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The Almost Rise and Not Quite Fall
of the Political Gerrymander

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I.	INTRODUCTION.....	409
II.	BACKGROUND	410
III.	THE HISTORY OF THE POLITICAL GERRYMANDER CLAIMS	412
IV.	COMPARISON TO THE RACIAL DILUTION CASES: OUTCOMES V. PARTICIPATION.....	415
V.	THE STRUGGLE FOR STANDARDS – <i>VIETH v. JUBELIRER</i>	416
VI.	TEXAS TALES	419
VII.	POLITICAL GERRYMANDERING TODAY: NEITHER DEAD NOR ALIVE.....	423

I. INTRODUCTION

For more than twenty years, those involved in the political process (political parties, politicians, their staffs, and above all, their lawyers) have alleged that the other side has manipulated the redistricting process to unfair, and indeed unconstitutional, ends.¹ These claims are known as partisan or political gerrymanders.² Claims alleging partisan political gerrymandering have ranged from the rather predictable and mundane, to the clever, to the downright audacious. However, they have all met with an equal measure of success: none. To date, no federal court has ever upheld a claim of partisan political gerrymandering.³ Why is that?

The short answer is that no court, including the United State Supreme Court, has ever been able to enunciate a standard by which claims of political fairness, or perhaps, more accurately, political unfairness, can be measured. The failure to establish such a standard, however, may not just be reflective of the elusiveness of the measure, but the difficulty of the underlying principal, fairness. Can fairness ever really be defined in this

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1. Compare *Davis v. Bandemer*, 478 U.S. 109 (1986) with *Badham v. Eu*, 694 F. Supp. 644 (N.I. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989).

2. *Davis*, 478 U.S. at 115.

3. *Id.* See also *Vieth v. Jubelirer*, 541, U.S. 267 (2004).

context? The Supreme Court, despite having taken several opportunities to try, has yet to succeed.⁴

In what most of us hope is an effective representative democracy,⁵ can the political system really ever be “unfair,” on a partisan basis, to the voters? When the voters are permitted to go the polls and vote on Election Day, and all the votes are completely and accurately counted, can the will of the voters ever be truly defeated? Is it patronizing to suggest it can be?

The results of the 2006 Congressional elections, where Democrats went from minority to majority party in both the Senate and the House (which President Bush described as a “thumping” of Republicans by Democrats⁶), demonstrate that, in fact, it is the voters who ultimately control the political process, and not the other way around. Similarly, in 1994, Newt Gingrich led the Republicans to an even more dramatic seizure of Congress from the Democrats. In each case, an entrenched party, the Democrats in 1994 and the Republicans in 2006, were abruptly shown the door by voters despite, and perhaps partly because of, their attempts to use the political process to entrench themselves in power.

This article will explore the development of political gerrymandering claims, the strengths and weaknesses of the various standards that have been considered but ultimately rejected, and whether the 2006 Congressional election results dictate that these claims ought to be resolved, as Justice O’Connor originally proposed, in the political arena.

II. BACKGROUND

But first, a bit of history: The term, “gerrymander,” in the context of partisan political claims, first came to the U.S. Supreme Court in 1986 in the case of *Davis v. Bandemer*.⁷ The term quite logically flowed from the racial gerrymandering claims that the Supreme Court had been considering since the early 1960s, beginning with *Gomillion v. Lightfoot*.⁸ But the term “gerrymander” has actually been around since the very founding of our country. The word is a portmanteau, combining the words “gerry” and

4. *Vieth*, 541 U.S. at 305-06.

5. See *Bush v. Gore*, 531 U.S. 98 (2001), for a contrary view.

6. Breitbart.com, *Bush Takes Blame for Election “Thumping,”*

<http://www.breitbart.com/news/2006/11/08/061108185622.1vbexy9n.html> (last visited Apr. 15, 2007).

7. 478 U.S.109 (1986).

8. 364 U.S. 339 (1960).

“mander.”⁹ The “gerry” derives from Elbridge Gerry, one of our nation’s founding fathers, and the “mander” is the end of the word “salamander.”¹⁰

Elbridge Gerry, who lived from 1744 to 1814, is one of the most significant people in our nation’s history, involved in many of our country’s most important historical events.¹¹ He signed the Articles of Confederation. He signed the Declaration of Independence. He refused to sign the Constitution because it did not contain a bill of rights.¹² He was then elected Governor of Massachusetts in 1810. He was re-elected in 1811, and, when in the middle of his second term, he made the mistake of proposing a redistricting of the State’s legislative districts.¹³ The Boston press found the proposal to be overly partisan, noting especially one district that resembled a slithering reptile.¹⁴ Thus, the district earned the moniker the “salamander.”¹⁵ In short order, that district became known as the “gerrymander.”¹⁶

Gerry was promptly voted out of office.¹⁷ He was later sent by President Adams to Paris, along with George Mason and Thomas Pinckney, to deal with French Foreign Minister Talleyrand in the infamous XYZ affair.¹⁸ When Talleyrand¹⁹ demanded a princely sum of \$250,000 to help “convince” the French to remain allied against the British, the Americans refused.²⁰ Gerry then ran as a candidate of Jefferson’s Democratic-

9. ACT Electoral Commission – Glossary at <http://www.elections.act.gov.au/glossary.html#G> (last visited Apr. 14, 2007).

