10-year period; and (b) no radical departure from traditional districting criteria is alleged; but (c) a majority party (as measured by the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections; *i.e.*, in congressional elections if a congressional map is being challenged) has *twice* failed to obtain a majority of the relevant legislative seats in elections; and (d) the failure cannot be explained by the existence of multiple parties or in other neutral ways. In my view, these circumstances would be sufficient to support a claim of unconstitutional entrenchment.

Second, suppose that plaintiffs could point to more serious departures from redistricting norms. *E.g.*, (a) the legislature has not redrawn district boundaries more than once within the traditional 10-year period; but (b) the boundary-drawing criteria depart radically from previous or traditional criteria; (c) the departure cannot be justified or explained other than by reference to an effort to obtain partisan political advantage; and (d) a majority party (as defined above) has once failed to obtain a majority of the relevant seats in election using the challenged map (which fact cannot be explained by the existence of multiple parties or in other neutral ways). These circumstances could also add up to unconstitutional gerrymandering.

Third, suppose that the legislature clearly departs from ordinary districting norms, but the entrenchment harm,

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while seriously threatened, has not yet occurred. *E.g.*, (a) the legislature has redrawn district boundaries more than once within the traditional 10-year census-related period—either, as here, at the behest of a court that struck down an initial plan as unlawful, see *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (MD Pa. 2002) (finding that Pennsylvania’s first redistricting plan violated the one-person, one-vote mandate), or of its own accord; (b) the boundary-drawing criteria depart radically from previous traditional boundary-drawing criteria; (c) strong, objective, unrefuted statistical evidence demonstrates that a party with a minority of the popular vote within the State in all likelihood will obtain a majority of the seats in the relevant representative delegation; and (d) the jettisoning of traditional districting criteria cannot be justified or explained other than by reference to an effort to obtain partisan political advantage. To my mind, such circumstances could also support a claim, because the presence of midcycle redistricting, for any reason, raises a fair inference that partisan machinations played a major role in the map-drawing process. Where such an inference is accompanied by statistical evidence that entrenchment will be the likely result, a court may conclude that the map crosses the constitutional line we are describing.

The presence of these, or similar, circumstances—where the risk of entrenchment is demonstrated, where partisan considerations render the traditional district-drawing compromises irrelevant, where no justification other than party advantage can be found—seem to me extreme enough to set off a constitutional alarm. The risk of harm to basic democratic principle is serious; identification is possible; and remedies can be found.

V

The plurality sets forth several criticisms of my approach. Some of those criticisms are overstated. Compare

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ante, at 31 (“[O]f course there *always* is a neutral explanation [of gerrymandering]—if only the time-honored criterion of incumbent protection”), with Brief for Appellants 13 (pointing to examples of efforts to gerrymander an incumbent of the opposition party out of office and elect a new member of the controlling party); compare *ante*, at 31 (complaining of “the difficulties of assessing partisan strength statewide”), with *supra*, at 12 (identifying the “majority party” simply by adding up “the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections”).

Other criticisms involve differing judgments. Compare *ante*, at 30 (complaining about the vagueness of *unjustified* political machination “whatever that means,” and of *unjustified* entrenchment), with *supra*, at 6–7 (detailed discussion of “justified” and *Reynolds v. Sims*); compare *ante*, at 32 (finding costs of judicial intervention too high), with *supra*, at 10–11 (finding costs warranted to assure majority rule).

But the plurality makes one criticism that warrants a more elaborate response. It observes “that the mere fact that these four dissenters come up with three different standards—all of them different from the two proposed in *Bandemer* and the one proposed here by appellants—goes a long way to establishing that there is no constitutionally discernible standard.” *Ante*, at 22–23.

Does it? The dissenting opinions recommend sets of standards that differ in certain respects. Members of a majority might well seek to reconcile such differences. But dissenters might instead believe that the more thorough, specific reasoning that accompanies separate statements will stimulate further discussion. And that discussion could lead to change in the law, where, as here, one member of the majority, disagreeing with the plurality as to justiciability, remains in search of appropriate standards. See *ante*, at 7 (KENNEDY, J., concurring in judg-

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ment).

VI

In the case before us, there is a strong likelihood that the plaintiffs' complaint could be amended readily to assert circumstances consistent with those I have set forth as appropriate for judicial intervention. For that reason, I would authorize the plaintiffs to proceed; and I dissent from the majority's contrary determination.