UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 80
Number 4 *Baker v. Carr: A Commemorative Symposium*

Article 11

5-1-2002

The Benefits of Judicially Unmanageable Standards in Election Cases under the Equal Protection Clause

Richard L. Hasen

THE BENEFITS OF "JUDICIALLY *UN*MANAGEABLE" STANDARDS IN ELECTION CASES UNDER THE EQUAL PROTECTION CLAUSE

RICHARD L. HASEN*

The conventional story about the Supreme Court's decision in Baker v. Carr *to adjudicate disputes over legislative appointment is that political market failure required judicial intervention. The market failed in the case of unequally populated districts because existing legislators could not be expected to vote themselves out of a job, nor would voters who benefit from the existing apportionment plan elect legislators inclined to do so. This market failure makes a strong case for extra-legislative intervention in apportionment, assuming we—or at least courts—may make the normative judgment that unequally populated districts are improper. Thus, a subtext of the conventional story is our trust in the judiciary. We need faith that judges' impartiality and general wisdom makes up for a lack of particular competence in dealing with political matters. Opponents of judicial intervention doubted judicial competence in this area, calling for nonjusticiability because "standards . . . were lacking." This concern over "judicial manageability" turned out to be seriously exaggerated in the legislative apportionment and districting cases, where the Court's adoption in* Reynolds v. Sims *of a strict standard required little more than knowledge of "sixth grade arithmetic," but it has proven more real in other cases, most recently, in* Bush v. Gore.

This Article argues that the Baker *majority and dissenters failed to appreciate the benefits of judicial* unmanageability *for dealing with election cases under the Equal Protection Clause of the Fourteenth Amendment. Precisely because these cases require the Supreme Court to make (at least implicit) normative judgments about the*

* Professor and William M. Rains Fellow, Loyola Law School, Los Angeles. B.A., 1986, University of California, Berkeley. M.A., 1988, J.D., 1991, Ph.D. (Political Science), 1992, University of California, Los Angeles. Thanks to Symposium participants and Del Dickson, Michnel McConnell, Dan Ortiz, Spencer Overton, Rick Pildes, Roy Schotland, and Peter Schuck for useful comments and suggestions and to Sofya Bendersky and Michael Kim for research assistance.

meaning of democracy or the structure of representative government, the danger of manageable standards is that they ossify the new rules and enshrine the current Court majority's political theory. That enshrinement is precisely what happened in the one-person, one-vote cases.

We cannot be surprised that the Court adopted the manageable standard of equally apportioned districts in Reynolds*; manageable standards lower administrative costs, decrease the chances of lower court deviation from Supreme Court preferences, and increase reliance interests of those involved in the electoral process. But, we must recognize the cost of manageable standards as well. In contrast to* Reynolds*, when the Court does not articulate a manageable standard, it leaves room for future Court majorities to deviate from or modify a ruling in light of new thinking about the meaning of democracy or the structure of representative government, or based on experience with the existing standard. It also allows for greater experimentation and variation in the lower courts using the new standard. Following modification and experimentation, it then often will be appropriate for the Court to articulate a more manageable standard.*

INTRODUCTION

The conventional story about the Supreme Court's decision in *Baker v. Carr*[1] to adjudicate disputes over legislative apportionment is that political market failure required judicial intervention.[2] The market failed in the case of unequally populated districts because existing legislators could not be expected to vote themselves out of a job, nor would voters who benefit from the existing apportionment plan elect legislators inclined to do so.[3] This market failure makes a strong case for extra-legislative intervention in apportionment, assuming we, or at least courts, may make the normative judgment that unequally populated districts are improper.[4]

A subtext of this conventional story is trust in the judiciary. We need faith that judges' impartiality and general wisdom make up for a lack of particular competence in dealing with political matters. Opponents of judicial intervention doubted judicial competence in this area, calling for nonjusticiability because "standards . . . for judicial judgment are lacking."[5] This concern over "judicial manageability" turned out to be seriously exaggerated in the legislative apportionment and districting cases, where the court's adoption in *Reynolds v. Sims* of a strict "one person, one vote" standard required little more than knowledge of "sixth grade arithmetic,"[6] but it has proven more real in other cases, most recently, as I will explain, in *Bush v. Gore*.[7]

This Article argues that the *Baker* Court majority and dissenters apparently failed to appreciate the benefits of judicial *un*manageability or murky standards for dealing with election cases

1. 369 U.S. 186 (1962).

2. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 117 (1980) ("[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage.").

3. *See id.* at 121 (noting that elected representatives have an incentive "toward maintaining whatever apportionment, good or bad, it is that got and keeps them where they are").

4. For a look at this normative question going back to John Locke and to the framers of the United States Constitution, see the sources cited in *id.* at 122 n.55.

5. *Baker*, 369 U.S. at 289 (Frankfurter, J., dissenting).

6. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 750 (1964) (Stewart, J., dissenting); *see also* ELY, *supra* note 2, at 121 (calling administrability the one-person, one-vote standard's "long suit").

7. 531 U.S. 98 (2000).

under the Equal Protection Clause of the Fourteenth Amendment. Precisely because these cases require the Supreme Court to make at least implicit normative judgments about the meaning of democracy or the structure of representative government, the danger of manageable standards is that they ossify the new rules and enshrine the current Court majority's political theory. That enshrinement is precisely what happened in the one-person, one-vote cases.

Arguably, we cannot be surprised that the Court adopted the manageable standard of equally apportioned districts in *Reynolds*; arguably manageable standards lower administrative costs, decrease the chances of lower court deviation from Supreme Court pronouncements, and increase reliance interests of those involved in the electoral process.[8] But we must recognize the cost of manageable standards as well.

In contrast to *Reynolds*, when the Court does not articulate a manageable standard, it leaves room for future Court majorities to deviate from or modify rulings in light of new thinking about the meaning of democracy or the structure of representative government, or based on experience with the existing standard. It also allows for greater experimentation and variation in the lower courts using the new standard. Following modification and experimentation, the Court appropriately may articulate a more manageable standard.

The benefits of an initial unmanageable standard no doubt come with costs as well: greater administrative costs, increased straying by the lower courts from Supreme Court majority pronouncements, and a decreased ability of political actors to rely upon Supreme Court precedent. But lack of Court competence in political matters suggests that those costs are worth bearing, at least for a time, as the Court and lower courts explore the contours of new equal protection rights created in election law cases.

This analysis leads to a two-part prescription for how the Supreme Court should handle equal protection claims in election cases. First, the Court should intervene only when the political process cannot correct itself from apparent political market failure. I

8. In a thoughtful recent paper, Spencer Overton explores this issue in the context of the debate over "rules" versus "standards." Spencer A. Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARV. C.R.-C.L. L. REV. 65 *passim* (2002). Overton's primary focus, however, is on the use of rules versus standards as a "kind of structural determination about who will make decisions." *Id.* at 66. He sees the choice about the extent to which the Court should "check the discretion of decisionmakers." *Id.* My focus here is on what the Court does to bind *its own hand* in future cases, with the understanding that reinterpreting a vague judicial standard is easier than overruling a non-vague rule.

suggest this limit because judges are not particularly competent to decide these questions. Thus, courts should engage in the exercise only when the legislative self-interest problem leaves the Court as the only practical alternative to inaction. Second, when the Supreme Court is convinced that intervention is necessary, it must articulate *an appropriately precise* standard for judging equal protection claims: the more controversial the Court's normative political theory underlying the claim in a particular case, the more it should strive to articulate legal standards that leave wiggle room for future Court majorities to modify.[9]

I do not claim that the Court has articulated unmanageable standards in the past *for this reason*; often such an articulation has been the product of political compromise, sloppy drafting, or unforeseen circumstances. My claim is that the Court *should*, at least initially, articulate unmanageable standards in certain equal protection election cases in the future.

Much has been written about the first part of this prescription. For example, Professor Pamela S. Karlan recently has argued that the Supreme Court's intervention in the 2000 Florida election controversy was unwarranted because the political process was still working; others, most notably Judge Richard A. Posner, disagree with that assessment of the Florida situation,[10] but presumably not with the premise that judicial intervention is unwarranted when the political market is well-functioning.

Accordingly, this Article focuses on the second part of the prescription: the calibration of the manageability of the judicial standard to the extent of social consensus on the nature of the meaning of political equality. This second part is especially important because there may be significant disagreement on the first part—whether the political market will correct itself. Most scholars writing about *Baker v. Carr* and cases in its wake have extolled the virtues of

9. At first blush, my argument has similarities to Cass Sunstein's calls for "judicial minimalism," which asserts that the Supreme Court decide as little as possible when it decides controversial cases. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999). One critical difference between us is that Sunstein calls for such minimalism "[t]o . . . allow democratically accountable bodies to function . . . . This is one reason why courts should and do act cautiously when they are in the midst of a 'political thicket.'" *Id.* at 26. In contrast, I call for initial unmanageability to give the Supreme Court greater information to settle upon the ultimate contours of the particular equal protection rule it will craft. I do not disagree, however, that courts should sometimes act cautiously for the reason Sunstein gives as well.