10. *Id.*

11. *Signers of the Declaration of Independence: Elbridge Gerry*, at <http://www.ushistory.org/declaration/signers/gerry.htm> (last visited April 13, 2007).

12. *Id.*

13. *Biographical Directory of the United States Congress*, GERRY, Elbridge at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000139> (last visited Apr. 14, 2007).

14. Encyclopedia Britanica online, *gerrymandering*, at <http://www.britanica.com/ebc/article-9365512> (last visited April 13, 2007).

15. *Id.*

16. *Id.*

17. Infoplease, *Gerry, Elbridge*, Encyclopedia, at <http://www.infoplease.com/ceb/people/A0820652.html> (last visited April 13, 2007).

18. *Id.*

19. Napoleon Bonaparte famously referred to Talleyrand as the “shit in silk stockings.” See Andrew Roberts, *Talleyrand: The Old Fraud*, at The New Criterion, <http://www.newcriterion.com/archives/25/04/talleyrand-the-old-fraud> (last visited April 13, 2007).

20. The political slogan of the day became, “millions for defense, but not one cent for tribute.” See THE HOME BOOK OF QUOTATIONS 63 (Burton Stevenson ed., 10th ed. 1967) (concluding that Rep. Robert G. Harper of South Carolina is the author of this June 1798 retort to French perfidy).

Republicans²¹ He later became the nation's fourth vice-president and died while serving in that position.²²

The lesson of this story, and the reason for its inclusion here, is the fickle cruelty of history. Gerry was truly one of our founding fathers; he was a signatory on our nation's birth documents and instrumental in the most significant events of his day.²³ He served, and died, in our country's second highest office.²⁴ The legacies of his colleagues from the XYZ affair have thrived through the centuries for example, George Mason has a major university named after him.²⁵ And Gerry? What is his lizard-like legacy? He gave us the "gerrymander."

III. THE HISTORY OF THE POLITICAL GERRYMANDER CLAIMS

The road toward an effective standard for measuring political gerrymandering claims has been unquestionably rocky. The reason, perhaps, is that the first steps along this street, some twenty years ago, were in the wrong direction. The various potholes and missteps along the road in the ensuing years may all be traced to those first fateful steps.

The Supreme Court first considered a political gerrymander claim in 1986, in *Davis v. Bandemer*.²⁶ In *Bandemer*, the Indiana Democrats claimed that the Republican majority used both gerrymandered district lines and multi-member districts to deliberately, and unconstitutionally, dilute Democratic representation in the Indiana legislature. The Democrats alleged that the districting scheme adopted by the Republicans deprived Democrats, on a statewide basis, of equal protection in violation of the Fourteenth Amendment.²⁷ Because the claim involved discrimination on a partisan, rather than racial basis, the Court concluded that the plaintiffs were required to demonstrate both discriminatory intent and effect.²⁸

In this respect, the political gerrymander claim differs from the racial gerrymander claim, which arises under Section 2 of the Voting Rights Act.²⁹ Section 2 requires only a showing of discriminatory effect, and requires no proof of intent.³⁰ Indeed, after the Supreme Court had read an

21. *Signers of the Declaration of Independence: Elbridge Gerry*, at <http://www.ushistory.org/declaration/signers/gerry.htm> (last visited April 13, 2007).

22. *Id.*

23. *Id.*

24. *Id.*

25. *See, About George Mason*, George Mason University, at <http://www.gmu.edu/primex/> (last visited Apr. 14, 2007).

26. 478 U.S. 109 (1986).

27. *Id.* at 115.

28. *Id.* at 127.

29. 42 U.S.C. 1973 to 1973aa-6 (2000).

30. *Id.*

intent requirement into Section 2 in *City of Mobile v. Bolden*,³¹ Congress amended Section 2 to specifically remove intent as a burden plaintiffs must establish.³²

In *Bandemer*, the Court considered two issues. First, the Court had to decide whether a political gerrymander claim was justiciable, and if it was, the Court would have to decide whether this plan was unconstitutional.³³ The Court answered the first question affirmatively,³⁴ but it answered the second question in the negative: this districting plan was not unconstitutional.³⁵ While this conclusion alone is certainly unremarkable, the Court's explanation as to why this plan was constitutional sounds a lot like an explanation as to why the answer to the first question should have been no.

