

NOTES

THE COSTS OF “DISCERNIBLE AND MANAGEABLE STANDARDS” IN VIETH AND BEYOND

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This Note argues against the use of the prudential political question doctrine (PPQD), as exemplified by the Vieth v. Jubelirer plurality opinion. In Vieth, the Supreme Court avoided formulating a standard for adjudicating the constitutionality of partisan gerrymandering due to a claimed lack of a “discernible and manageable standard.” This meant, according to the plurality, that no proposed doctrinal test was both concrete enough to be workably deployed by lower courts and discernible enough in the constitutional text, history, and structure, inter alia. Although the Vieth plurality opinion presents itself as based on universally applicable metadoctrines determining what is and is not a discernible and manageable doctrinal test, this Note argues the Court’s use of the PPQD is ultimately based on a gestalt prudential judgment about the wisdom of intervention in the particular area of partisan gerrymandering.

This Note then argues that the PPQD leads to negative consequences for future litigants and judicial legitimacy. The PPQD sends litigants on a wild goose chase for a perfect doctrinal standard, when it seems clear that no standard will satisfy the Vieth plurality. It also invites litigants to argue about what a discernible and manageable doctrinal test is in the abstract, rather than to address the particular legal issue at hand. These diversions insulate the judiciary from legitimate criticism of the grounds of its decisions. This Note then compares the PPQD to another option for judicial avoidance: a merits standard that is almost impossible for plaintiffs to meet in practice, such as rational basis review. This Note concludes that a stringent merits standard is a superior mechanism for judicial avoidance because it does not carry the same high costs for litigants and judicial legitimacy as the PPQD. Additionally, it allows the Court to exit from active adjudication of an issue while still preserving its ability to intervene in egregious cases.

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INTRODUCTION

Judges have the often unenviable task of having to answer very difficult legal questions. Some apprehension toward this task is understandable, and a judge might want to duck the task of writing a new doctrinal test to resolve the hard question and similar claims in the future. How can a judge accomplish this? Aside from using familiar mechanisms of avoidance, such as the justiciability doctrines of standing, mootness, and ripeness,¹ a judge also can craft a doctrinal test that will be all but impossible for a plaintiff to meet in practice (what I will call a “stringent doctrinal standard”),² such as the rational basis review test for the constitutionality of economic legislation.³

In 2004’s *Vieth v. Jubelirer*,⁴ a four-Justice plurality avoided formulating a standard by which to adjudicate partisan gerrymandering due to a claimed lack of judicially discernible and manageable standards.⁵ The lack of discernible and manageable standards forms one subcategory of the prudential political question doctrine, through which the Court avoids answering a constitutional question for a variety of prudential reasons. Unlike the classical political question doctrine, the prudential political question doctrine makes no reference to the constitutional vesting of final decisionmaking authority over a particular legal question in a coordinate federal branch. The *Vieth* plurality opinion is unique in the modern era of the political question doctrine (PQD)⁶ because it relies on the manageability and

¹ Standing, mootness, and ripeness are justiciability doctrines used by the judiciary to ensure that any claim before a federal court is raised by the proper party at the proper time, and that a genuine controversy exists. *See generally infra* note 15 (providing further background on justiciability doctrines).

² Stringent doctrinal standards have a similar effect as other means of avoidance because they also result in plaintiffs’ claims for relief not being granted.

³ The late–New Deal Court used this stringent doctrinal standard to retreat from active review of economic legislation. *See, e.g.,* Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch out of the Political Thicket*, 82 B.U. L. REV. 667, 686–87 (2002) (noting that New Deal Court “essentially decided to abandon close scrutiny of economic and social legislation” opting instead for “a substantive standard that every challenged enactment will satisfy”); *see also infra* Part IV (discussing rational basis review).

⁴ 541 U.S. 267 (2004).

⁵ Manageability refers to how concrete a particular doctrinal test is and how capable it will be of firmly guiding future judges. Discernibility refers to whether a doctrinal test is suggested or compelled by legitimate legal materials such as constitutional language, structure, history, and precedent. For a catalog of the most common modes of constitutional argument, see Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 700–51 (1980).

⁶ For a discussion of the modern PQD era and the uniqueness of *Vieth* in that era, see *infra* notes 32–50 and accompanying text.

discernibility factor of the prudential political question doctrine (PPQD)⁷ as *sufficient* grounds to avoid a merits decision.⁸

Accepting *arguendo* the premise that judicial avoidance is sometimes legitimate, this Note uses *Vieth* as a case study to demonstrate that how a court implements a policy of judicial avoidance has far-reaching and important consequences that ought to be considered by a court before selecting one method over another.⁹ This Note then examines whether the PPQD is a legitimate tool of avoidance, in part by comparing it to the alternative avoidance mechanism of a stringent doctrinal standard. Ultimately, this Note argues against the use of the PPQD by examining its negative effects for future litigants and concluding that stringent doctrinal standards impose fewer costs. However, no complete theory of judicial avoidance is proposed here; rather, the comparison between the two means of avoidance is designed only to help analyze the merits of the PPQD.¹⁰

Part I of this Note gives a conceptual and historical background of the PPQD and provides a brief contextual background of modern constitutional review of political districting. Part II argues that the PPQD is essentially arbitrary by examining *Vieth v. Jubelirer*,¹¹ the only constitutional case in the modern PQD era invoking the “manageable standards” criterion as a sufficient basis for non-justiciability. Part III argues that the gap between the presentation of the PPQD as a principled doctrine and its arbitrary reality leads future litigants to spin their wheels proposing new doctrinal standards or arguing about “discernibility” and “manageability” in the extreme abstract. Both exercises, I argue, are futile given the treatment of previous proposals by the *Vieth* plurality. Part IV compares the PPQD to the alternative

⁷ Throughout this Note, the term PPQD is used to refer to the prudential political question doctrine, a subcategory of the general political question doctrine (PQD). Further, most references to the PPQD refer mainly to the particular strand of the prudential political question doctrine that deals with the lack of judicially discernible and manageable standards; other “prudential” rationales, outlined briefly *infra* in notes 33–34 and accompanying text, are examined only to the extent they can be subsumed under the discernible and manageable standards prong. Additionally, the term is used to refer to cases that utilize *purely* prudential rationales for rendering a political question holding, unmixed with classical rationales. See *infra* notes 25–37 and accompanying text (further explaining distinction between using prudential factors to buttress classical PQD holding and using prudential factors as independently sufficient grounds for PQD holding).

⁸ See *infra* notes 42–48 and accompanying text (discussing sole reliance on manageability/discernibility prong of PPQD in *Vieth*).

⁹ This Note’s primary contribution to the literature is its thesis that the way in which a court implements a policy of judicial avoidance matters greatly, even if the end result in any case is lack of relief for the plaintiffs’ claims. For a description of this Note’s reliance on and contribution to the existing literature, see *infra* notes 12, 103, and 177.

¹⁰ See *infra* note 177 (explaining why only these two alternatives are considered).

¹¹ 541 U.S. 267 (2004).

approach of adopting a stringent doctrinal merits standard and argues that the stringent doctrinal standard not only works as well as the PPQD in allowing a court to avoid cases, but also is preferable because it allows for future legal growth in egregious cases.

I

HISTORICAL AND CONCEPTUAL BACKGROUND OF PRUDENTIAL POLITICAL QUESTION DOCTRINE

The political question doctrine (PQD) is one of the most powerful justiciability doctrines at the Court's disposal, allowing it to be extremely deferential to non-judicial decisionmakers.¹² The PQD applies to those cases that are either political in nature or constitutionally assigned to another federal branch¹³ and precludes *any* consideration of the underlying merits of the "political" question at hand.¹⁴ While many justiciability doctrines, such as standing, mootness, and ripeness, determine the *optimal situation* in which to hear a case,¹⁵ a PQD holding entails finding that there is *no situation* in which the controversy is properly considerable.¹⁶ Regardless of whether the

¹² My elucidation of the background of the PQD and of the distinction between the classical and prudential political question doctrines draws primarily from Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 246–63 (2002). See *infra* note 19 and accompanying text for further discussion of the PQD's "prudential" and "classical" strands.