10. See the discussion between Karlan and Posner in *Forum: The Triumph of Expedience: How America Lost the Election to the Courts*, HARPERS, May 2001, at 31, 32.

manageability;[11] this Article by contrast is in praise of some unmanageability, at least in certain cases and for a certain period of time.

Part I of this Article explores whether the Court adopted an appropriately precise standard in the one-person, one-vote cases.[12] It argues that the Court adopted the most manageable of standards that in retrospect has been too restrictive of political realities. It further considers how politics and jurisprudence might have been different had the Court adopted Justice Stewart's alternative, unmanageable standard for judging malapportionment claims.[13] Justice Stewart's standard would have provided greater flexibility in dealing with apportionment problems and greater information to the Justices as they refined the new constitutional standards.

Part II of this Article explores three additional areas in which the Court has adjudicated election cases under the Equal Protection Clause: cases involving wealth qualifications,[14] suffrage qualifications,[15] and vote counting.[16] These three cases illustrate how the Court may increase the unmanageability of the equal protection standards as it faces a more controversial equal protection claim.[17]

Finally, Part III briefly demonstrates how unmanageable standards may counteract the possibility of court-imposed proportional representation, which lurks in the background of a number of election cases under the Equal Protection Clause.[18] Unmanageable standards sometimes will be a better alternative than

11. *See, e.g.*, Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of* Baker v. Carr, 1995 U. ILL. L. REV. 683, 688, 690, 694 (contrasting the manageability of the one-person, one-vote standard with the unmanageability of the standards for judging partisan and racial gerrymandering set forth in later cases); Jeffrey G. Hamilton, Comment, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1571 (1994) ("Judicially manageable standards are necessary if the Court intends to continue on the course set by the holdings in *Shaw v. Reno* and *Davis v. Bandemer*.") (footnotes omitted); Jeremy M. Taylor, Comment, *The Ghost of Harlan: The Unfulfilled Search for Judicially Manageable Standards in Voting Rights Litigation*, 65 MISS. L.J. 431, 435 (1995) (calling upon the Supreme Court to "develop and adopt a workable and stable judicial standard" to guide the lower courts in current voting rights controversies). For a brief article arguing against judicially manageable standards and in favor of the use of multiple criteria, see Paul S. Edwards & Nelson W. Polsby, *Introduction: The Judicial Regulation of Political Processes—In Praise of Multiple Criteria*, 9 YALE L. & POL'Y REV. 190 (1991).

12. *See infra* pp. 1475–83.

13. *See infra* pp. 1483–88.

14. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

15. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

16. Bush v. Gore, 531 U.S. 98 (2000).

17. *See infra* pp. 1489–98.

18. *See infra* pp. 1498–1503.

denying relief altogether. Part III makes this point by contrasting two cases. In *Mobile v. Bolden*,[19] the Court rejected a claim that an at-large districting plan violated the Equal Protection Clause. It did so at least in part because it believed that to hold otherwise would have imposed a system of proportional representation on the creation of legislative bodies. In *Davis v. Bandemer*,[20] the partisan gerrymandering case, the Court recognized a claim of an unconstitutional partisan gerrymander under the Equal Protection Clause, but did so using an unmanageable standard. Contrary to the predictions of Court Justices not signing the plurality opinion and of some commentators, the Court in *Bandemer* successfully avoided imposing a proportional representation test on partisan gerrymandering claims. Thus, the *Mobile* Court was incorrect that a decision under the Equal Protection Clause inexorably would have led to proportional representation.

I. ONE PERSON, ONE VOTE, ONE MANAGEABLE STANDARD

A. Introduction: From Colegrove *to* Baker *in Search of Judicially Manageable Standards*

The one-person, one-vote standard was hardly inevitable. In 1946, Justice Frankfurter's plurality opinion in *Colegrove v. Green*[21] announced the Court's refusal to enter the "political thicket."[22] Frankfurter explained that the Court would not decide legislative apportionment issues because their "peculiarly political nature" made them unsuitable "for judicial determination."[23]

The Court essentially overruled *Colegrove* in *Baker v. Carr*,[24] thereby allowing challenges to legislative apportionment to go forward. Justice Brennan, writing the majority opinion in *Baker*, described the contours of the "political question" doctrine. He explained that the doctrine precluded judicial intervention in six categories of cases, including the category of cases in which "a lack of judicially discoverable and manageable standards for resolving" the dispute existed.[25]

19. 446 U.S. 55 (1980).
20. 478 U.S. 109 (1986).
21. 328 U.S. 549 (1946).
22. *Id.* at 556 (plurality opinion).
23. *Id.* at 552 (plurality opinion).
24. 369 U.S. 186 (1962).
25. *Id.* at 217. The six categories are:

The majority and dissent in *Baker* disagreed about whether apportionment cases fell into this category. Over Justice Frankfurter's argument in dissent that "standards . . . for judicial judgment are lacking,"[26] the majority stated that "[j]udicial 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."[27] The *Baker* majority distinguished *Colegrove* as a Guaranty Clause case, and characterized that clause as "not a repository of judicially manageable standards."[28]

This move by the *Baker* majority was nothing short of a judicial sleight-of-hand. As Michael McConnell explained in a recent article:

> As an interpretation of the political question doctrine, this was nonsense. At the time of *Baker*, the Equal Protection Clause had never been applied to the districting question, and there were any number of possible interpretations, with no judicially manageable means of choosing among them. ("One person, one vote" is obviously a judicially manageable standard, but at the time of *Baker*, the Court had not embraced it.) Conversely, if the Court were inclined to develop judicially manageable standards under the Equal Protection Clause, it could do so equally well under the [Guaranty] Clause. The existence *vel non* of "judicially manageable standards" was inherent in the underlying issue, not in the constitutional label attached to it. Thus, it is hard to avoid the conclusion that the fateful decision was made

---

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

Id. *See generally* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 207–09 (1964) (disputing the link between the political question doctrine and the need for judicially manageable standards).

26. *Baker*, 369 U.S. at 289 (Frankfurter, J., dissenting).

27. *Id.* at 226.

28. *Id.* at 223.

> for no reason other than to avoid the *appearance* of a departure from the nonjusticiability precedents.[29]

It may be, as McConnell argues, that the choice to use the Equal Protection Clause rather than the Guaranty Clause pushed the Court to choose particularly manageable standards in *Reynolds* and later cases.[30] My concern here, however, is not with the doctrinal question of *where* (if anywhere) in the Constitution standards for policing the apportionment process should come from, but rather with the *ramifications* of *Baker*'s holding that courts would find judicially manageable standards in the Equal Protection Clause to decide apportionment cases.[31]

Justice Brennan's statement in *Baker* that standards to apply in this area were "well developed and familiar" was true only if taken to an unhelpful level of abstraction. Thus, in *Baker*, the Court announced the existence of judicially manageable standards, but left everyone to guess about what those standards should be. Would the Court require equipopulousity, apportionment that was rational rather than "arbitrary and capricious," or compliance with some other standard? The Equal Protection Clause provided no answers on its face.

A recently published series of Supreme Court conference notes from the time reveals that the lack of an articulated standard in *Baker* apparently stemmed not from an oversight by the Court but from the political compromises necessary to get a majority vote in favor of justiciability. On April 20, 1961, during the conference following the initial oral argument in *Baker*, Justice Harlan argued that the case

---

29. Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 106–07 (2000).

30. *See id.* at 107–08. McConnell argues that the Equal Protection Clause language committed the Court to a focus on equal populations while a Guaranty Clause claim could have allowed the Court to focus on preserving the right of a state not to be trampled by a permanent political minority. But in other equal protection election cases (including the cases discussed later in this Article), the Court has not imposed any exacting requirement of strict equality such as in *Reynolds*.

31. McConnell's argument raises another issue. *Baker* speaks of "judicially *discoverable* and manageable standards." 369 U.S. at 217 (emphasis added). Thus, the Court apparently imposed two requirements. First, the *discoverability* question suggests that the text or history of the constitutional provision in question must provide some guidance on how to decide these cases. McConnell argues that no such guidance exists regarding how to apply the Equal Protection Clause to districting questions. *See* McConnell, *supra* note 29, at 110. I ignore this discoverability question here because the Court has gone down and likely will continue to go down the road of deciding these election cases whether such guidance is "discoverable" from the text or history of the Constitution or not. The second requirement is judicial manageability. My concern is with the ramifications of this second requirement.

should not be justiciable because "[t]his Court is not competent to solve this type of problem."[32] Justice Brennan responded, "I do not believe the remedies are insoluble—I worked it out with a judicial remedy."[33] At that point, Brennan obviously was contemplating some standard, perhaps the one-person, one-vote standard.