The Court, while requiring a demonstration of intent, mentioned it barely in passing by saying that "this record would support a finding that the discrimination was intentional"³⁶ and therefore "we decline to overturn the District Court's finding on discriminatory intent as clearly erroneous."³⁷ Thus, the outcome of *Bandemer* turned on the Democrats' ability to demonstrate discriminatory effect.

On that question, however, the Court concluded that the Democrats had come up short. The Court rejected the District Court's conclusion, and analysis, which had been that any districting plan that purposely prevents proportional representation was unconstitutional.³⁸ The Court summarily rejected any notion of proportional representation on the basis that "the power to influence the political process is not limited to winning elections."³⁹ Instead, the "group of individuals who votes for the losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters."⁴⁰ In other words, once the election is over, the winning candidate must represent all of his constituents and be equally attentive to them.

In a nutshell, the Court ruled that these political disputes were justiciable, and thereby suitable to judicial intervention and remedy, but pointed directly back to the political process as the remedy making intervention

31. 446 U.S. 55 (1980).
32. 42 U.S.C. 1973 to 1973aa-6 (2000).
33. *Bandemer*, 478 U.S. at 127.
34. *Id.*
35. *Id.* at 143.
36. *Id.* at 127.
37. *Id.*
38. *Bandemer*, 478 U.S. at 129-30.
39. *Id.* at 132.
40. *Id.*

unnecessary. Thus, the political system was both the problem to be remedied and the remedy to the problem.

Having come to this point, the Court finally alighted on the following standard: "continued frustration of the will of a majority of the voters or effective denial of a minority of voters a fair chance to influence the political process."⁴¹ Justice O'Connor, in her concurring opinion, bluntly, but accurately, described this standard as "nebulous."⁴² Justice O'Connor argued that the political remedy the Court mentioned (that the winner represents all voters) was precisely why these claims should be left to the political process.⁴³ For that reason, among others, she, joined by Chief Justice Berger and Justice Rehnquist, concluded that the court should have rejected the claim as being a non-justiciable political question.⁴⁴ Her admonition went unheeded, and the Court's determination to craft a judicial remedy with such indefinite terms had the effect of making the already rocky road slippery as well.

Consider the plight of the California Republicans. In *Badham v. Eu*,⁴⁵ the California Republicans asserted a political gerrymandering claim against the congressional districting plan approved by the Democrat controlled legislature in 1981.⁴⁶ The statistics supporting this claim were that the Republicans had received 50.1% of the statewide vote in 1984, but held only 40% of the congressional seats.⁴⁷ The plaintiffs, recognizing the *Bandemer* Court's emphasis on the need to demonstrate "continued frustration," alleged that the re-apportionment plan would consign them to "minority status throughout the 1980's."⁴⁸ The court, however, never even had to measure the evidence to support that allegation because it instead concluded that "[t]here are no allegations that the California Republicans were 'shut out' of the political process. . ."⁴⁹ Thus, the nebulous "continued frustration"⁵⁰ standard of *Bandemer* became a more stringent "shut out of the political process."⁵¹

In fact, the court used the plaintiffs' own statistics against them, noting that "[c]hief among our observations is our undisputed knowledge that California Republicans still hold 40% of the congressional seats, a sizeable

41. *Id.* at 133.

42. *Id.* at 145 (O'Connor, J., concurring).

43. *Id.* at 152-53.

44. *Bandemer*, 478 U.S. at 161.

45. 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989).

46. *Id.* at 665-66.

47. *Id.* at 670.

48. *Id.*

49. *Id.*

50. *Bandemer*, 478 U.S. at 133.

51. *Badham*, 694 F. Supp. at 670.

bloc that is far more than mere token representation.”⁵² Additionally, the court recognized that there were no allegations that “anyone has ever interfered with Republican registration, organizing, voting, fundraising, or campaigning.”⁵³ The court thus concluded that it would take much more than simply a demonstration of a frustration of the will of the majority, but would have to be the complete exclusion of one party from the entire political process.⁵⁴ The Supreme Court summarily affirmed this decision.⁵⁵

Similarly, in *O’Lear v. Miller*, the Supreme Court summarily affirmed a decision from Michigan dismissing the Democrats’ political gerrymandering claim regarding that congressional redistricting plan.⁵⁶ There, the district court’s opinion dismissing the Democrats’ complaint stuck to the *Bandemer* principles, and noted that the plaintiffs failed to allege they would not be adequately represented by the victorious Republicans,⁵⁷ and, like *Badham*, that they would be completely “shut out” of the political process.⁵⁸

IV. COMPARISON TO THE RACIAL DILUTION CASES: OUTCOMES V. PARTICIPATION

After *Bandemer* and *Badham*, the Supreme Court appeared to have drawn a line in the political gerrymandering cases that it has, so far, refused to draw in the context of racial redistricting. The Court turned away from a simple outcome analysis (was the minority party continually frustrated at the polls), to a participation analysis (was the minority party “shut out” of the political process by interference with registration, voting, organization and campaigning). The Court has engaged in a similar debate in the area of racial voting cases, but come to the opposite conclusion.