¹³ See Barkow, *supra* note 12, at 239–40 (describing PQD as threshold inquiry regarding whether absolute interpretive power has been granted to legislative or executive branch either by Constitution's text or inferences from branch's institutional characteristics).

¹⁴ For instance, if a plaintiff asked the Court to rule on the merits claim of whether a particular constitutional right was violated, a PQD holding, like any nonjusticiability holding, would not even consider whether the right was violated. A political question determination only speaks to "the scope or boundaries of an area about whose subject matter [courts] should not express any opinion." Michael J. Gerhardt, *Rediscovering Non-justiciability: Judicial Review of Impeachments After Nixon*, 44 DUKE L.J. 231, 244 (1994) (emphasis added). But many have argued that a political question holding is nothing more than a merits holding in disguise. See *infra* note 180 and accompanying text.

¹⁵ For an overview of the Court's use of justiciability doctrines to define its own jurisdictional boundaries, see generally ERWIN CHERMERINSKY, FEDERAL JURISDICTION 41–171 (5th ed. 2007). Like the other justiciability doctrines, "[t]he political question doctrine establishes the boundaries of the Supreme Court's jurisdiction by identifying those constitutional questions that are beyond the scope of a judicial 'case' or 'controversy.'" Barkow, *supra* note 12, at 241 (citation omitted); see U.S. CONST. art. III, § 2, cl. 1 (establishing Court's jurisdiction as extending to "all Cases . . . arising under [federal law, and] . . . to Controversies . . . between Citizens of different States").

¹⁶ See, e.g., Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 480 n.94 (2004) ("When a court uses other avoidance techniques, it holds open the possibility that the claim might be adjudicated by different parties suing at a different time. In contrast, a political question determination permanently insulates an area from legal challenge.").

Court might possibly find a constitutional violation if it were to consider the merits,¹⁷ the Court will not interfere with the allegedly unconstitutional action. For political questions, the Court will not be there to save us, even in an apocalyptic constitutional scenario.¹⁸

Scholars of the PQD have typically bifurcated it into *classical* and *prudential* strands.¹⁹ The classical version of the PQD is premised on maintaining a proper allocation of final constitutional decisionmaking authority among the three branches of the federal government based primarily on the Constitution's text.²⁰ Thus, the classical PQD is ulti-

¹⁷ See Barkow, *supra* note 12, at 319–20 (discussing spectrum of constitutional deference); cf. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 45 (1961) (noting that some scholars have described PQD as “potentially the widest and most radical avenue of escape from adjudication”).

¹⁸ I express no opinion as to the validity of this “Court as Savior” outlook besides noting it is longstanding and widespread. See, e.g., THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that constitutional rights “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). However, it also should be noted that constitutional norms can be enforced by other actors. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2005) (arguing that historically, constitutional norms have been interpreted and enforced by citizenry); Seidman, *supra* note 16, at 453 (“Judicially unenforceable rights can have real world consequences if enforced by the political branches.”).

¹⁹ This formulation goes back at least to the debate between Professors Wechsler and Bickel in the mid-twentieth century, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), and has become firmly established in the PQD literature since Professor Barkow's article on the subject in 2002. See Barkow, *supra* note 12, at 237 (explaining bifurcation); see also, e.g., Luis Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899, 1908–15 (2006) (discussing “the political question doctrine in both its classical and prudential forms”); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1211–12 (2006) (same). However, commentators occasionally disagree about whether a particular holding is “prudential” or “classical,” especially because political question holdings often utilize concurrent justificatory strategies. See, e.g., Barkow, *supra* note 12, at 257 (“[T]he Court's analysis in [*Luther v. Borden*] thus shows how prudential factors colored the Court's application of the classical political question doctrine” (discussing *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849))). One way to distinguish between the two is to note that classical PQD holdings explicitly vest decisionmaking authority in one or both of the coordinate federal branches, primarily on the basis of the constitutional text, while prudential PQD holdings abstain without necessarily designating the “proper” decisionmaker, theoretically deferring even to state actors. See *infra* note 33 (further discussing distinction between classical and prudential PQD analyses).

²⁰ Cf. *Marbury*, 5 U.S. (1 Cranch) at 166 (“[If] the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that [executive agents'] acts are only politically examinable.”); *id.* at 170 (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”). While other interpretive methods may also be used in finding a classical political question, the Court has emphasized the role of the constitutional text. See *infra* note 33 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

mately rooted in the fundamental idea of the separation of powers among the three federal branches. In classical PQD cases, the judiciary acknowledges that the role it usually plays as the final arbiter of constitutional law should be played by the federal executive or legislative branch.²¹ Using this doctrine, the Court has read the Constitution to vest the executive with final authority to determine the constitutionality of certain national security decisions.²² It has also held that the political branches retain sole and final control over the enforcement of the Constitution's guarantee of a republican form of government to the states²³ and that the Senate is the sole judge of the constitutionality of Senate impeachment trial procedures.²⁴

Beginning during the New Deal, prudential rationales,²⁵ including a perceived lack of discernible and manageable standards, were introduced more prominently to buttress classical political question holdings.²⁶ For example, in *Coleman v. Miller*,²⁷ the Court held that the "ultimate authority [was] in the Congress" to determine whether constitutional amendments expire after taking excessively long to achieve ratification.²⁸ The Court's conclusion that the Constitution vested "ultimate authority" over the question in a coordinate federal branch was a classical PQD rationale.²⁹ But the Court also noted the additional prudential rationale that "the criteria for such a judicial determination . . . are [not] to be found in [the] Constitution."³⁰

²¹ See, e.g., Seidman, *supra* note 16, at 444 (arguing that classical political question doctrine entails finding that "the Constitution vests in the political branches final interpretive authority as to the meaning of some constitutional provisions").

²² See, e.g., *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29–30 (1827) (stating that President has sole discretion to determine when militia must be called forth).

²³ *Luther v. Borden*, 48 U.S. (7 How.) 1, 42–44 (1849) (holding that whether disputed government of Rhode Island, which restricted voting based on property holdings, was "Republican" under Guarantee Clause was political question); see U.S. CONST. art. IV, § 4, cl. 1 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

²⁴ *Nixon v. United States*, 506 U.S. 224, 226 (1993).

²⁵ See *infra* note 33 and accompanying text (setting out all five prudential rationales—of six total PQD rationales—listed in canonical *Baker* formulation of PQD).

²⁶ See Barkow, *supra* note 12, at 258–61 (charting rise of prudential rationales in classical PQD cases in 1930s).

²⁷ 307 U.S. 433 (1939).

²⁸ *Id.* at 450.