Justice Stewart, the swing vote, could not decide how to vote, and the case was set for reargument.[34] Following reargument the next October, Justice Stewart expressed the view in conference that the case was justiciable, but he rejected the argument that "equal protection requires representation approximately commensurate with voting strength. States could give towns only one vote, whatever their size."[35] By this point, Justice Brennan had proposed asserting jurisdiction, but not directing a specific decree.[36] He hoped that the "assertion of power would cause the Tennessee legislature to act."[37] Thus, the emergence of one person, one vote awaited future Court decisions, after some changes in Court personnel.[38]

B. *The Most Judicially Manageable of Standards: One Person, One Vote*

The last section demonstrated that *Reynolds v. Sims*,[39] establishing the one-person, one-vote standard for judging the constitutionality of state legislative apportionment, did not follow automatically from *Baker*. The Court moved there after *Baker*, first in *Gray v. Sanders*,[40] striking down unequal weighting of votes within a single constituency, and then in *Wesberry v. Sanders*,[41] requiring that congressional districts be drawn on an equal population basis. *Gray* prevented states from using a system analogous to the electoral

32. THE SUPREME COURT IN CONFERENCE (1940–1985), at 846 (Del Dickson ed., 2001) [hereinafter CONFERENCE] (quoting Justice Harlan). For additional historical accounts, see BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT: A JUDICIAL BIOGRAPHY 411–28 (1983); Anthony Lewis, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 29, *passim* (1997).

33. CONFERENCE, *supra* note 32, at 846 (quoting Justice Brennan).

34. *Id.* at 847.

35. *Id.* at 850 (quoting Justice Stewart).

36. *Id.* at 849.

37. *Id.* (quoting Justice Brennan).

38. The case apparently divided the Justices bitterly, as illustrated by a note that Frankfurter sent to Harlan just before Justice Frankfurter collapsed in his chambers. *Id. at* 851 n.71. In the note, Frankfurter stated that the *Baker* majority failed "to appreciate the intrinsic and acquired majesty of the Court's significance in the affairs of the country." *Id.*

39. 377 U.S. 533 (1964).

40. 372 U.S. 368 (1963).

41. 376 U.S. 1 (1964).

college in electing statewide officials, but it did not involve the more common question of a multi-member governmental body. *Wesberry* was not decided under the Equal Protection Clause but under Article I, Sections 2 and 4 of the Constitution, and was thus applicable only to the United States House of Representatives.[42] As late as the conference in *Wesberry*, Justice Brennan hesitated in imposing the one-person, one-vote standard. He stated, "On the remedy, I think that we would be wise only to reverse and let the district court fashion a remedy without giving any hints as to what it should do. There must be substantial equality. This one is way out of line."[43]

Nonetheless, first in *Wesberry*, then in *Reynolds*, the Court majority adopted the one-person, one-vote standard. In *Wesberry*, the Court held that "as nearly as is practicable[,] one man's vote in a congressional election [must] be worth as much as another's."[44] In *Reynolds*, the Court held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[45]

Justice Warren, writing for the *Reynolds* majority, declared the principle as the "clear and strong command of"[46] the Equal Protection Clause: "This is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."[47] The Court left the states with just a bit of wiggle room:

> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-protection principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation.[48]

---

42. DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW—CASES AND MATERIALS 113 (2d ed. 2001).

43. CONFERENCE, *supra* note 32, at 852 (quoting Justice Brennan).

44. *Wesberry*, 376 U.S. at 7–8.

45. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

46. *Id.*

47. *Id.*

48. *Id.* at 579–80 (footnote omitted).

The Court held that a state might justify minor deviations for the sake of keeping political subdivisions together in the state body.[49] But a state could not promote that interest if "population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body . . . ."[50]

C. *The Aftermath of the One-Person, One-Vote Cases and the Problems of Judicially Manageable Standards*

1. One Person, One Vote after *Wesberry* and *Reynolds*

The Supreme Court's first foray into the political thicket required most states to reapportion both congressional and state legislative districts.[51] The one-person, one-vote standard announced by the Court was easy to understand and was popular among the public.[52] As Professor Ely points out, once the reapportionment took place on an equal population basis, controversy over the cases died down: legislators elected from the newly apportioned districts had every incentive to preserve the new status quo.[53]

The only significant litigation regarding state or congressional apportionment to follow from these cases was the question of how much a state could deviate from exact mathematical equality for subordinate reasons, such as the desire to keep a political subdivision together in one district. The Court has allowed virtually no deviation in the case of congressional districting,[54] and allowed some, but not much, deviation in the case of state legislative districts.[55]

Commentators have criticized the emergence of two standards for judging deviation depending upon whether congressional or state legislative districting is involved, pointing out that the text of the Constitution does not give any reason to treat one more leniently

---

49. *Id.*

50. *Id.* at 581.

51. *See* ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 4 (1968); *see also* HAROLD M. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 1999–2000, at 74–75 tbl.1–30 (2000) (showing deviations from equality in congressional and state legislative districts in the 1960s, 1980s, and 1990s).

52. *See* Robert B. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 228–29 (1968).

53. ELY, *supra* note 2, at 121.

54. White v. Weiser, 412 U.S. 783, 790 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969).

55. Voinovich v. Quilter, 507 U.S. 146, 161 (1993); Gaffney v. Cummings, 412 U.S. 735, 751 (1973); Mahan v. Howell, 410 U.S. 315, 329 (1973); Abate v. Mundt, 403 U.S. 182, 185 (1971).

than the other.[56] Despite these differences, one person, one vote remains the overriding component in districting decisions.

More significant litigation arose out of attempts to apply the one-person, one-vote standard to local elections. Beginning in *Avery v. Midland County*,[57] the Court required local government entities to apply the standard, despite protests that an equally districted *state* legislature could use state law if desired to equalize any unequally districted local or regional entities.[58]

The *Avery* Court left open the possibility that the one-person, one-vote standard would not apply to special purpose districts whose burdens fell disproportionately on one group.[59] In two cases, the Court applied this exception to exempt elections for special purpose water districts.[60] But these exceptions have not been applied widely. In practice, the lion's share of elections even on the local level are conducted using the one-person, one-vote standard.

2. Problems with the Judicially Manageable One-Person, One-Vote Standard

Despite the popularity of the one-person, one-vote standard, some scholars recently have attacked it. Not all the attacks are strong; one weak argument claims that the standard has opened up the political system to all kinds of partisan and racial gerrymandering and incumbency protection.[61] According to this argument, once legislators became free to violate traditional "constraints" on redistricting like adherence to the boundaries of political subdivisions in the name of one person, one vote, they were "liberated to snake lines all over the map to achieve their own purposes."[62]

---

56. LOWENSTEIN & HASEN, *supra* note 42, at 121–22; Jerry R. Parkinson, Note, *Reapportionment: A Call for a Consistent Quantitative Standard*, 70 IOWA L. REV. 663, 680–81 (1985).

57. 390 U.S. 474 (1968); *see also* Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970) (applying the one-person, one-vote rule to an election for a junior college district).

58. Justice Fortas made this point in his *Avery* dissent. 390 U.S. at 509 (Fortas, J., dissenting).

59. 390 U.S. at 476.

60. Ball v. James, 451 U.S. 355, 370 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973). On these exceptions, see LOWENSTEIN & HASEN, *supra* note 42, at 132–47; Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 360–70 (1993). Briffault argues that these cases do not state clearly when the exception applies. Briffault, *supra*, at 366. As I argue later in the text, however, some uncertainty in this area, at least initially, is desirable.

61. Justice Harlan suggested the possibility of partisan gerrymandering in his *Reynolds* dissent. 377 U.S. 533, 622 (1964) (Harlan, J., dissenting).

62. McConnell, *supra* note 29, at 112.

This claim is weak because no such "constraint" ever existed in the sense of a pre-*Reynolds* legal obligation on legislators to draw district lines conforming to the boundaries of political subdivisions. Although many pre-*Reynolds* districts conformed to such subdivisions, conformity resulted from neither legal constraint nor civic motivation. Self-interested legislators looking to protect their interests did not *need* to violate political boundaries because they had a much more potent weapon to protect themselves: the drawing of vastly unequal districts or simply preserving districts that had become increasingly malapportioned over time.[63] Indeed, adherence to the boundaries provided some political cover for legislators to draw or retain grossly malapportioned districts.

Another, more convincing line of attack has focused on the *Avery* branch of these cases. Critics have argued that the one-person, one-vote standard sometimes works to prevent the formation of regional governments to deal with problems that appropriately are handled on a regional, rather than local, basis. As Bruce Cain recently explained, the Court's decision to apply the standard:

> deprived the American people of an entire class of institutional mechanisms for compromise which could be used to solve collective action problems. For example, when the San Francisco Bay area considered establishing a regional government to cope with problems of growth and traffic management, its lawyers informed the planners that they could not design a confederation which did not conform to the principle of one person, one vote. Since the smaller cities were unwilling to join into any arrangement that would allow their suburban votes to be swamped by the more numerous votes of the larger, urban cities, the governance problem proved to be insurmountable. What the Bay Area cities wanted was to replicate the logic of the original compromise that induced smaller states to join the large states in the union at the founding of the country. In effect, the courts made it impossible for modern legislators to do what the Founding Fathers had been able to do.[64]

The Bay Area cities were correct in believing the courts would not uphold a regional compromise that violated the one-person, one-

63. *See* DIXON, *supra* note 51, app. A (contrasting state by state the malapportionment of state legislative districts before and after *Reynolds*). California, for example, had a 1,432% deviation in districts before 1966. *Id.* at 592.

64. Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105, 1110 (1999); *see also* Edwards & Polsby, *supra* note 11, at 201 (discussing the problem of the Bay Area regional government).

vote principle. The Supreme Court rejected a one-borough, one-vote rule for a regional government body in New York City in *Board of Estimate v. Morris*,[65] and a federal district court rejected a regional plan for the Seattle area that violated the principle.[66] As Richard Briffault explained in his careful examination of this problem, "[t]he inability to create a federal structure in which the principle of population equality is tempered by a concern for some parity among the pre-existing units [of local government] may render the regional unit politically impossible."[67]

D. The Road Not Taken: Justice Stewart's Judicially Unmanageable Alternative

The regional government argument advanced by Professors Cain and Briffault suggests a number of responses. First, one could argue that the one-person, one-vote standard's effect of hampering regional government is unfortunate, but it is a small price to pay for the fundamental gains in equality that the Court worked in *Wesberry* and *Reynolds*. Second, one could echo Justice Fortas' dissent in *Avery*, agreeing that the one-person, one-vote standard was necessary on the state level but disagreeing with its application on the local level. Reversal of *Avery* but not *Reynolds* would eliminate the de facto Court prohibition on regional governments, and an equally districted state legislature could block unequal and unfair regional government plans.

Both of these responses to the regional government problem are reasonable ones, and choosing between the two today is difficult. But perhaps the problem could have been avoided from the beginning. Despite Justice Brennan's reassuring rhetoric in *Baker* that equal protection standards were "well developed and familiar,"[68] when the Court decided *Baker*, *Wesberry*, *Reynolds*, and then *Avery*, it was in uncharted territory.

At first the Court proceeded cautiously, refusing in *Baker* to articulate particular standards to judge the equal protection claim, with at least Justice Brennan hoping that the threat of Court action

65. 489 U.S. 688, 690 (1989).

66. Cunningham v. Municipality of Metro. Seattle, 751 F. Supp. 885, 895 (W.D. Wash. 1990).

67. Briffault, *supra* note 60, at 404; *see also id.* at 344 (stating that "citizen understanding of and participation in government decisionmaking may be enhanced where regional government districts are coterminous with community or neighborhood lines, even where neighborhoods differ in population").

68. Baker v. Carr, 369 U.S. 186, 226 (1962).

would lead to a political solution. But then the Court in *Wesberry* and *Reynolds* committed itself to the one-person, one-vote principle, and, with the exception of an allowance for minor deviations in state legislative districting,[69] it has remained behind this principle for nearly forty years. In *Avery*, despite protests of Justice Fortas and others, the Court extended the one-person, one-vote rule to local government bodies.

In hindsight, the Court may have been wiser to have adopted initially Justice Stewart's alternative test, which he articulated in one of the companion cases to *Reynolds*, *Lucas v. Forty-Fourth Assembly District*.[70] Stewart agreed the cases were justiciable,[71] but he disagreed with the one-person, one-vote standard. He stated that the *Reynolds* majority was wrong in seeing the principle as rooted in a universally accepted representational theory or historical practice in the United States.[72] He disagreed that unequal districting "debased" a citizen's votes: "I find it impossible to understand how or why a voter in California, for instance, either feels or is less a citizen than a voter in Nevada, simply because, despite their population disparities, each of these states is represented by two United States Senators."[73]

Stewart rejected reliance on population equality alone in view of what he saw as the legitimate differing needs of different states. He then put forward his alternative:

> The fact is, of course, that population factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, effective, and balanced representation of the regional, social, and economic interests within a State.... What constitutes a rational plan reasonably designed to achieve this objective will vary from State to State, since each State is unique, in terms of topography, geography, demography, history, heterogeneity and concentration of population, variety of social and economic interests, and in the operation and interrelation of its political institutions. But so long as a State's apportionment plan reasonably achieves, in the light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of

69. *See supra* note 55 and accompanying text.

70. 377 U.S. 713 (1964).

71. *See id.* at 751 (Stewart, J., dissenting).

72. *Id.* at 745 (Stewart, J., dissenting); *see also* SHAPIRO, *supra* note 25, at 227–32 (discussing alternative representational theories to one person, one vote).

73. *Lucas*, 377 U.S. at 746 (Steward, J., dissenting).

> effective majority rule, that plan cannot be considered irrational.[74]

Justice Stewart further explained that his proposed alternative test for compliance with the Equal Protection Clause had two attributes: the plan must be rational in light of the state's own characteristics and needs, and it must not "permit the systematic frustration of the will of a majority of the electorate of the State."[75] Using this standard, Justice Stewart would have upheld the unequal districting plans in Colorado and New York,[76] but he agreed with the majority's result in *Reynolds* to strike down Alabama's scheme, which he deemed "irrational."[77]

Justice Stewart's proposed alternative is an homage to judicial unmanageability.[78] Among the terms he did not define carefully in his alternative are: "subordination," "fair, effective and balanced representation," "rational," "reasonably designed," "reasonable achieve[ment]," "effective and balanced representation," "substantial interests," "effective majority rule," and "systemic frustration of the will of the majority."

Long and protracted litigation over virtually every state's apportionment likely would have followed from the adoption of Justice Stewart's alternative standard. Perhaps the litigation would have boiled down to a question of whether the challenged scheme looked more like Alabama's scheme, which fails Justice Stewart's test, than New York's scheme, which passes Justice Stewart's test. More likely, lower courts would have developed more specific tests

---

74. *Id.* at 751 (Stewart, J., dissenting).

75. *Id.* at 753–54 (Stewart, J., dissenting).

76. *Id.* at 765 (Stewart, J., dissenting). He took various positions in the other cases decided concurrently. *See* Carl Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 58.

77. Reynolds v. Sims, 377 U.S. 533, 588 (1964) (Stewart, J., concurring). McConnell recently endorsed Justice Stewart's standard, but said it is more properly grounded in the Guaranty Clause than the Equal Protection Clause. McConnell, *supra* note 29, at 114 n.47. For a defense of grounding these cases in equal protection, see ELY, *supra* note 2, at 118–19 (discussing this issue); Auerbach, *supra* note 76, at 74–79.

78. *See, e.g.*, Auerbach, *supra* note 76, at 58–59 ("Mr. Justice Stewart justifies disproportionate representation as necessary to check the concentrated power of the most populous areas, but he does not indicate, satisfactorily, how much disproportionateness he would tolerate."); *see also id.* at 61 ("The difficulty with Mr. Justice Stewart's test of effective majority rule (and any other such test designed to sanction minority veto power) is that it is unable, logically, to specify any percentage short of 100 (or unanimity) which should empower the taking of affirmative action."); Note, *The Theory of the Reapportionment Cases*, 79 HARV. L. REV. 1228, 1246 (1966) ("The difficulty confronting all proposals [like Justice Stewart's] to overrepresent certain interests is that there are no standards for deciding which interests should be favored.").

for judging the constitutionality of state plans, and likely those courts' tests would conflict. The Court then would have been asked to bring some order to this chaos.

This description may appear to have little to commend it; we are all to a greater or lesser extent drawn to political order over chaos.[79] But a period of uncertainty and experimentation in this area would have been a positive, rather than a negative. Prior to *Reynolds*, judges had no experience engaging in this massive redistricting enterprise. Perhaps judicial intervention would be for the good; perhaps it would not. But the one-person, one-vote rule was a single, decisive step in one direction; Justice Stewart's alternative test would have allowed for initial baby steps in different directions by lower-level decisionmakers who did not have to speak definitively for the nation.[80]

Critics feared that Justice Stewart's test, which would have required the courts to delve into the details of political power in each state, would have unduly burdened the courts and undermined their legitimacy. For example, Professor Deutsch argued that the test

> would indeed require the Court to canvass the actual workings of the floor leadership in the legislative branches, the mechanisms of party control not only over voters and the city government but also over elected representatives—in short, the details of the petty corruption and networks of personal influence that all too often constitute crucial sources of power in municipal politics .... Even assuming that the evidence was available and would be forthcoming, is it likely that our society could accept, as a steady diet, the spectacle of the judiciary solemnly ruling on the accuracy of a political boss's testimony concerning the sources of his power over voters and the degree of control that he exercised over elected officials?[81]

---

79. *See* Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 714 (2001).