In the racial context, the Court remains focused on outcomes, and not participation. The very notion of one-person, one vote in *Reynolds v. Sims*⁵⁹ is entirely outcome based. In *Thornburg v. Gingles*⁶⁰ (coincidentally decided on the same day as *Bandemer*), the Court defined the current requirements for establishing a racial vote dilution claim.⁶¹ A plaintiff must establish the three *Gingles* factors: (1) that the minority group is “suffi-

52. *Id.* at 672.

53. *Id.* at 670.

54. *Id.*

55. 488 U.S. 1024 (1989).

56. *O’Lear v. Miller*, 222 F. Supp. 2d 850 (E.D. Mich. 2002), *aff’d*, 537 U.S. 997 (2002).

57. *O’Lear*, 222 F. Supp. 2d at 857.

58. *Id.* at 856.

59. 377 U.S. 533 (1964).

60. 478 U.S. 30 (1986).

61. *Id.*

ciently large and geographically compact to constitute a majority” in an alternative plan; (2) that the minority group is a cohesive voting group, and (3) that white bloc voting “defeats the minority’s preferred candidate.”⁶² These factors must operate to deny the minority group an opportunity to elect the candidates of their choice.⁶³

The analysis of a racial gerrymandering claim is thus entirely outcome based: did the districting plan operate to deny the minority group the opportunity to elect the candidate of their choice. In *Holder v. Hall*, Justice Thomas, joined by Justice Scalia, argued that the racial analysis should be, like the political analysis, participation based, rather than outcome based.⁶⁴ Justice Thomas derided the racial outcome analysis as “political apartheid” that resulted in drawing lines around racial groups that would only serve to perpetuate the separation of racial groups.⁶⁵ Justice Thomas urged the Court, in essence, to get out of the outcomes business altogether, and instead focus only upon participation. According to Justice Thomas, as long as the right to participate (through registration and voting, etc.) remains undisturbed, the Court should do no more to protect the outcome of any group’s voting strength.

While the wisdom of that approach is certainly debatable, and indeed has been debated extensively, the purpose of its inclusion here is simply to point out the different approaches that the Court adopted in the area of political and racial gerrymandering claims.

V. THE STRUGGLE FOR STANDARDS – *VIETH v. JUBELIRER*

In 2004, the Supreme Court revisited the issue of political gerrymandering for the first time since *Bandemer*.⁶⁶ In *Vieth v. Jubelirer*, a divided Court struggled to establish a workable standard by which political gerrymandering claims could be measured.⁶⁷ The plurality decision by Justice Scalia, joined by Chief Justice Rehnquist and Justices O’Connor and Thomas, reprised Justice O’Connor’s *Bandemer* conclusion that political gerrymanders ought to be non-justiciable political questions.⁶⁸

Justice Scalia noted that eighteen years of litigation had done little but generate attorneys fees, “with virtually nothing to show for it.”⁶⁹ The reason such a standard has not been established, he concluded, is that none

62. *Id.* at 50-51.

63. *Id.* at 51.

64. 512 U.S. 874 (1994).

65. *Id.* at 905 (Thomas, J., concurring).

66. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

67. *Id.*

68. *Id.*

69. *Id.* at 281.

exists.⁷⁰ Accordingly, the four Justices decided that “we must conclude that political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.”⁷¹

The plurality rejected the plaintiff’s proposed standard as effectively urging proportional representation: “[i]n any winner-take-all district system, there can be no guarantee, no matter how the district lines are drawn, that a majority of party votes statewide will produce a majority of seats for that party.”⁷² Additionally, the Justices concluded that not only would any standard lead to calls for proportional representation, but it would inevitably lead to a comparison with other, hypothetical alternatives that would cast judges “forth upon a sea of imponderables.”⁷³

Justice Kennedy, establishing himself as a potential swing vote on this question, concurred in the decision.⁷⁴ In essence, Justice Kennedy agreed with the plurality that no manageable standard has yet been suggested by which courts could address these claims.⁷⁵ He disagreed with the plurality, however, that no such standard could ever be crafted: “[i]t 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.”⁷⁶ Justice Kennedy went on to conclude that just because “no [appropriate] standard has emerged in this case should not be taken to prove that none will emerge in the future.”⁷⁷

Justice Stevens, in dissent, established a blunt standard that, for him, is easy to measure.⁷⁸ Justice Stevens wrote that he need not be troubled by how much politics is too much, because he knows that 100% is too much.⁷⁹ In other words, if “partisanship is the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.”⁸⁰ If a legislative districting plan is not impartial, then there can be no “rational justification.”⁸¹

Justice Souter, joined by Justice Ginsberg, dissented and advocated establishing a five step *prima facie* test that courts could use in measuring

70. *Id.*

71. *Id.*

72. *Vieth*, 541 U.S. at 289.