²⁹ See *supra* notes 20–24 and accompanying text (describing classical and prudential strands of PQD); cf. *infra* note 33 (describing canonical formulation of PQD under *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

³⁰ *Coleman*, 307 U.S. at 453. Professor Barkow argues that "[w]hat is interesting about *Coleman* is the extent to which the Justices relied on prudential factors alone to reach their conclusion." Barkow, *supra* note 12, at 260. But the reference to Congress as final arbiter of the claim, quoted *supra* in the text accompanying note 28, puts *Coleman* more on the classical side of the divide than *Vieth*, in which the lack of judicially discernible and manageable standards was an independently sufficient rationale for a political question

In the mid-twentieth century, Professor Alexander Bickel forcefully argued that these prudential rationales should break free from their classical mooring and stand on their own as a separate doctrine motivated by a distinct set of concerns.³¹ When the PQD was given its canonical modern formulation in 1962's *Baker v. Carr*,³² which synthesized the rationales relied on in prior PQD holdings into six criteria, Justice Brennan included the prudential "lack of judicially discoverable and manageable standards" rationale, reminiscent of the reasoning in *Coleman* and similar cases, among them.³³ This clear doctrinal elaboration, which was lacking in the pre-*Baker* PQD era, has become the starting point for all modern PQD analyses in either the classical or prudential context.³⁴

In the post-*Baker* era before *Vieth* in 2004, the Court found a political question to exist only twice, and both cases ultimately rested

holding. See *Nixon v. United States*, 506 U.S. 224, 240–41 (1993) (White, J., concurring in the judgment) (stating that prudential factor was used as "coordinate inquiry" in *Coleman* to buttress what was essentially classical PQD holding); see also *infra* text accompanying notes 44–48 (discussing lack of genuine classical PQD reasoning in *Vieth*).

³¹ See generally Bickel, *supra* note 17, at 79 (arguing that Supreme Court should apply prudential factors to determine which cases to refuse to adjudicate).

³² 369 U.S. 186 (1962).

³³ *Id.* at 217; see also *supra* note 30 (discussing *Coleman*, 307 U.S. at 453). *Baker* identified six criteria as "[p]rominent on the surface of any case held to involve a political question":

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 the 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. All of the *Baker* rationales are prudential except for the first rationale. See Barkow, *supra* note 12, at 265 (stating that only "the first [*Baker*] factor and perhaps the second, depending on whether it is used to inform the first" are classical PQD factors). While I disagree with Professor Barkow that the "discoverable and manageable standards" prong can "perhaps" be deemed classical if used to support a classical PQD holding, *id.*, the disagreement is ultimately little more than terminological; we agree that the prong is primarily prudential but has also been used to buttress classical PQD analyses. See also PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 890–91 (5th ed. 2006) (describing first *Baker* factor as "jurisdictional," that is, embodying classical PQD, while suggesting that "[f]actors two and three of the *Baker* test seem to reflect a different idea [than the first]," by counseling judicial abdication for lack of clear, principled, or "legal" rules).

³⁴ The *Baker* formulation has become *de rigueur*. ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 119 (1997) ("Virtually every case considering the political question doctrine quotes [the *Baker* formulation].").

on classical PQD grounds.³⁵ For example, in *Nixon v. United States*,³⁶ the Court ruled that the constitutionality of Senate impeachment procedures was nonjusticiable.³⁷ Justice Rehnquist noted that “the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.”³⁸ But as Justice White argued in his concurrence in the judgment, it is extremely doubtful that the lack of manageable standards, standing on its own, would have been a sufficient rationale for the *Nixon* Court.³⁹ Justice White argued that forming discernible and manageable doctrine from the word “try” in the Constitution⁴⁰ “presents no greater, and perhaps fewer, interpretive difficulties than some other constitutional standards that have been found amenable to familiar techniques of judicial construction”⁴¹ Citing the example of the meager constitutional phrase “due process of law,” out of which the Court has constructed an elaborate jurisprudence, Justice White protested that there was nothing in the constitutional language *itself* dictating a lack of standards.⁴²

What makes *Vieth*’s use of the PPQD unique, at least in the post-*Baker* PQD era, is that it relied on the lack of judicially discernible and manageable standards as an independently sufficient rationale for rendering a PQD holding, without any genuine argument that the issue was textually committed to a coordinate federal branch.⁴³ It is true that the plurality at times insinuated that Congress is assigned to adjudicate the constitutionality of partisan gerrymandering under the classical PQD, but commentators have noted that this was merely an

³⁵ Barkow, *supra* note 12, at 267–68. A Westlaw search of Supreme Court cases containing the phrase “political question” reveals no political question decisions between the publication of Professor Barkow’s article in 2002 and the *Vieth* case in 2004.

³⁶ 506 U.S. 224 (1993).

³⁷ *Id.* at 226. See generally U.S. CONST. art. I, § 3, cl. 6 (granting Senate “sole Power to try . . . Impeachments”); Barkow, *supra* note 12, at 271–73 (discussing classical political question analysis in *Nixon*).

³⁸ *Nixon*, 506 U.S. at 228–29.

³⁹ *Id.* at 245–50 (White, J., concurring in the judgment).

⁴⁰ See U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

⁴¹ *Nixon*, 506 U.S. at 247.

⁴² See *id.* (contending that “due process of law” is perhaps less amenable to discernible interpretation than “to try”).

⁴³ This is true despite the fact that there were other notable arguments for deploying the PPQD in this period, such as Justice Breyer’s dissent in *Bush v. Gore*, 531 U.S. 98 (2000), arguing that although the constitutional question of the appropriate remedy was not constitutionally committed to a coordinate branch, the Court should nonetheless abstain for the prudential reason that the Court’s intervention might, among other things, “undermin[e] respect for the judicial process.” *Id.* at 157 (Breyer, J., dissenting); see also Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 655–56 (2001) (praising Justice Breyer’s prudential political question reasoning in *Bush v. Gore*).

“intriguing feint.”⁴⁴ After all, the only constitutional clauses on which a classical PQD holding concerning partisan gerrymandering could rest⁴⁵ have been understood *not* to support a classical PQD holding since *Baker*.⁴⁶ The Court remains involved in many areas of the constitutional law of political districting, so it could not coherently rule that these very same clauses present a classical political question in the case of partisan gerrymandering.⁴⁷ As such, the *Vieth* plurality could “rest[] on only one of *Baker v. Carr*’s six bases . . . [,] namely, ‘a lack of judicially discoverable and manageable standards for resolving it.’”⁴⁸

In its pure form, as best exemplified by *Vieth*, the PPQD is based not on the other federal branches’ constitutionally assigned roles as final arbiters in certain limited constitutional domains, but rather on a concern for maintaining the proper nature and bounds of the judicial endeavor itself. In contrast to the classical PQD, a purely prudential PQD holding such as *Vieth* does not purport to pass the constitutional buck to anyone.⁴⁹ Rather, the PPQD seeks to avoid arbitrary rulings in the absence of “discernible” clues from text, history, precedent, and other legitimate sources of constitutional authority.⁵⁰ Ultimately, the doctrine seeks to emphasize the difference between the decision-making processes of the legislator and the judge.

⁴⁴ Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 559 (2004).

⁴⁵ See U.S. CONST. art. I, § 4 (granting authority to Congress to set time, place, and manner of elections); see also *id.* art. I, § 2 (vesting in Congress duty of apportioning representatives among states according to population); *id.* art. I, § 5 (vesting in Congress duty of judging qualification of its members).

⁴⁶ See *infra* Part I.B (discussing constitutional background of apportionment and gerrymandering).

⁴⁷ See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (“Although the legislative branch plays the primary role in congressional redistricting, our precedents recognize an important role for the courts when a districting plan violates the Constitution.”).

⁴⁸ Issacharoff & Karlan, *supra* note 44, at 559 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁴⁹ That is to say, while a classical PQD holding explicitly designates one or both of the coordinate federal branches as the final arbiter of the constitutional question at issue, under the PPQD the Court abstains from ruling without necessarily naming another actor as the proper decisionmaker. See *supra* notes 19–21 (distinguishing classical PQD from prudential PQD).

⁵⁰ See *supra* note 5 (providing background on common methods of constitutional analysis). This nondiscernibility worry is essentially the same concern underlying *Baker*’s desire to avoid an “initial policy determination of a kind clearly for nonjudicial discretion”: The question is a political choice unamenable to guidance by legal authority. *Baker*, 369 U.S. at 217.