80. Perhaps, a manageable standard was necessary in *Reynolds* because it was the Court's first real entry into a state's political processes. Briffault argues that Stewart's position "could have been seen as an apologia for the perpetuation of malapportionment," Briffault, *supra* note 60, at 415, and that the Court's decisive one-person, one-vote standard may have "enhanced the legitimacy of judicial intervention ... by indicating that questions of representation could be resolved by a relatively simple formal rule, rather than a complex analysis." *Id.* But my main point is a more general one about how the Court should handle equal protection claims in the election area in the future.

81. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN L. REV. 169, 247 (1968); *see also* ELY, *supra* note 2, at 124 (endorsing Deutsch's view and explaining that the Court adopted the one-person, one-vote standard rather than Stewart's "in-between" standard

Deutsch's argument raised a genuine concern, though one that appears in hindsight to be unwarranted in light of current litigation under section 2 of the Voting Rights Act, which requires the courts to engage in exactly this kind of analysis.[82] The concern could have been tested in the lower courts as they struggled with the new unmanageable standard. This period of experimentation would have benefited not only the development of standards for Supreme Court policing of the districting process, but aided the Supreme Court's thinking about further entries into the political thicket, such as its later forays into policing of racial or partisan gerrymandering.[83]

Nor would characterizing Justice Stewart's standard as one that would have promoted more result-oriented judging be fair.[84] Once the Court entered into this thicket, the choice was not one between judging based upon objective standards and result-oriented judging.

"precisely because of considerations of administrability"); Auerbach, *supra* note 76, at 61 ("Any effort to apply [Justice Stewart's] test practically calls for such a detailed evaluation of the politics of a state—which are always subject to change—that its application would hurl the Court back into the thicket of non-justiciable issues.").

82. Section 2 proscribes state imposition of any voting rule "which results in denial or abridgement of the right of any citizen of the United States to vote on account of" race, color, or membership in a protected language group. Voting Rights Act § 2, 42 U.S.C. § 1973(a). It defines such abridgement as established

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to participation by members of a [protected] class ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Voting Rights Act § 2, 42 U.S.C. § 1973 (b).

The statute further explains that section 2 does not establish a right to proportional representation. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (1994)). The Supreme Court imposed some manageability in this area in articulating a three-prong threshold test in *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). *See generally* LOWENSTEIN & HASEN, *supra* note 42, at 230–81 (providing a general discussion of *Thornburg v. Gingles*).

83. In contrast to this position, Peter Schuck argues against a separation of rights and remedies, claiming in particular that judges should consider the scope of the remedy before finding the violation of any particular right. PETER H. SCHUCK, SUING GOVERNMENT 186–89 (1983).

84. *Cf.* Overton, *supra* note 8, at 95 ("Standards allow judges to introduce arbitrary and subjective political biases into their deliberations and thus do not clearly confine the decisionmaking power of judges."). My point is simply that a bright-line rule like the one-person, one-vote standard similarly allows judges to introduce subjective political biases into the rule, though it is done in one fell swoop.

A separate criticism of Stewart's rule, raised by Lowenstein, is that the standard would have threatened the pluralist system of districting by requiring that the *content* (that is, outcome) of a districting process be rational. *See* Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245, 251 (David K. Ryden ed., 2000). I do not deal with this criticism in this Article.

Rather the choice was whether to have all the results dictated at the front end through the one-person, one-vote rule, or to allow for variation on the back-end through Justice Stewart's flexible standard. Arguably the latter is a more satisfactory solution, at least initially, and at least in situations like the apportionment cases where highly disputed normative principles are involved.

That is not to say that the Court should never have refined Justice Stewart's test into a more manageable standard, perhaps even eventual use of the one-person, one-vote standard. But the Court lost valuable information by moving decisively, rather than incrementally.

Of course, nothing now formally prevents the Court from backpedaling from a decisive standard like the one-person, one-vote standard. But my sense is that a move from a mushy unmanageable standard to a more manageable standard is easier for the Court than to overrule existing precedent or even to make a *sub silentio* switch from a firm manageable standard to mushiness. The point is illustrated by the criticism that the Court has faced in for its inconsistent willingness to allow slight deviations in district populations depending upon whether the districting is congressional or state/local.[85] Had this distinction developed incrementally out of an unmanageable standard, it would have likely faced greater acceptance.

In addition, the Court sometimes will not get valuable information about the effects of its decision when it adopts a manageable standard in the first instance, and therefore will not know about the need to backpedal. For example, the problems with regional government formation perhaps were not appreciated adequately at the time the Court decided *Avery*. With a Stewart-like standard applied on the local level, the Court could have observed whether state legislatures responded to regional government plans that failed to comply with one person, one vote. Perhaps the legislatures would have blocked such plans with great population disparities; or perhaps the legislatures would have approved of such plans, finding that the "federal" model was politically desirable on the regional level. Perhaps also the Court could have observed the success or failure of political pressure on the state government from those people in malapportioned regional government districts. This information would have proved valuable to the Court in considering the ultimate constitutionality of unequally apportioned regional government schemes.

85. *See supra* notes 54–55 and accompanying text.

II. CALIBRATING CONTROVERSY TO UNMANAGEABILITY: WEALTH QUALIFICATIONS, VOTER QUALIFICATIONS, AND VOTE-COUNTING STANDARDS

Unmanageability is not an unmitigated good in election law cases. As noted in the introduction, unmanageability imposes greater administrative costs, increased straying by the lower courts from Supreme Court majority preference, and a decreased ability of political actors to rely upon Supreme Court precedent.

These concerns are mitigated, however, when the Court calibrates the unmanageability of its standard to the novelty or controversy of its equal protection holding: the greater the novelty or controversy surrounding the holding, the more unmanageable the standard that the Court should articulate. To illustrate this approach using three cases of increasing novelty or controversy, consider *Harper v. Virginia State Board of Elections*,[86] *Kramer v. Union Free School District No. 15*,[87] and *Bush v. Gore*.[88] *Harper* involved a poll tax for voting in state elections, *Kramer* involved a law limiting the franchise in a school district election to owners and renters of taxable realty in the district, along with their spouses, and parents or guardians of children in public schools, and *Bush v. Gore* concerned the standards over a recount of votes for Florida's electors in the 2000 presidential election.

Before proceeding with this analysis, I must detour with a significant caveat. In the introduction, I explained that when the Supreme Court considers intervening in an election law dispute under the Equal Protection Clause, it should undertake a two-part analysis. First, the Court should intervene only when the political process cannot correct itself from apparent political market failure. Second, if the Court intervenes, it should engage in the calibration that I am now describing. My detour looks at the first part of this test—political market failure—for the three cases at issue.

Harper looks like a case that passes the first test because voters frozen out of the political process cannot use the political process to get in.[89] *Kramer* is a more questionable case on this basis. Although voters excluded from the school district election could not effectively use the local political process to get relief, arguably the voters—who were fully enfranchised in state elections—could have used the *state*

86. 383 U.S. 663 (1966).
87. 395 U.S. 621 (1969).
88. 531 U.S. 98 (2000).
89. *See* ELY, *supra* note 2, at 120.

political process to change the rules for school district elections.[90] *Bush v. Gore* is a case that convincingly fails the first test. The political process was working, not failing, with the Florida legislature and United States Congress poised to step in if necessary.[91]

Despite the fact that one and perhaps two of the three cases I choose in this part are cases in which the Court should not have intervened, I focus here on only the second part of the test. That is, assuming the Court was correct in intervening in these cases, was the level of manageability of the rule enunciated by the Court properly calibrated to the novelty of the equal protection holding? This second part of the test is especially important if, as in the case of *Bush v. Gore*, the Court will sometimes err in the first part of the analysis.

A. Little Novelty/Highly Manageable Standard

Harper fits into the category of cases in which the Court's equal protection holding had little novelty and therefore it was appropriate for the Court to articulate a highly manageable standard. In *Harper*, Virginia residents sought to have Virginia's poll tax, which required an annual payment of one dollar and fifty cents as a precondition to voting, declared unconstitutional.[92] The Court chose not to rely upon history indicating that the tax originally was devised to disenfranchise African Americans,[93] instead asking whether a *fairly applied* poll tax could violate the Equal Protection Clause.[94]

The Court, in holding that a fairly applied poll tax violated equal protection, announced a bright-line manageable rule: "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[95] The Court's rationale was

90. *But cf.* Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1048–51 (1980) (disputing the ability of the plaintiff in *Kramer* to get assistance on the state level).

91. *See* Richard L. Hasen, *A "Tincture of Justice": Judge Posner's Failed Rehabilitation of* Bush v. Gore, 80 TEX. L. REV. 137, 148–49 (2001) (book review).

92. The tax was collected along with personal property taxes. Those who did not pay a personal property tax were not assessed for the poll tax, "it being their responsibility to take the initiative and request to be assessed." Harper v. Va. Bd. of Elections, 383 U.S. 663, 664 n.1 (1966).

93. *See id.* at 666 n.3. The dissenting Justices agreed that a poll tax intended as a device to discriminate on the basis of race would be unconstitutional. *See id.* at 672 (Black, J., dissenting); *id.* at 683 n.5 (Harlan, J., dissenting).