73. *Id.* at 290.

74. *Id.* at 306 (Kennedy, J., concurring).

75. *Id.* at 307-08.

76. *Id.* at 309-10.

77. *Id.* at 311.

78. *Vieth*, 541 U.S. at 318 (Stevens, J., dissenting).

79. *Id.* at 336 (“So too can partisanship be a permissible consideration in drawing district lines, so long as it does not predominate.”).

80. *Id.* at 318.

81. *Id.*

political gerrymanders.⁸² First, a plaintiff would have to establish that it is part of a “cohesive political group,” usually a “major political party.”⁸³ Second, a plaintiff would have to demonstrate that the district into which he was placed “paid little or no heed to traditional districting principles,” such as “contiguity, compactness, respect for political subdivisions,” etc.⁸⁴ Third, a plaintiff must “establish specific correlations between . . . deviations from traditional principles and the distribution of the population of his group.”⁸⁵ In other words, deviations from traditional principles, such as compactness, must be tied to demonstrable political gains by the majority party. Fourth, a plaintiff must demonstrate that “a hypothetical district” exists that would remedy the over-representation (“in a packing claim”) or under-representation (“in a cracking one”), and would also have less deviation from traditional principles.⁸⁶ Finally, a plaintiff would be required to demonstrate “that the defendants acted intentionally to manipulate the shape of the districts” to pack and/or crack.⁸⁷ If a plaintiff was able to meet these five *prima facie* steps, then Justice Souter would advocate shifting the burden to defendants to justify the plan.⁸⁸

The plurality justices rejected Souter’s “eminently scientific” argument, claiming that his opinion failed to identify the harm he seeks to remedy.⁸⁹ The plurality agreed with Justice Souter that the proper question is “how much . . . is too much?”⁹⁰ The plurality concluded that question was unanswerable, and rejected Justice Souter’s attempts to “break down the original unanswerable question (How much political motivation and effect is too much?) into four more discrete but equally unanswerable questions.”⁹¹

Justice Breyer also dissented and proposed that the unjustified use of political factors to entrench minority power should have a judicial remedy.⁹² His proposed measure would be the failure of the majority-vote getting party to win a majority of seats in successive elections, and the

82. *Id.* at 346 (Souter, J., dissenting).

83. *Id.*

84. *Vieth*, 541 U.S. at 347-48.

85. *Id.* at 349.

86. *Id.* In redistricting parlance, a district is “packed” when it is drawn to over-represent a particular group, either racial or political. For example, a district that is 90% African-American or Democratic could be packed. On the other hand, a district is “cracked” when a majority group is split between two or more districts to prevent that group from attaining a majority in any district. *Id.* at 286-87.

87. *Id.* at 350.

88. *Id.* at 351.

89. *Vieth*, 541 U.S. at 296.

90. *Id.* at 297.

91. *Id.* at 296-97.

92. *Id.* at 362 (Breyer, J., dissenting).

absence of any neutral explanation.⁹³ The plurality likewise rejected this standard by saying, in essence, that there will always be a neutral explanation that will justify any districting plan.⁹⁴

Almost before the ink was even dry, however, speculation about the next case had already begun to percolate, as the dramatic events surrounding the mid-decade redistricting of Texas's congressional districts began to unfold.

VI. TEXAS TALES

It would, perhaps, be an understatement to say that Texas has had an interesting political history, and that the redistricting drama of 2003 was a new and equally interesting chapter. Following the Civil War, the Democratic Party seized and maintained control over the political process in Texas as part of the "solid south."⁹⁵ Democrats' efforts to maintain this stranglehold on power included persistent attempts to exclude blacks from participation in its primary elections.⁹⁶ Indeed, the "white primary" cases brought the issue to the Supreme Court three separate times between 1927 and 1953.⁹⁷

After the Supreme Court required the Democrats to allow black voter participation in primary elections, the Democratic controlled legislature sought to further entrench its power through the use of multi-member districts and other tools designed to limit minority participation in the political process and to dilute black voting strength.⁹⁸ Supreme Court intervention also halted these practices by the 1970's, which left the Democrats with only the gerrymandering arrow in their quiver for maintaining political power.