A. *The PPQD's Roots in American Unease with
Judicial Overreaching*

This judicial desire to distinguish itself from the political branches stems from the precarious position of the American judiciary in a government founded upon the idea of popular sovereignty. The most conspicuous exception to the constitutional principle of popularly elected representation is the fact that an entire branch of government, the federal judiciary, is not elected but “hold[s its] Offices during good Behaviour” once appointed.⁵¹ While judges are tenuously related to the will of the electorate through the appointment process,⁵² the federal judiciary need not worry about standing for reelection when rendering controversial constitutional holdings. This is the basis on which the most devastating critique of the legitimacy of the Supreme Court has issued. The unelected and generally irreversible Supreme Court has been denounced for its lack of popular accountability as an “aristocracy of the robe,”⁵³ resembling a “bevy of Platonic Guardians”⁵⁴ and flying in the face of the democratic principles at the root of American political theory.⁵⁵

But the theory behind unelected judges in a democracy rests on the value of an independent judiciary that can stand up to the elected branches, state governments, and a popular majority to preserve individual constitutional rights.⁵⁶ Life tenure gives judges the freedom to act contrary to the momentary popular will; if Supreme Court Justices

⁵¹ U.S. CONST. art. III, § 1. This, of course, is not the only exception: Numerous officials can be appointed, *see id.* art. II, § 2, cl. 2, and the Senate was elected by the state legislatures rather than by popular election in the original constitutional arrangement. *See id.* art. I, § 3, cl. 1 (“The Senate . . . shall be composed of two Senators from each State, chosen by the Legislature thereof . . .”), *amended by* U.S. CONST. amend. XVII.

⁵² *See id.* art. II, § 2, cl. 2 (granting executive power to appoint Supreme Court Justices “by and with the Advice and Consent of the Senate,” and empowering Congress to vest appointment of inferior officers in President alone).

⁵³ 2 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 365 (1893).

⁵⁴ LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958) (arguing vesting unaccountable “chamber” with unchecked power to override majority’s will violates “underlying presuppositions of popular government,” and preferring “vagaries of popular assemblies” to hypothetical “bevy” of benevolent dictators).

⁵⁵ For a comprehensive overview of the history of this critique of the American federal judiciary, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998).

⁵⁶ *See, e.g.*, THE FEDERALIST NO. 78, *supra* note 18, at 467 (describing independent judiciary as “intermediate body between the people and the legislature [serving], among other things, to keep the latter within the limits assigned to their authority”). Hamilton argued that constitutional rights “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, [constitutional rights] would amount to nothing.” *Id.* at 466.

stood for periodic reelection, “it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.”⁵⁷

Thus, the American judiciary occupies an odd and ambiguous position: It is criticized for its antidemocratic character, and yet it is also praised for its rights-preserving and democracy-tempering capacity. But between these two attitudes, which almost certainly are held simultaneously to some extent by most constitutional thinkers, there arises the question of *how* this unelected group of jurists is legitimately to preserve rights by constraining democratic majorities. If we accept that legal rights must generally be backed by judicial remedies⁵⁸ while simultaneously accepting that the judiciary must not usurp the legislative function,⁵⁹ we must find some device by which judges can thread this needle.

The PPQD purports to be part of such a legitimacy-preserving agenda. It rose to prominence in the mid-twentieth century in the context of the Court’s political districting jurisprudence—a context in which the need to preserve the Court’s democratic legitimacy was, and remains, acute.

B. *The Court’s Long Struggle with Partisan Gerrymandering and the Development of the PPQD*

*Vieth v. Jubelirer*⁶⁰ forms part of the Court’s multifaceted law of democracy, a body of law that has grown immensely since the Warren Court years.⁶¹ While this Note does not attempt to analyze the issue of partisan gerrymandering *per se*,⁶² the following discussion is aimed

⁵⁷ *Id.* at 470.

⁵⁸ The view that all rights require remedies, and that the judiciary must provide the remedy should the other branches of government fail to do so, was famously expounded by Chief Justice Marshall in *Marbury v. Madison*: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” 5 U.S. (1 Cranch) 137, 163 (1803). *But see supra* note 18 (outlining critique of this view).

⁵⁹ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (1997) (“The judiciary shall not usurp legislative power, says the Bill of Rights” (quoting Robert Rantoul, Oration at Scituate (July 4, 1836), in KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY: CASES AND MATERIALS 317, 317 (1991))).

⁶⁰ 541 U.S. 267 (2004).

⁶¹ *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 37–65 (3d ed. 2007) (tracing growth of Supreme Court jurisprudence on voting rights since 1959).

⁶² Partisan gerrymandering is a process by which one political party, simply by redrawing district lines, attempts to increase its congressional seats from the total it had under the old districting scheme. For example, a Democratic gerrymander could transform

at establishing two important facts surrounding the decision in *Vieth*. First, the Court is involved in many other elements of political districting;⁶³ political gerrymandering is not radically unfamiliar territory for the Court. Second, there never has been a dearth of proposed doctrinal standards for the Court to adopt in the gerrymandering context.⁶⁴ If anything, the problem confronting the *Vieth* Court was a glut of potential standards, leaving the Court the unsavory task of justifying a choice of one over another.

The story of the Court's entrance into actively overseeing the constitutionality of political districting begins with *Colegrove v. Green*⁶⁵ in 1946. For the first time, the Court was asked to remedy outdated districting schemes that gave rural voters a hugely disproportional share of the vote. Instead, the Court rendered a classical PQD holding.⁶⁶ All political districting cases are decided against the backdrop of the Constitution's grant of power to Congress to set the "Times, Places and Manner of holding Elections for Senators and Representatives."⁶⁷ Speaking through Justice Frankfurter, the *Colegrove* Court reasoned that this grant entailed that "the Constitution . . . conferred upon Congress exclusive authority to secure fair representation."⁶⁸ If citizens wanted something done about grossly nonproportional state districting schemes, they would have to go to Congress.

When the "extreme deference of the New Deal Court" gave way to the "aggressive judicial review of the Warren Court,"⁶⁹ the Court declared political districting justiciable in 1962's *Baker v. Carr*.⁷⁰ Decrying the Court's about-face, Frankfurter's vigorous dissent "attempted to turn the entire political question doctrine into a pru-

two solidly Republican districts into only one, thereby limiting the opposing party's legislative seats, by redrawing district lines to pack all the neighboring Republicans into one district, where previously they had been spread out evenly over two. For other examples, see *id.* at 838–39.

⁶³ *Id.* at 836–38.

⁶⁴ See Luis Fuentes-Rohwer, *Back to the Beginning: An Essay on the Court, the Law of Democracy, and Trust*, 43 WAKE FOREST L. REV. 1045, 1073 (2008) ("[M]yriad standards exist [for resolving partisan gerrymandering claims], coming practically from all corners of the academy.").

⁶⁵ 328 U.S. 549 (1946).

⁶⁶ *Id.* at 552–54. *But see* Barkow, *supra* note 12, at 260 ("The Supreme Court made . . . use of prudential factors in *Colegrove v. Green*"). These prudential rationales supported the classical PQD holding in *Colegrove* as the prudential rationales in *Coleman* and *Nixon* supported the holdings in those cases. See *supra* notes 25–30, 36–42 and accompanying text for discussion of the *Coleman* and *Nixon* decisions.

⁶⁷ U.S. CONST. art. I, § 4.

⁶⁸ *Colegrove*, 328 U.S. at 554.

⁶⁹ Barkow, *supra* note 12, at 263.