94. *Id.* at 666.

95. *Id.*

similarly simple: "Voter qualifications have no relationship to wealth nor to paying or not paying this or any tax."[96]

The Court did not need to announce such a bright-line rule in striking down Virginia's poll tax. For example, the Court could have said something more opaque like: "Because the right to vote is so fundamental and because a poll tax will make it more likely that the poor people will fail to vote in Virginia elections, the state has the burden of proving convincingly that a substantial relationship exists between the poll tax and voter qualifications. The state has made no such showing here."

The Court was correct in articulating a highly manageable standard. The reason is not that the doctrinal case under the Equal Protection Clause for the rule was stronger than the doctrinal case for the one-person, one-vote rule in *Reynolds*. As Ely explained, despite the *Harper* Court calling the poll tax "irrational," "[i]t may also be true, or at least it is not irrational to think so, that persons of some wealth tend to be more 'responsible' citizens or, more plausibly still, that willingness to pay a fee for voting is some reflection of serious interest in the election."[97] Instead, the Court was correct in using the manageable standard because a near social consensus existed in the United States against the poll tax by the time the Court decided *Harper*.

The case for this social consensus was made, somewhat ironically,[98] by Justice Harlan in his *Harper* dissent. Justice Harlan explained that poll taxes in *federal* elections had already been banned by the Twenty-Fourth Amendment, which had passed very quickly.[99] Most states had abolished poll taxes for state and local elections, leaving only four states (including Virginia) still using them.[100] After setting forth the old argument that the poll tax encourages the "right" kind of voters to vote, Justice Harlan explained that such "viewpoints, to be sure, ring hollow on most contemporary ears. Property and

96. *Id.*

97. ELY, *supra* note 2, at 120; *see also* Richard A. Epstein, *"In Such Manner as the Legislature Thereof May Direct": The Outcome in* Bush v. Gore *Defended, in* THE VOTE: BUSH, GORE, & THE SUPREME COURT 13, 15 (Cass R. Sunstein & Richard A. Epstein eds., 2001) (characterizing *Harper* as a "free-form decision" that was "something of a stretch under classical equal protection law given that a poll tax is facially neutral and, unlike literacy tests, can be applied in a mechanical way that eliminates the dangers of political discretion").

98. Harlan raised the point to show that Congress or the constitutional amendment process could take care of the problem, and that it was not the Court's place to hold the poll tax unconstitutional.

99. *Harper*, 383 U.S. at 680, 685 (Harlan, J., dissenting).

100. *Id.* at 680 (Harlan, J., dissenting).

poll-tax qualifications, very simply, are not in accord with current egalitarian norms of how a modern democracy should be organized."[101]

The Court's position was thus neither novel nor particularly controversial. Indeed, it was in line with an emerging view of political equality that excluded wealth considerations.[102] In such circumstances, the Court properly articulated a manageable standard eliminating all wealth qualifications for voting.

B. *Intermediate Novelty/Less Manageable Standard*

Kramer fits into the category of cases in which the Court's equal protection holding had somewhat greater novelty than *Harper* and therefore it was appropriate for the Court to articulate a somewhat less manageable standard. In *Kramer*, the plaintiff, an unmarried district resident who lived with his parents, brought a class action suit challenging a New York law limiting the franchise in his school district's election to owners and renters of taxable realty in the district, along with their spouses, and parents or guardians of children in public schools. The plaintiff did not challenge the age, citizenship, or residency requirements imposed by the district.[103]

By the time the Court decided *Kramer* in 1969, it had understood its earlier cases such as *Reynolds* and *Harper* to require application of strict scrutiny to voting classifications because voting constituted a "fundamental right."[104] Strict scrutiny requires that the state provide a compelling state interest to justify its discrimination and that the means be narrowly tailored to meet that interest. The Court held that the state failed to meet its burden under strict scrutiny and that the New York law therefore was unconstitutional. Of particular interest here is that the Court articulated a fairly unmanageable standard to apply in future cases.

The state argued that it had a legitimate interest in limiting the franchise in school district elections to those "primarily interested in such elections" and that the category of those persons allowed to vote

---

101. *Id.* at 685–86 (Harlan, J., dissenting).

102. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 93–101 (1993). Contemporary criticism of *Harper* is rare. For some examples, see William J. Michael, *The Original Understanding of Original Intent: A Textual Analysis*, 26 OHIO N.U. L. REV. 201, 214 (2000); Stephen J. Safranek, *Can Science Guide Legal Argumentation? The Role of Metaphor in Constitutional Cases*, 25 LOY. U. CHI. L. J. 357, 364 (1994).

103. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969).

104. *See id.* at 628. *See generally* LOWENSTEIN & HASEN, *supra* note 42, at 41–42 (providing a general discussion of the Supreme Court's equal protection doctrines).

were those primarily interested in school affairs.[105] The Court understood the argument as one limiting the franchise to those "directly affected" by school affairs, rather than those "subjectively concerned" about school matters.[106] As the Court wrote:

> The State apparently reasons that since the schools are financed in part by local property taxes, persons whose out-of-pocket expenses are 'directly' affected by property tax changes should be allowed to vote. Similarly, parents of children in school are thought to have a 'direct' stake in school affairs and are given a vote.[107]

The Court declined to reach the question of whether the state's interest was compelling.[108] Instead, the Court held that the classification was not narrowly tailored to meet the interest. "The classifications [of the state law] permit inclusion of many persons who have, at best, a remote and indirect interest, in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions."[109] The Court elaborated in a footnote:

> For example, appellant resides with his parents in the school district, pays state and federal taxes *and is interested in and affected by* school board decisions; however, he has no vote. On the other hand, an *uninterested* unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election.[110]

As Briffault has noted, the Court in *Kramer*, as it had in *Baker*, engaged in a judicial sleight-of-hand.[111] It wrote that it understood the state's argument as one about an *objective* interest in elections, but its analysis switched to the plaintiff's *subjective* state of mind and the subjective state of mind the fictional unemployed counterpart in holding the provision was not narrowly tailored.[112]

---

105. *Kramer*, 395 U.S. at 630–31.
106. *Id.*
107. *Id.* at 631.
108. *Id.* at 632 n.14.
109. *Id.* at 632.
110. *Id.* at 632 n.15 (emphases added).
111. Briffault, *supra* note 60, at 354–56.
112. Briffault writes:

> [T]he Court's use of the term "interest," and its contrast between [plaintiff] and his fictional unemployed counterpart, suggests that the relevant interests were subjective states of mind, rather than objective ties to school board operations. Kramer was attentive to and concerned about local school affairs. He was, therefore, "interested." His fictional unemployed counterpart was indifferent when the subject of education came up and therefore, not

Thus, the Court enunciated a fuzzy rule when it could have enunciated a manageable standard. The Court failed to define what "constitutes an 'interest' sufficient to justify a claim to the franchise"[113] in the school district election. The Court could have simply and clearly held that the franchise may not be limited except on the basis of age, citizenship, and residency. That would be an exceedingly manageable rule to apply in future cases.

Perhaps the Court did not so hold because to do so would have contradicted directly the Court's earlier decision in *Lassiter v. Northampton County Board of Elections*.[114] In *Lassiter*, the Court upheld a fairly applied literacy test on grounds that the "ability to read and write... has some relation to standards designed to promote intelligent use of the ballot."[115] A rule that limits voter qualifications to age, citizenship, and residency has no room for literacy tests. Despite the fact that Justice Black focused his *Kramer* dissent on his inability to distinguish the case from *Lassiter*,[116] the *Kramer* majority did not even cite *Lassiter*.

In retrospect, the Court's articulation of a less manageable standard may have been wise. As Briffault argues, the disenfranchisement in *Kramer* was not especially troubling—it did not disenfranchise traditionally victimized groups, no entrenchment of a territorial minority existed, and no class discrimination existed.[117] Thus, the extension of equal protection law in this direction was somewhat novel. Moreover, unlike the situation in *Harper*, there was no evidence of a societal consensus that voting qualifications like the ones in *Kramer* or *Lassiter* were improper. The Court faced a situation where the equal protection issue was more novel, and thus the Court was correct to be less than crystal clear on the rule to apply in future cases.

The fuzziness of the *Kramer* standard gave room for the Court to further refine franchise standards. It carved out an exception for

---

"interested." Thus, the state statute had failed to discriminate with sufficient precision when it sought to vest the school board's franchise only in those "interested."

Id. at 355–56.

113. *Id.* at 355.

114. 360 U.S. 45 (1959).

115. *Id.* at 51. Congress subsequently banned literacy tests in the Voting Rights Act. *See* Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973a(b) (1994)).

116. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 634 (1969) (Stewart, J., dissenting).