Following the 1990 census, the Texas congressional delegation grew from twenty-seven to thirty to reflect population growth in the preceding decade.⁹⁹ By then, political power in Texas, and much of the south, was beginning to shift away from Democrats to Republicans, especially in presidential and statewide elections.¹⁰⁰ The Texas Democrats responded by

93. *Id.* at 366.

94. *Vieth*, 541 U.S. at 300 (Scalia, J., plurality).

95. Race, Voting Rights, and Segregation, The "Solid South," 1948 at <http://www.umich.edu/lawrace/votetour8.htm> (last visited Apr. 14, 2007).

96. See, e.g., *White v. Register*, 412 U.S. 755 (1973); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927).

97. See, e.g., *Nixon*, 273 U.S. 536; *Smith*, 321 U.S. 649; *Terry*, 345 U.S. 461.

98. *White v. Register*, 412 U.S. 755 (1973).

99. *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004).

100. *Henderson v. Perry*, 399 F. Supp. 2d 756, 763 n.22 (E.D. Tex. 2005) (citing Mike Kingston & John Tower, *The GOP, Godfather*, in *TEXAS ALMANAC* (1992-1995)).

carving Texas into districts with “incredibly convoluted lines”¹⁰¹ that were designed to protect Democratic control by packing Republican voters into a handful of heavily Republican districts in suburban areas around Dallas and Houston.¹⁰²

The Republicans’ success continued throughout the decade, and by the 2000 statewide elections they had become a solid majority party, gathering 59% of the statewide vote.¹⁰³ The success did not, however, flow down to elections at the congressional district level, and Democrats captured seventeen of the thirty congressional seats that same year.¹⁰⁴ Republicans’ political gerrymandering claims fared no better than the similar claims in *Bandemer*, *Badham*, and others.¹⁰⁵

After the 2000 census, the Texas congressional delegation again grew, this time from thirty to thirty-two.¹⁰⁶ By now, however, the Republicans had broken the Democrats’ stranglehold on the redistricting process, controlling both the Governor’s office and the State Senate.¹⁰⁷ Because the Democrats still controlled the House of Representatives, however, neither party could pass a districting plan, leading to a (pardon the pun) Texas stand-off.¹⁰⁸

Needless to say, litigation ensued. First, a state court judge attempted to craft a districting plan, but the Texas Supreme Court vacated that plan.¹⁰⁹ Next, a three-judge panel took on the “unwelcome obligation of performing in the legislature’s stead.”¹¹⁰ The Supreme Court subsequently affirmed the product of this litigation, Plan 1151C.¹¹¹

In the 2002 congressional elections, Plan 1151C did not result in any sweeping changes in the make-up of the Texas delegation.¹¹² While the Republican Party continued to grow in statewide popularity, that popularity did not translate into Republican gains in the congressional elections.¹¹³ Proving that incumbency is a more powerful tool than partisan affiliation, a

101. *Henderson*, 399 F. Supp. 2d 756, n.22 (citing Michael Barone, *THE ALMANAC OF AMERICAN POLITICS* 2004 1510 (2003)).

102. *Id.*

103. *Id.* at 763.

104. *Id.*

105. *Terrazas v. Slagle*, 789 F. Supp. 828 (W.D. Tex. 1991); *Terrazas v. Slagle*, 821 F. Supp. 1162 (W.D. Tex. 1993).

106. *Henderson*, 399 F. Supp. 2d at 764.

107. *Id.*

108. *Id.* at 763.

109. *Perry v. Del Rio*, 67 S.W.3d 85 (Tex. App. 2001).

110. *Balderas v. Texas*, No. Civ.A. 6:01CV158, 2001 WL 34104836 (E.D. Tex. 2001).

111. *Balderas v. Texas*, 536 U.S. 919 (2002).

112. *Henderson*, 399 F. Supp. 2d at 764.

113. *Id.* at 768 n.52.

number of Democratic incumbents were re-elected in new districts that, at least on paper, appeared to favor Republican candidates.¹¹⁴ As a result, Republicans won only fifteen of the thirty-two congressional seats.¹¹⁵

Republicans were, however, considerably more successful in the state legislative elections, capturing a majority of the seats in the state House of Representatives.¹¹⁶ As a result, Republicans controlled the Texas House, Senate and Governor's office.¹¹⁷ And this, of course, is where the story gets interesting.