⁷⁰ 369 U.S. 186, 198–204 (1962).

dential one”⁷¹ by recharacterizing *Colegrove* and prior PQD opinions as premised on the idea that adjudication in those cases necessarily entailed a choice of political theory: “It is the nature of the controversies . . . , nothing else, which has made [apportionment claims] judicially unenforceable.”⁷² Because of the nature of the controversies, remedying the wrongs complained of in *Colegrove* and in *Baker* would require the judiciary to determine a baseline of democratic representativeness and fairness.⁷³ Frankfurter believed this would entail an essentially arbitrary choice of a favorite political theory by which to adjudicate the claims due to the lack of textual and precedential guidance in this new area of constitutional jurisprudence.⁷⁴

Once *Baker* closed the door on a classical PQD understanding of political districting by finding at least some claims in the arena justiciable, the Court moved into adjudicating nearly every aspect of the drawing of state electoral subdivisions. *Reynolds v. Sims*⁷⁵ imposed the one-man, one-vote standard, prohibiting deviations from the equipopulational ideal in which every electoral subdivision, representing the same number of legislative seats, contains the same number of voters.⁷⁶ Additionally, the Court began adjudicating claims that even equipopulational districts had been drawn impermissibly based on race, first in constitutional minority-vote dilution and statutory Voting Rights Act cases,⁷⁷ and later through its constitutional racial gerrymandering cases.⁷⁸

⁷¹ Barkow, *supra* note 12, at 266.

⁷² *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting).

⁷³ *Cf. id.* at 333 (Harlan, J., dissenting) (“The federal courts have not been empowered by the Equal Protection Clause to judge whether this resolution of the State’s internal political conflict is desirable or undesirable, wise or unwise.”).

⁷⁴ *See id.* at 300 (Frankfurter, J., dissenting) (“What is actually asked of the Court . . . is to choose among . . . competing theories of political philosophy—in order to establish an appropriate frame of government for . . . all the States of the Union.”); *cf. Reynolds v. Sims*, 377 U.S. 533, 620 (1964) (Harlan, J., dissenting) (attacking majority’s opinion as decided “on the basis of political judgments which [courts] are incompetent to make”); Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459, 460 (2004) (“The ‘got theory’ argument [pioneered by Frankfurter and Harlan in the reapportionment cases] maintains that the Court must defer to the political branches in these political cases to avoid freezing one particular theory of politics into the structure of governance.”).

⁷⁵ 377 U.S. at 559–61.

⁷⁶ *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 727 (1983) (striking down districting plan which deviated less than one percent from equipopulational standard).

⁷⁷ *See White v. Regester*, 412 U.S. 755 (1973) (striking down Texas districting scheme for unconstitutionally diluting minority votes); *Mobile v. Bolden*, 446 U.S. 55 (1980) (upholding at-large city council elections that allegedly diluted minority vote against Voting Rights Act and constitutional challenges).

⁷⁸ *See, e.g., Shaw v. Reno*, 509 U.S. 630 (1993) (striking down districting plan for impermissibly relying on race as predominant motive).

But despite this active involvement in determining the constitutionality of districting, the Court curiously did not deal with partisan gerrymandering prior to *Davis v. Bandemer*⁷⁹ in 1986. Partisan gerrymandering is a process by which one political party attempts to gain seats simply by redrawing district lines.⁸⁰ The one-man, one-vote doctrine, which requires each electoral subdivision to contain approximately the same number of voters,⁸¹ also requires states to redraw district lines frequently, so as to prevent population shifts over time from rendering electoral subdivisions non-equipopulational.⁸² Thus, the one-man, one-vote doctrine has been criticized for instituting a “gerrymandering revolution” by giving self-interested, partisan-elected officials a recurring constitutional excuse to redraw lines in their favor.⁸³

A fractured Court attempted to respond to this situation in *Bandemer*, holding that partisan gerrymandering was justiciable under the Equal Protection Clause and setting out a loosely defined doctrinal test. Justice White’s plurality opinion required both discriminatory intent and “actual discriminatory effect” on an “identifiable political group.”⁸⁴ In order to prevail on a gerrymandering claim, a plaintiff had to show that a gerrymander “consistently degrade[d] a . . . group of voters’ influence on the political process as a whole.”⁸⁵ Justice White invited a broad inquiry, in which courts were to suss out a “frustration of the will of a majority of the voters or effective denial

⁷⁹ 478 U.S. 109 (1986).

⁸⁰ See *supra* note 62 (providing example of partisan gerrymandering technique). *But see* ISSACHAROFF ET AL., *supra* note 61, at 841 (discussing separate problem of bipartisan gerrymandering, which aims to create safe seats for both parties).

⁸¹ However, whether the doctrine would be satisfied by placing an equal number of people, rather than registered voters, into electoral subdivisions remains a topic of debate. See ISSACHAROFF ET AL., *supra* note 61, at 144–46.

⁸² See *Reynolds v. Sims*, 377 U.S. 533, 583–84 (1964) (“While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.”).

⁸³ See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 245 (2003) (arguing one-person, one-vote doctrine exacerbates gerrymandering because “[e]very reapportionment is an occasion for gerrymandering”). However, states can devise ways to insulate redistricting decisions from partisan control, including committing the decisions to independent commissions removed from the political process and (theoretically) the urge to gerrymander, or requiring redistricting authorities to “precommit” to a redistricting formula before revealing census data. See ISSACHAROFF ET AL., *supra* note 61, at 838–39 (listing suggested mechanisms that would constrain discretion of redistricting authorities, including computer programs, precommitment requirements, and commissions).

⁸⁴ *Bandemer*, 478 U.S. at 127.

⁸⁵ *Id.* at 132.

to a minority of voters of a fair chance to influence the political process.”⁸⁶

Due to the high level of abstraction at which Justice White’s test was pitched, the Court was roundly criticized for leaving the lower courts without clear, workable doctrinal standards with which to confront complex gerrymandered districting plans.⁸⁷ Lower courts were confused about what exactly the standard required and were leery of invalidating democratically drawn districting plans based on such weak doctrinal grounding.⁸⁸ Due to this uncertainty, the *Bandemer* standard proved almost impossible for challengers of districting plans to meet in practice.⁸⁹

Just as they did before *Bandemer*, critics lobbied for a new doctrinal standard, proposing numerous alternatives. Like the sharp mathematical principles used by the Court in the one-person, one-vote cases, certain proposals would have set bright lines to determine when gerrymandering went too far. One proposal drew its line based on past election results, another based on the susceptibility of the districting plan to partisan swings in voting patterns.⁹⁰ Other proposals would have changed the procedures constitutionally required when redistricting. These approaches ranged from requiring that plans be drawn by neutral third parties,⁹¹ to using computer programs to draw

⁸⁶ See *id.* at 133.

⁸⁷ See, e.g., LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-9, at 1083 (2d ed. 1988) (“[*Bandemer* provided no] real guidance to lower courts forced to adjudicate this issue”); Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1365 (1987) (arguing that *Bandemer* standard requires “largely subjective” judgments that “beg questions that lie at the heart of political competition in a democracy”).

⁸⁸ See ISSACHAROFF ET AL., *supra* note 61, at 834 (noting lower courts’ struggle with making sense of *Bandemer* and alluding to doctrine’s lack of teeth).

⁸⁹ See *id.* (“*Bandemer* served almost exclusively as an invitation to litigation without much prospect of redress. Only one case actually found an unconstitutional partisan gerrymander.”).