117. Briffault, *supra* notes 60, at 356.

special purpose districts in which the franchise could indeed be limited to classes of persons disproportionately impacted by the district's decisions. Indeed, in such elections, votes could be allocated other than on a one-person, one-vote basis.[118]

What emerged from *Kramer* and the cases involving special election districts is a more nuanced set of rules that prohibits additional voter qualifications in most elections but allows such qualifications in a special class of elections. That regime would have been much harder to create if the *Kramer* Court had simply said "no additional voter qualifications in any elections." Still, the difficulty of satisfying the exception for special purpose district elections suggests that the Court should have created an even murkier standard in *Kramer*.

C. *High Novelty/Unmanageable Standard*

Bush v. Gore fits into the category of cases in which the Court's equal protection holding had great novelty and therefore the Court properly articulated an unmanageable standard.[119] Much ink has been spilled and continues to be spilled on this case,[120] and I do not intend to rehash the many legal issues here; instead I focus narrowly on the case's unmanageable equal protection standard.

Republican candidate George W. Bush challenged on equal protection grounds the standards for a statewide recount of the votes that the Florida Supreme Court had articulated in Democratic candidate Al Gore's election contest. The *Bush v. Gore* per curiam opinion by the U.S. Supreme Court began its equal protection analysis with the following words:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383

118. *See supra* note 60 and accompanying text.

119. The line of cases beginning with *Shaw v. Reno*, 509 U.S. 630, 630 (1993), establishing the "unconstitutional racial gerrymander," also fits into this category. Chapter 7 of LOWENSTEIN & HASEN, *supra* note 42, explores the development of this constitutional claim. I note here only that the "bizarreness" standard of *Shaw* and the "predominant factor" standard of the post-*Shaw* case of *Miller v. Johnson* might be understood as a battle between Justices O'Connor and Kennedy over how unmanageable a standard should be applied to this new constitutional claim.

120. For an overview of the legal issues surrounding the case, see LOWENSTEIN & HASEN, *supra* note 42, chs. 3, 4.

> U.S. 663, 665 (1966). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 377 U.S. 533, 555 (1964).[121]

After noting that "[t]he question before us . . . is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate,"[122] the Court answered the question in the negative. It held that the recount mechanism adopted by the Florida Supreme Court did "not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right"[123] under the Equal Protection Clause for four related reasons: (1) although the Florida court had instructed that those individuals conducting the manual recounts judge ballots by discerning the "intent of the voter," it failed to formulate uniform rules to determine such intent, such as whether to count as a valid vote a ballot whose chad is hanging by two corners; (2) the recounts already undertaken included a manual recount of all votes in selected counties, including both undervotes and overvotes, but the new recounts ordered by the Florida court included only undervotes; (3) the Florida Supreme Court had ordered that the current vote totals include results of a partial recount from Miami-Dade County, allowing the Supreme Court to conclude that "[t]he Florida Supreme Court's decision thus gives no assurance that the recounts included in a final certification must be complete;" and (4) the Florida Supreme Court did not specify who would count the ballots, forcing county boards to include team members without experience in recounting ballots. Nor were observers permitted to object during the recount.[124] After holding the Florida procedure violated the Equal Protection Clause, the Court refused to remand the case to the Florida courts to articulate standards that would comply with the clause.[125]

So what precisely is the equal protection holding of *Bush v. Gore*? Commentators have noted that the case's judicial standard is muddled. Professors Dorf and Issacharoff, for example, write that

---

121. 531 U.S. 98, 104–05 (2000).

122. *Id.* at 105.

123. *Id.*

124. *Id.* at 109.

125. *Id.* at 110. This was among the most controversial portions of the opinion. For a criticism of the Court's decision on this point, see Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 388–90 (2001).

"[w]here *Baker v. Carr* and *Reynolds v. Sims* spawned a judicially-enforceable rule that is, if anything, unduly mechanical, the *per curiam* opinion in *Bush v. Gore* was perfectly opaque as to what impact, if any, its decision would have on future challenges to election procedure."[126] Similarly, Professor Overton noted that the Court avoided the "articulation of a clear, workable rule."[127]

By including language in the opinion limiting its precedential value to the "present circumstances,"[128] perhaps the case means nothing for the future development of equal protection law. On the other hand, by including vastly broad language indicating that it violates the Equal Protection Clause to "value one person's vote over that of another,"[129] the opinion has potentially broad implications. Indeed, in another article I explore how the equal protection holding in *Bush v. Gore* might—and I emphasize *might*—apply to a host of other "nuts and bolts" election questions.[130]

The opacity of the equal protection holding is actually the best feature of a very bad opinion. Overton noted, "the Court ... left lower courts and others without manageable tools to determine equal protection violations in the political context"[131]—precisely, and all for the good. Now, as myriad cases make their way through the federal courts raising a *Bush v. Gore* equal protection claim (for example, is punch-card voting, with its relatively high error rate, now unconstitutional?), the courts will try different approaches to deal with the claims. *Bush v. Gore* will be viewed by lower court lenses in Rashomonic fashion and the Court will eventually sort it out. If the Court does its job well, it can refine its new equal protection standard in light of what works and does not work in the lower courts.[132]

The Court was right to articulate an unmanageable standard because its holding was unprecedented and not in line with any social consensus about the proper standards to use in the recounting of ballots, an issue about which the public had no opinion before the

126. Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923, 932 (2001).

127. Overton, *supra* note 8, at 93.

128. 531 U.S. at 109.

129. *Id.* at 104–05.

130. *See* Hasen, *supra* note 125, at 378 (considering the application of the case to challenges to punch card voting, recount standards, and the use of the "butterfly ballot").

131. Overton, *supra* note 8, at 93.

132. I am not predicting that the Court will do so. In fact I have predicted that the Court will eventually assign no precedential value to the case. Hasen, *supra* note 125, at 381. But the Court *should* do so, assuming it really believes there was an equal protection violation in the case. *Id.* at 379.

2000 controversy. As noted above, the *Bush v. Gore* Court's principal authority for its holding was *Reynolds* and *Harper*.[133] Neither case involved the mechanics of elections, what had heretofore been seen to be a matter for local officials. Indeed, the Court in recent years had expressed great deference to local officials who wished to structure their elections in the way they see fit.[134]

The Court in *Bush v. Gore* moved in a new direction, without societal consensus or precedential reason to do so. Opacity made sense.

III. UNMANAGEABLE STANDARD OR NO STANDARD: THE COURT AND FEAR OF PROPORTIONAL REPRESENTATION

Lurking in the background of many of these election cases decided under the Equal Protection Clause is what Professor Sanford Levinson has called the "brooding omnipresence of proportional representation."[135] Levinson explained that courts and commentators would not be concerned with thorny issues such as the constitutionality of partisan gerrymandering if the Warren Court in *Baker* "had not embarked on what was widely (and perhaps correctly) perceived as a radical intervention into long-established modes of apportioning legislative seats."[136] Once the Court opened the door to claims of inequality in a system that granted everyone a vote, it opened the door as well to claims that the Constitution demanded greater proportionality in the voting systems used. This fear of proportional representation goes all the way back to *Reynolds*, where Justice Stewart in dissent in the companion *Lucas* case warned that the majority's position would lead to proportional representation.[137]

The fear that political equality arguments, pushed to the extreme, might lead to court-imposed proportional representation is not laughable.[138] Assuming the Justices have this fear,[139] the question becomes what strategy the Court should use to block this development. The Court appears to have used two strategies:

133. *See supra* note 121 and accompanying text.

134. *See* Hasen, *supra* note 125, at 388 (describing such cases).

135. Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 257 (1985).

136. *Id.* at 259.

137. Reynolds v. Sims, 377 U.S. 533, 750 n.12 (1964).

138. *See* Levinson, *supra* note 135, at 259.

139. I do not claim that the Justices *should* fear proportional representation, although Levinson offers a number of reasons why they might. *See id.* at 271–76.

refusing to extend its political equality precedents to new types of claims and using unmanageable standards as a bulwark against extreme cases of political inequality.

Mobile v. Bolden[140] is an example of the Court using the first strategy. In *Mobile*, African-American residents of Mobile, Alabama brought a class action suit challenging the constitutionality of the city's at-large method of electing its three city commissioners under the Equal Protection Clause of the Fourteenth Amendment and under the Fifteenth Amendment. The evidence showed that African-American voters made up about one-third of the Mobile electorate, but given the persistence of substantial voting along racial lines and the use of at-large voting rather than single-member districts, no African-American-preferred candidate had ever been elected commissioner or was likely to be elected commissioner in the foreseeable future.[141] Had voting taken place using single-member, rather than at-large districts, African-American voters would have had a better chance to elect a candidate of their choice, or at least to exert greater political influence.[142]

The Court rejected the argument that the at-large method violated the Equal Protection Clause.[143] A four-Justice plurality stated that plaintiffs' claim failed because the plaintiffs lacked evidence that the electoral system was designed with a racially discriminatory *purpose*.[144] Justice Blackmun concurred in the result on grounds that the relief afforded by the trial court "was not commensurate with the sound exercise of judicial discretion."[145] Justice Stevens concurred essentially on grounds that a contrary ruling would be impossible to administer.[146]

Three Justices dissented.[147] Justice Marshall, joined by Justice Brennan, relied explicitly on *Reynolds v. Sims*[148] in arguing that the at-large system constituted a denial of equal protection:

---

140. 446 U.S. 55 (1980).