Texas' congressional Republicans, led by Majority Leader Tom Delay, immediately announced plans to redraw Texas' congressional districts "solely for the purpose of seizing between five and seven seats from Democratic incumbents."¹¹⁸ Indeed, Republicans were not shy about admitting "that political gain for the Republicans was 110% of the motivation for the Plan"¹¹⁹

Faced with being outnumbered and essentially powerless to stop the Republicans from passing a new districting plan, the Democratic members of the House fled the state to deny the Republicans a quorum.¹²⁰ The Governor called a special session and the House passed a districting plan on a straight party line vote.¹²¹ The Senate's procedural rules required a two-thirds consent, however, and unable to achieve that number, the measure failed.¹²²

When the Governor called a second special session during which the Senate President announced the suspension of the two-thirds rule, the Senate Democrats, not to be outdone by their House companions, likewise fled, albeit to a different state, to successfully deprive the Senate of a quorum.¹²³ After a prolonged stand-off, with lots of boring television footage of Texas Democrats hanging around dreary looking motels, one Democrat either gave up, or came to his senses (depending on one's point of view), and returned to Texas.¹²⁴

114. *Id.*

115. *Id.* at 768, 764.

116. *Session*, 298 F. Supp. 2d at 458.

117. *Id.*

118. *Id.* at 472 (citing Brief of Texas House Democratic Caucus, et al., as Amici Curiae, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580)).

119. *Id.* at 458.

120. *Id.*

121. *Id.*

122. *Id.* ("The Senate's 'two-thirds' supermajority rule permitted the Democrats to block a vote.")

123. *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2630 (2006) (Stevens, J., concurring in part and dissenting in part) [hereinafter *LULAC*].

124. *Id.*

The Governor immediately called a third special session.¹²⁵ The House and Senate, now with a quorum available, each immediately passed its map, Plan 1374C, in time for the 2004 elections.¹²⁶ To no one's surprise at all, the Democrats immediately sued.¹²⁷

The Supreme Court declined to revisit the issue left undecided by *Vieth*, namely whether political gerrymandering claims are justiciable.¹²⁸ Instead, in *League of Latin American Citizens (LULAC) v. Perry*, the Court considered whether the mid-decade nature of the Texas redistricting rendered the Plan 1374C unconstitutional, and whether the plaintiffs offered a manageable standard for measuring political gerrymandering claims.¹²⁹

The plaintiffs first claimed that the mid-decade redistricting, motivated solely by political goals, "violate[d] equal protection and the First Amendment because it serve[d] no legitimate public purpose and burden[ed] one group because of its political opinions and affiliation."¹³⁰ The Court rejected this argument on the basis that is impossible to ever truly ascribe a "sole-intent" to a state legislature, which by its nature is made up of "a composite of manifold choices."¹³¹ Moreover, the Court noted that there is "nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own."¹³²

In fact, the Court pointed out that, under plaintiffs' theory, a very effective political gerrymander coincident with a decennial census "would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting."¹³³ This scenario, if accepted, would provide an incentive for "partisan excess at the outset of the decade" because it would be immune to the sole-intent standard urged by the plaintiffs.¹³⁴

The Court likewise rejected the notion that a mid-decade redistricting violates the one-person, one-vote requirement.¹³⁵ Plaintiffs argued that because the population of Texas had shifted since the 2000 census, the 2003 plan violated this requirement.¹³⁶ The Court, however, recognized that every districting plan is a "legal fiction" the day it is enacted because the population of every state shifts constantly and that an ongoing requirement

125. *Id.*

126. *Id.*

127. *Id.* at 2631.

128. *Id.* at 2594.

129. *LULAC*, 126 S. Ct. at 2605. The Court also considered whether the Plan violated § 2 of the Voting Rights Act regarding the racial make-up of certain districts. *Id.*

130. *Id.* at 2609.

131. *Id.*

132. *Id.*

133. *LULAC*, 126 S. Ct. at 2609.

134. *Id.* at 2611.

135. *Id.* at 2612.

136. *Id.* at 2611.

to conform with one-person, one vote would lead to “constant redistricting, with accompanying costs and instability.”¹³⁷

In short, *LULAC*, despite all the drama and national media attention, provided little guidance for the future of political gerrymandering claims. The Court not only declined to revisit the question of justiciability, but also refused to set any limits on the excessive partisan districting practices.¹³⁸

VII. POLITICAL GERRYMANDERING TODAY: NEITHER DEAD NOR ALIVE

The political gerrymandering claim is like Frankenstein’s monster. In *Bandemer*, it was jolted to life and instilled fear and anxiety on those who would use the districting process for partisan advantage.¹³⁹ However, this monster never quite got off the operating table to roam through the redistricting countryside wreaking havoc. In *Vieth*, it even teetered on the brink of extinction, with four justices (O’Connor, Rhenquist, Scalia and Thomas) advocating that these claims be non-justiciable.¹⁴⁰

LULAC had the strange effect of bringing political gerrymandering claims both further away from, and closer to, extinction. The political gerrymandering claim is further from extinction, because in *LULAC*, only Justices Scalia and Thomas held to the proposition that political gerrymanders were non-justiciable.¹⁴¹ Chief Justice Roberts and Justice Alito, new to the Court since its decision in *Vieth*, agreed with Justice Kennedy that, although no standard by which these claims can be effectively measured has yet appeared, one may someday.¹⁴² As a result, only two Justices remain firmly in the non-justiciable camp.