⁹⁰ See, e.g., Charles Backstrom et al., *Establishing a Statewide Electoral Effects Baseline*, in *POLITICAL GERRYMANDERING AND THE COURTS* 145, 160 (Bernard Grofman ed., 1990) (arguing for calibrating districting plans with outcomes of statewide partisan races); Gordon E. Baker, *The “Totality of the Circumstances” Approach*, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra*, at 203, 205–10 (arguing for multifactor analysis drawn from Court’s Voting Rights Act jurisprudence); Thomas Hofeller & Bernard Grofman, *Comparing the Compactness of California Congressional Districts Under Three Different Plans: 1980, 1982 and 1984*, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra*, at 281, 281–82 (arguing for requiring districts to be sufficiently compact to combat partisan gerrymanders); Richard G. Niemi, *The Swing Ratio as a Measure of Partisan Gerrymandering*, in *POLITICAL GERRYMANDERING AND THE COURTS*, *supra*, at 171, 175–77 (arguing for measuring susceptibility of districting scheme to partisan swings).

⁹¹ See Jeffery C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837, 838, 845 (1997) (arguing that politically balanced redistricting commissions with neu-

district lines based on reviewable and methodical algorithms,⁹² to rejecting plans adopted only by the will of a single political party.⁹³

It would take another eighteen years after *Bandemer* for the Court to revisit the issue in *Vieth v. Jubelirer*.⁹⁴ Yet, rather than adopting one of the many standards suggested in the post-*Bandemer* years, the *Vieth* plurality ultimately opted to exit the field of policing gerrymandering entirely.

Just as in *Bandemer*, the *Vieth* Court was deeply divided. A four-Justice plurality would have held partisan gerrymandering claims to be nonjusticiable political questions.⁹⁵ Four dissenting Justices would have continued to hold these claims justiciable but variously proposed a total of three different standards, either newly invented or drawn directly from other areas of constitutional law.⁹⁶ Standing in the middle of the fray was Justice Kennedy, who agreed with the plurality that no manageable standard had *yet* been put forth but refused to

tral, tie-breaking chair “offer a viable means of restoring a degree of efficiency, fairness, and finality to a state’s decennial gerrymander”).

⁹² See Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1695 (1993) (calling for precommitment to algorithm-based redistricting); Michelle H. Browdy, Note, *Computer Models and Post-Bandemer Redistricting*, 99 YALE L.J. 1379, 1384–89 (1990) (advocating automated computer redistricting for its transparent process and superior ability to “implement” fair representation criteria); see also ISSACHAROFF ET AL., *supra* note 61, at 838–39 (suggesting alternative of automated computer programs that formulaically redistrict from arbitrary geographic point).

⁹³ See *Peterson v. Borst*, 786 N.E.2d 668, 678 (Ind. 2003) (per curiam) (“The decision by the Marion Superior Court to adopt, by a close, party-line vote, a plan that has been uniformly supported by one major political party and uniformly opposed by the other, cannot be reconciled with both the appearance and fact of scrupulous judicial independence and neutrality.”).

⁹⁴ 541 U.S. 267 (2004).

⁹⁵ *Id.* at 281.

⁹⁶ Justice Stevens proposed using the standards from the *Shaw* line of cases dealing with improper use of race in districting, *id.* at 322–23 (Stevens, J., dissenting), which subject districts drawn predominantly according to race to strict scrutiny. See generally ISSACHAROFF ET AL., *supra* note 61, at 732–38, 740–50, 755–61 (outlining complex history of *Shaw* doctrine). Justice Breyer would have invalidated gerrymanders that prevented a majority of the electorate from receiving a majority of legislative seats. *Vieth*, 541 U.S. at 361 (Breyer, J., dissenting). Justice Souter, joined by Justice Ginsburg, proposed a five-part prima facie test borrowed from the Court’s Title VII racial discrimination jurisprudence. *Id.* at 346–47 (Souter, J., dissenting). Justice Souter’s test would have required a plaintiff to make a prima facie showing that she belonged to a cohesive political group, that her district was drawn with minimal regard for traditional districting principles such as compactness, that the deviations from traditional districting principles were correlated with the geographic distribution of her political group, that a hypothetical district would adhere more closely to traditional districting principles while less negatively impacting her political group, and that the defendants intentionally drew her district so as to negatively impact her political group. *Id.* at 347–50. If the plaintiff satisfied this initial burden, the burden would shift to the defendants to show that their drawing of the district in question was motivated by nonpolitical goals. *Id.* at 351.

rule partisan gerrymandering claims definitively nonjusticiable in the hope that a workable standard would one day emerge.⁹⁷ Though Justice Kennedy technically controlled the disposition of the case, he did not reject the plurality's reasoning regarding justiciability standards, nor suggest an alternative logic, so commentators typically focus on the plurality opinion in their analyses.⁹⁸

Justice Scalia's plurality opinion laid out a vision of the PPQD very much in line with the American discomfort with an unconstrained, unelected judiciary outlined above:

"The judicial Power" created by Article III, § 1, of the Constitution is not *whatever* judges choose to do It is the power to act in the manner traditional for English and American courts. . . . [J]udicial action must be governed by *standard*, by *rule*. [Congressional laws] can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.⁹⁹

Justice Scalia then attempted to demonstrate that, although the Court was unanimous in finding that an excess of partisan animus in districting could violate the Fourteenth Amendment,¹⁰⁰ "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."¹⁰¹ The plurality therefore concluded that the Court could not adjudicate gerrymandering claims. As the next Part argues, the Court based this decision not on a "doctrinal" rule capable of determining precisely what is and is not manageable, but on a gestalt impression of the wisdom of judicial intervention in a particular area of law.¹⁰² However, the essential problem with the plurality's opinion is that it presents itself as the former rather than the latter.

⁹⁷ *Vieth*, 541 U.S. at 306–07 (Kennedy, J., concurring in the judgment).

⁹⁸ See, e.g., Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1281–85 (2006) (focusing on plurality opinion); Fuentes-Rohwer, *supra* note 19 (same).

⁹⁹ *Vieth*, 541 U.S. at 278.

¹⁰⁰ See Fallon, *supra* note 98, at 1276 ("Writing for the *Vieth* plurality, Justice Scalia assumed that 'an excessive injection of politics [into the design of electoral districts] is unlawful' under the Equal Protection Clause, but he maintained nonetheless that courts could not adjudicate partisan gerrymandering claims." (alteration in original) (citation omitted)).

¹⁰¹ *Vieth*, 541 U.S. at 281.

¹⁰² See Fallon, *supra* note 98, at 1278 ("[The *Vieth* Court made] its judgments about whether proposed standards count as judicially manageable under criteria that would themselves fail to qualify as judicially manageable if the requirement of judicial manageability applied . . .").

II
THE UNMANAGEABILITY OF “MANAGEABLE STANDARDS”
IN *VIETH*

This Part critiques Justice Scalia’s *Vieth* plurality opinion, arguing that its PPQD arguments cannot be applied universally to all of constitutional law in the way the opinion implies that it can.¹⁰³ To avoid getting bogged down in the mechanics of the various proposed doctrinal standards, this Part shows only that Justice Scalia rejects each of the proposed standards in one of two ways: (1) arguing that they are too loose and unpredictable (i.e., unmanageable) or (2) arguing that admittedly manageable standards from other areas of constitutional law are not discernible in the Constitution in this case. Section A deals with his “manageability” arguments, while Section B deals with his “discernibility” arguments.

Both argumentative approaches ultimately prove too much.¹⁰⁴ For example, there is nothing discernible in the phrases “due process” or “equal protection” that commands a manageable standard either. In fact, Justice Scalia’s arguments could be turned on nearly any constitutional doctrine. Justice Scalia may well be right that many of the proposed standards would be difficult to administer and might produce unpredictable results, but the logic of his PPQD argument, if it were to escape from its political gerrymandering cage, could tear down most of constitutional law as we know it.