141. *Id.* at 122–23 (Marshall, J., dissenting).

142. *Id.* at 105 n.3 (Marshall, J., dissenting).

143. *Id.* at 65–80 (plurality opinion). The Court also rejected the Fifteenth Amendment claim, but I focus here only on the Fourteenth Amendment claim.

144. *Id.* at 65–70 (plurality opinion).

145. *Id.* at 80 (Blackmun, J., concurring).

146. *Id.* at 93 (Stevens, J., concurring) ("A contrary view 'would spawn endless litigation concerning the multi-member district systems now widely employed in this country,' and would entangle the judiciary in a voracious political thicket.") (citation omitted).

147. Justice White dissented on grounds that the plaintiffs had proved purposeful discrimination. *Id.* at 103 (White, J., dissenting).

> *Reynolds v. Sims* and its progeny focused solely on the discriminatory *effects* of malapportionment. They recognize that, when population figures for the representational districts of a legislature are not similar, the votes of citizens in larger districts do not carry as much weight in the legislature as do votes cast by citizens in smaller districts. The equal protection problem attacked by the "one person, one vote" principle is, then, one of vote dilution: under *Reynolds*, each citizen must have an "equally effective voice" in the election of representatives. In the present cases, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors rather than by unequal population distribution, is analytically the same concept: the unjustified abridgment of a fundamental right. It follows, then, that a showing of discriminatory intent is just as unnecessary under the vote-dilution approach... as it is under our reapportionment cases.[149]

The plurality rejected Justice Marshall's reliance on *Reynolds*. It saw his dissent as an endorsement of proportional representation and "not the law. The Equal Protection Clause... does not require proportional representation as an imperative of political organization."[150]

Regardless of whether Justice Marshall's position should properly be characterized as an endorsement of proportional representation,[151] it seems no more a stretch to extend the equal protection analysis of *Reynolds* to the means of aggregating votes, what Marshall refers to as "electoral structures," than to the mechanics of voting. In other words, the principle of promoting political equality has no "natural" stopping point, even if we can draw distinctions among the cases.

Thus, a plurality of Justices wished to stop the equality precedents from going so far as proportional representation, while two other Justices saw Justice Marshall's test as an unmanageable

148. *Mobile*, 446 U.S. at 116–17 (Marshall, J., dissenting) (citations and footnotes omitted).

149. *Mobile*, 446 U.S. at 116–17 (Marshall, J., dissenting) (citations and footnotes omitted).

150. *Id.* at 75–76 (plurality opinion). For a critical examination of the concept of vote dilution, see Larry Alexander, *Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution)*, 50 VAND. L. REV. 327 *passim* (1997).

151. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1356–1425 (1983) (providing history of enactment of revised section 2 in response to *Mobile v. Bolden*).

one. In retrospect, the plurality's fears appear unfounded. Congress essentially codified Justice Marshall's position in *Mobile v. Bolden* through an amendment to section 2 of the Voting Rights Act in 1982.[152] Although section 2 has moved "electoral structures" toward greater proportionality, it does not appear to have created any general right to proportional representation. The Court has been careful not to interpret section 2 so broadly.[153]

If indeed it was primarily fear of proportional representation, rather than some concern on the merits, that led the *Mobile v. Bolden* plurality away from a holding in favor of the plaintiffs, the Court should have considered instead imposing an unmanageable standard to see if lower courts could develop satisfactory ways to adjudicate these claims. The Court appears to have (perhaps unwittingly) adopted this type of approach in another election case from the 1980s, *Davis v. Bandemer*.[154] *Bandemer* involved the question of whether a political party could raise a claim of unconstitutional partisan gerrymandering. A majority of the Court concluded that the Indiana Democrats' claim that the 1981 redistricting plan violated their rights under the Equal Protection Clause was justiciable.[155] Then, speaking for a plurality of the Court, Justice White articulated an unmanageable standard for judging when an unconstitutional partisan gerrymander has occurred.

The plurality's analysis began by stating that to make such a claim, proving both "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" is necessary. The plurality summarily upheld the district court's finding of discriminatory intent, noting that one party controlling the districting process often will have the intent of discriminating against the other party.[156]

The big question in *Bandemer* was how a political party could prove "actual discriminatory effect." The plurality's analysis on this point began by recognizing that there is no constitutional right to proportional representation[157] and that "mere lack of proportional representation will not be sufficient to prove unconstitutional

152. 42 U.S.C. § 1973(b) (1988).

153. *See generally* LOWENSTEIN & HASEN, *supra* note 42, ch. 6 (discussing the relationship of section 2 to proportional representation).

154. 478 U.S. 109 (1986).

155. *Id.* at 125.

156. *Id.* at 127–28 (plurality opinion).

157. *Id.* at 130 (plurality opinion).

discrimination."[158] "Rather, unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[159] Applying this test, the Court concluded that the Indiana Democrats failed to prove discriminatory effect.

Commentators have disagreed on the meaning of *Bandemer* since it was decided. Professor Bernard Grofman, for example, construed the case to mean that partisan gerrymandering is unlawful when it is "(1) intentional, (2) severe, and (3) predictably nontransient in its effects."[160] Professor Dan Lowenstein, in contrast, believes that the Court imposed an extremely high bar for proving partisan gerrymandering, but did so in a way to "retain the option to intervene." He suggests that perhaps members of the plurality did so because they "recogniz[ed] the complexity of the subject, [and they] may have been uncertain what abusive practices might be brought to light in the future . . . ."[161]

Professor Tribe contends that the plurality opinion did not give "any real guidance to lower courts forced to adjudicate this issue."[162] In other words, *Bandemer* is a case of unmanageable standards. Since *Bandemer*, lower courts have struggled with *Bandemer* and allegations of partisan gerrymandering thus far have met with little success.[163] Indeed, Professor McConnell has called the *Bandemer* standard "so toothless that [the Court] might as well have held partisan gerrymandering nonjusticiable."[164]

These historical developments belie the strongly voiced concerns at the time of *Bandemer* that the case likely would lead to a constitutional right to proportional representation. Justice O'Connor, in her *Bandemer* concurrence, stated that the plurality's "standard will over time either prove unmanageable and arbitrary or else evolve toward some loose form of proportionality."[165] Professor

158. *Id.* at 132 (plurality opinion).

159. *Id.* (plurality opinion).

160. Bernard Grofman, *Toward a Coherent Theory of Gerrymandering:* Bandemer *and* Thornburg, *in* POLITICAL GERRYMANDERING AND THE COURTS 29, 30–32 (Bernard Grofman ed., 1990).

161. Daniel Hays Lowenstein, Bandemer*'s Gap: Gerrymandering and Equal Protection, in* POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 160, at 64, 96–97.

162. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1083 (2d ed. 1988).

163. *See* LOWENSTEIN & HASEN, *supra* note 42, at 197 n.8.

164. McConnell, *supra* note 29, at 114.

165. Davis v. Bandemer, 478 U.S. 109, 155 (1986) (O'Connor, J., concurring).

Peter Schuck developed these arguments further, purporting to demonstrate that "*Bandemer*, despite the Court's disclaimer, will encourage proportionality as the standard against which partisan gerrymandering claims will tend to be measured."[166]

For good or not, *Bandemer*'s unmanageability has served as a bulwark against proportional representation. Had lower courts more aggressively interpreted *Bandemer* to create such a right, the Supreme Court was ready to reinterpret its standard in *Bandemer* to reverse the trend. In the meantime, as Lowenstein suggests, *Bandemer* serves as a backstop (and perhaps as a deterrent) to police the most egregious forms of partisan gerrymandering. The unmanageability solution, rather than the path taken in *Mobile v. Bolden*, provides the Court with the greatest flexibility as it ponders these political questions about which it sometimes has little more to go on than intuition.

CONCLUSION

Unmanageability in the pursuit of political equality is no vice. Indeed, unmanageable judicial standards have much to commend them in certain circumstances. If we think about the overused metaphor of the Court making its way through the political thicket, we might imagine a few ways that the Court could reach its destination. We begin with the Court stuck in a deep forest. Manageable standards are the equivalent of the leader using all of her resources to clear the path in a particular direction. That strategy is appropriate if one has a very good sense of where one wants to go, but dangerous if one does not.

When unsure of the correct direction, the leader's best strategy might be to stay in a single location and send a few scouts out along different paths. Each scout then reports to the leader with updated information on the paths available. The leader, after receiving this information, can then make a more informed decision on the ultimate path to be taken. If the Court, as is likely, will remain in the political thicket, unmanageability may be one of the best tools available for finding the right paths.

166. Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1361 (1987).