At the same, however, after *LULAC*, the political gerrymandering claim is dead in all but name. The Texas redistricting drama certainly presented the most compelling factual circumstances of any case the Court has ever considered. The mid-decade redistricting motivated entirely by, in the proponent’s own words, partisan advantage, offered the Court the most drastic and heavy-handed of all political gerrymanders, but nonetheless, the Court declined to intercede. In other words, if the Texas Democrats could not get any relief, it is difficult to imagine any scenario that could ever result in an unconstitutional political gerrymander.

Perhaps that is the right answer. This way, the Supreme Court does not have to say “never,” allowing for the very unlikely possibility that something truly extraordinary could occur that could warrant intervention.

137. *Id.*

138. *Id.*

139. 478 U.S. 109 (1986).

140. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

141. *LULAC*, 126 S. Ct. at 2663 (Scalia, J., dissenting).

142. *Id.* at 2663-64 (Scalia, J., dissenting).

At the same time, the *LULAC* decision clearly renders a political gerrymandering claim a fool's errand. In light of *LULAC*, the political gerrymandering claim will become even more like Frankenstein's monster: it will fade from memory into legend, with future generations of redistricters free to debate whether or not it was really ever alive.

This may be the right answer for another reason, namely that political gerrymanders are only marginally successful. There can be little dispute that the party, either Democrat or Republican, controlling the redistricting process can effectively use that process to its advantage. Swing seats can become safe, opposition incumbents can be paired together to create new open seats for the majority to target. But political gerrymanders cannot do what they are truly designed to do: permanently imbed the majority party in power.

Like much of the world, the redistricting business has undergone tremendous technological advances in the last twenty years.¹⁴³ New software allows district makers to draw districts with precision unimaginable as recently as 1980.¹⁴⁴ This, along with the judicial inaction discussed above, has resulted in the most aggressive, unfettered political gerrymanders the country has ever seen. Yet, at the same time, Congress has switched from Democrat to Republican and back again in just twelve years.¹⁴⁵

For example, in Texas, the undisputed purpose of the redistricting was to garner more Republican seats in Congress to prevent a Democratic takeover.¹⁴⁶ Yet, that is precisely what happened just three years later.¹⁴⁷ Similarly, in 1990, Democratic controlled states used the redistricting process to attempt to entrench Democratic control of Congress throughout the decade.¹⁴⁸ However, just one election later, in 1994, Republicans swept to power in Congress with unprecedented gains.¹⁴⁹

In each instance, the voters had become tired and disillusioned with the majority party for various reasons best debated by political scientists,

143. From Crayons to Computers: The Evolution of Computer Use in Redistricting, Altam, MacDonald & McDonald, at http://www.hmdc.harvard.edu/micah_altman/papers/crayons.pdf.

144. *Id.*

145. Pew Research Center: *What Was – and Wasn't on the Public's Mind...and How Opinions Changed During 2006*, at <http://pewresearch.org/pubs/110/what-was-and-wasnt-on-the-publics-mind> (last visited Apr. 14, 2007).

146. Ronald Keith Gaddie, *The Texas Redistricting, Measure for Measure, Extensions*, at <http://www.ou.edu/special/albertctr/extensions/fall2004/Gaddie.html> (last visited April 13, 2007).

147. *Id.*

148. See generally David Lublin & D. Stephen Voss, *The Missing Middle: Why The Median Vote Theory Can It Save Democrats from Singing The Boli-Weevil Blues*, *THE JOURNAL OF POLITICS* 65 (1) 227-37 (2003).

149. *Id.*

not lawyers, but which had little or nothing to do with redistricting.¹⁵⁰ In each instance, voters across the country indicated that they disagreed with, were almost angry with, the majority party, its policies and its leadership.¹⁵¹ To put it more bluntly, when the voters decide that it is time to throw the rascals out, that is exactly what they do, and no amount of gerrymandering will prevent it. Thus, when it comes to a politician's self-preservation, the angry voter is a more dangerous monster than Frankenstein.

150. *See id.*

151. *See* Dan Baiz, Shailagh Murray & Peter Slevin, *Voter Anger Might Mean an Electoral Shift in '06*, WASH. POST, Nov. 6, 2005, at A1.