¹⁰³ This Part’s critique of the *Vieth* plurality opinion as essentially arbitrary develops several arguments in Fallon, *supra* note 98, and is consonant with many elements of a similar criticism laid out in Fuentes-Rohwer, *supra* note 19, at 1933. This Note builds on the prior literature by developing the argument that the PPQD is not “doctrinal,” see Seidman, *supra* note 16, at 442, and examining the *Vieth* plurality opinion in the context of its potential costs to future litigants. This Part also draws on arguments made on a more general level in the judicial candor literature, as exemplified by David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987).

¹⁰⁴ See Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643, 657 (1989) (arguing that because “there is no intrinsic reason for judicially manageable standards to exist in any special way for any provision,” this logic “threaten[s] all of judicial review”); see also J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 163 (1988) (“[A] lack of ‘judicially discoverable . . . standards’ [cannot] prevent review without casting doubt on all the Court’s controversial decisions interpreting the due process and equal protection clauses.” (alteration in original) (footnote omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))); Martin H. Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031, 1047 (1985) (“If we were really to take seriously the ‘absence-of-standards’ rationale, then . . . a substantial portion of all constitutional review is susceptible to the same critique.”).

A. Manageability

Justice Scalia's critique of certain standards as unmanageably vague¹⁰⁵ could be raised against tests from numerous areas of constitutional law in which detailed and precise doctrinal standards are wanting. Prominent examples include the *Miller v. California*¹⁰⁶ obscenity standard, which requires judges to determine as a matter of law whether a work has "serious literary, artistic, political, or scientific value" to an abstract reasonable person,¹⁰⁷ and various "totality of the circumstances" tests,¹⁰⁸ which Scalia has occasionally called for¹⁰⁹ despite his preference for clear constitutional rules.¹¹⁰

One of the more notorious examples of vague constitutional doctrine is the Court's test for whether executive action violates substantive due process: the "shocks the conscience" standard, first announced in determining that a police-administered, involuntary stomach-pump of a suspect was unconstitutional.¹¹¹ There is nothing

¹⁰⁵ For example, in dismissing Justice Souter's proposed five-part test as unmanageably vague, Justice Scalia writes:

While this five-part test seems eminently scientific, upon analysis one finds that each of the last four steps requires a quantifying judgment that is unguided and ill suited to the development of judicial standards: *How much* disregard of traditional districting principles? *How many* correlations between deviations and distribution? *How much* remedying of packing or cracking by the hypothetical district? *How many legislators* must have had the intent to pack and crack—and *how efficacious* must that intent have been (must it have been, for example, a *sine qua non* cause of the districting, or a *predominant* cause)?

541 U.S. at 296.

¹⁰⁶ 413 U.S. 15 (1973).

¹⁰⁷ *Id.* at 26; *cf.* *Pope v. Illinois*, 481 U.S. 497, 504 (1987) (Scalia, J., concurring) (stating that *Miller* standard is impermissibly vague because "many accomplished people . . . have found literature in Dada, and art in the replication of a soup can").

¹⁰⁸ *See, e.g.*, Fallon, *supra* note 98, at 1289 n.57 (collecting numerous totality of circumstances cases).

¹⁰⁹ *Id.* at 1288–89 ("Justice Scalia . . . has repeatedly castigated this formula as a betrayal of rules, yet he has occasionally called for totality of the circumstances inquiries himself." (footnote omitted)); *see, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 463–64 (2000) (Scalia, J., dissenting) (arguing that "totality-of-the-circumstances" test would be superior to *Miranda* rules for determining when confessions are voluntary); *Virginia v. Moore*, 128 S. Ct. 1598, 1604 (2008) (Scalia, J.) (holding certain Fourth Amendment searches should be analyzed under "traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999))).

¹¹⁰ Fallon, *supra* note 98, at 1289; *see also* *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (stating that totality of circumstances test is "ungoverned by rule, and hence ungoverned by law").

¹¹¹ *See* *Rochin v. California*, 342 U.S. 165, 172 (1952) (announcing "shocks the conscience" standard).

in the test itself, or in its subsequent refinements,¹¹² dictating how shocking an executive action must be or in what sense it must be shocking. Indeed, Justice Kennedy has noted that this standard can be used only as a “beginning point” in an analysis that must ultimately focus on “objective considerations, including history and precedent, [as] the controlling principle[s].”¹¹³

Justice Kennedy’s insight regarding how the “shocks the conscience” standard is actually applied helps lead us to see that Justice Scalia’s critique in *Vieth* could apply to constitutional doctrine more broadly, including to such constitutional mainstays as Fourteenth Amendment equal protection law.¹¹⁴ For example, the three substantive equal protection tests are formulated with ambiguous terms that only acquire clear meaning through their repeated applications: that a statute be reasonably related to a legitimate government interest (rational basis),¹¹⁵ substantially related to an important government interest (intermediate scrutiny),¹¹⁶ or narrowly tailored to a compelling government interest (strict scrutiny).¹¹⁷ All of the important terms in these doctrinal tests require judicial interpretation that is not controlled by the terms alone, especially the consideration of which government interests are “legitimate,” “important,” or “compelling.” What has made these standards manageable is their history of being applied to discrete sets of facts and the judicial reasoning for doing so.¹¹⁸ This has given legal decisionmakers numerous data points with

¹¹² See Anna M. Krstulic, Comment, *America’s Most Shocking Standard: When Innocent Parties Are Injured or Killed in High-Speed Pursuits, What Police Conduct Sufficiently “Shocks the Conscience” To Allow Recovery?*, 47 WASHBURN L.J. 785, 793 (2008) (explaining addition of intent requirement and subsequent judicial elaboration of “shocks the conscience” test).

¹¹³ *County of Sacramento v. Lewis*, 523 U.S. 833, 857–58 (1998) (Kennedy, J., concurring).

¹¹⁴ See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 837 n.286 (2005) (arguing that Court is not “able to administer such majestic constitutional generalities as the Equal Protection Clause without crafting doctrine whose every jot and tittle [sic] could not possibly be described as constitutionally discoverable”); Mulhern, *supra* note 104, at 163 (“[A] lack of ‘judicially discoverable . . . standards’ [cannot] prevent review without casting doubt on all the Court’s controversial decisions interpreting the due process and equal protection clauses.” (alteration in original) (footnote omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962))).

¹¹⁵ See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) (providing definition of rational basis standard).

¹¹⁶ See *United States v. Virginia*, 518 U.S. 515, 533 (1996) (defining intermediate scrutiny standard).

¹¹⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (setting out strict scrutiny test).

¹¹⁸ See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–91 (1996) (arguing that constitutional analysis should be, and generally is, guided primarily by slow development of constitutional precedents rather than by single-

which to triangulate answers for new and untested fact patterns under old and vague standards.¹¹⁹

Thus, there exists no universally applicable rule or standard for how concrete a standard must be to be judicially manageable.¹²⁰ Longstanding constitutional doctrines run the gamut from highly abstract tests to baroque, multipart inquiries.¹²¹ Moreover, ostensibly vague standards can be refined through precedent and attention to the standard's purposes. The rational basis and strict scrutiny tests—linguistically vague, and yet almost always outcome determinative in practice—serve as examples.¹²² Additionally, detailed tests can prove highly unpredictable in practice. For example, the multipronged *Planned Parenthood of Southeastern Pennsylvania v. Casey* test for determining when precedent should be abandoned¹²³ has been panned for not being predictably applied.¹²⁴

B. Discernibility

Justice Scalia's argument against Justice Stevens's proposal similarly proves too much. Justice Stevens proposed that the Court simply apply the standard employed in the racial gerrymandering context (i.e., whether race was the "predominant motive" in drawing a district

minded focus on constitutional text); *cf. supra* note 113 and accompanying text (noting that according to Justice Kennedy, "shocks the conscience" test is manageable only by pointing to precedent showing when it has been applied).

¹¹⁹ *Cf. supra* note 118 (suggesting constitutional provisions acquire meaning through accumulating precedent over time).

¹²⁰ *See* Fallon, *supra* note 98, at 1289 ("The prominence of relatively open-ended tests in constitutional law presents a central puzzle about the demand for judicially manageable standards. Sometimes the Supreme Court (or at least a majority of the Justices) regards such standards, including totality-of-the-circumstances tests, as judicially manageable. But sometimes it does not.").

¹²¹ *See infra* notes 134–45 and accompanying text (discussing varieties of constitutional doctrinal tests).

¹²² *See, e.g.,* Joseph M. Brunner, Note, *Square Pegs into Round Holes? Strict Scrutiny and Voluntary School Desegregation Plans*, 75 U. CIN. L. REV. 791, 791 (2006) ("For most of the second half of the twentieth century, applying strict scrutiny to a challenged statute or policy meant that the statute at issue would be held unconstitutional."); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) ("Some situations [in the Warren Court years] evoked the aggressive 'new' equal protection, with scrutiny that was 'strict' in theory and fatal in fact; in other contexts, the deferential 'old' equal protection [applying the rational basis test] reigned, with minimal scrutiny in theory and virtually none in fact.").

¹²³ 505 U.S. 833, 854–55 (1992).

¹²⁴ *See* *Lawrence v. Texas*, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) (criticizing majority for failing to adhere to *Casey* test for determining bindingness of precedent); *see also, e.g.,* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989) (criticizing "discretion-conferring" multipart balancing tests as failing to constrain decisionmakers because "[o]nly by announcing rules do we hedge ourselves in").

line) to the political gerrymandering context generally.¹²⁵ In rejecting the standard as indiscernible despite being manageable, Justice Scalia said:

[T]he mere fact that there exist standards which this Court could apply—the proposition which much of Justice Stevens’s opinion is devoted to establishing . . . —does not mean that those standards are discernible in the Constitution. This Court may not willy-nilly apply standards—even manageable standards—having no relation to constitutional harms.¹²⁶

According to Justice Scalia, Justice Stevens’s error was assuming that discrimination on the basis of politics and race should merit the same level of constitutional scrutiny, a conclusion discernible neither in the Court’s case law nor in the Constitution.¹²⁷ But Justice Scalia’s discernibility argument suffers from the same problem as his manageability argument—he does not articulate a standard for determining *how* discernible a standard must be.¹²⁸

The *Vieth* Court did manage to agree on a broad constitutional principle: All of the Justices agreed that excessive partisan motivation in drawing districting lines ran afoul of Equal Protection Clause principles.¹²⁹ And notably, Justice Scalia did not attack the other proposals for being indiscernible, presumably because their high level of abstraction meant that they hewed fairly closely to the broad principle on which all of the Justices agreed. Yet, it was this very abstraction that rendered these proposals unmanageably vague in Justice Scalia’s estimation.¹³⁰ He seemed to reason that the discernible standards, in remaining faithful to the broad constitutional principle, were too abstract to be workable, while conversely, the manageable standards, in creating a workable test, strayed too far from the broad constitutional principle to be discernible.

¹²⁵ *Vieth v. Jubelirer*, 541 U.S. 267, 336 (2004) (Stevens, J., dissenting) (“If . . . the predominant motive of the legislators who designed District 6, and the sole justification for its bizarre shape, was a purpose to discriminate against a political minority, that invidious purpose should invalidate the district.”); *see also id.* at 322–24 (outlining contours of racial gerrymandering jurisprudence).

¹²⁶ *Id.* at 294–95 (plurality opinion).

¹²⁷ *See id.* at 293 (“A purpose to discriminate on the basis of race receives the strictest scrutiny under the Equal Protection Clause, while a similar purpose to discriminate on the basis of politics does not.”).

¹²⁸ *See infra* notes 150–51 and accompanying text (arguing no clear rule governs manageability or discernibility of constitutional standards).

¹²⁹ *See supra* note 100 and accompanying text (discussing unanimous agreement among *Vieth* Court that excess of partisan animus violates Fourteenth Amendment in theory).

¹³⁰ *See* Fallon, *supra* note 98, at 1282–85 (“Scalia argued that the dissenters had failed . . . [to] fashion[] standards that deserved to count as judicially manageable.”).

The *Vieth* plurality thus conceives of the process of crafting doctrine as discerning highly abstract and relatively uncontroversial constitutional norms—derived from examination of the constitutional text, history, and precedent—and solidifying them into a workable standard without unduly attenuating them from their source. However, Professor Fallon has noted that *Vieth* is “anomalous” as part of a “practice in which courts routinely fashion doctrinal tests to implement vague constitutional language.”¹³¹ The Court itself has recognized in the past that fashioning workable doctrine to implement vague constitutional language is a crucially important part of its role.¹³² Professor Fallon has argued:

[T]he best semantic approximation of a vague constitutional guarantee is likely to be a vague judicial standard. Virtually no one, however, believes that courts should always be debarred from developing clear rules to implement vague legal norms [A] central element of the [debate] involves the optimal tradeoff between interests in adhering as closely as possible to semantic meaning and interests in promoting other values, including the value of achieving clear rules for the future.¹³³

Various doctrines thus operate at various distances from the “vague constitutional guarantees” they respectively implement.¹³⁴ On one end of the spectrum lie prophylactic rules designed to prevent the occurrence of serious constitutional violations that are otherwise hard to define or remedy after the fact. By requiring adherence to the prophylactic rule and punishing all deviations—for example, by refusing to admit the evidence obtained by that deviation, as the exclusionary rule does for Fourth Amendment violations¹³⁵—courts obviate the difficult task of crafting a contextual standard that might underprotect the right.¹³⁶ Prophylactic rules thus operate at a relatively far distance from the vague constitutional guarantees they purport to implement.

¹³¹ *Id.* at 1277.

¹³² See, e.g., *United States v. Munoz-Flores*, 495 U.S. 385, 396 (1990) (“Surely a judicial system capable of determining when punishment is ‘cruel and unusual,’ when bail is ‘[e]xcessive,’ when searches are ‘unreasonable,’ and when congressional action is ‘necessary and proper’ for executing an enumerated power is capable of making . . . more prosaic judgments” (alteration in original)).

¹³³ Fallon, *supra* note 98, at 1310.

¹³⁴ *Id.* at 1279; see also *id.* at 1277–79 (developing “permissible disparity thesis,” which allows certain disparities to exist between Constitution’s meaning and judicial doctrines developed to implement those constitutional guarantees).

¹³⁵ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence obtained in violation of Fourth Amendment may not be admitted in state courts).

¹³⁶ Fallon, *supra* note 98, at 1303–06.

Further toward the middle of this spectrum lie multipart balancing tests such as the *Mathews v. Eldridge* test,¹³⁷ which implements the constitutional guarantee of due process. This test points to several benchmarks of due process, drawing from prior case law, older tests, historical notions of due process, and prudential judgments about the proper scope of governmental discretion to experiment with various procedures for effecting “deprivations.”¹³⁸ Venturing substantially beyond the constitutional text requiring simply “due process”¹³⁹—but less so than a prophylactic rule (if only because it is a standard rather than a rule)—the test balances the private interest, the governmental interest, and the practicality of greater procedural protections.¹⁴⁰

At the other end of the spectrum lie doctrinal tests that add little new content beyond what is already stated in the constitutional text, because the text already provides sufficient elaboration. The Court’s holding in *Powell v. McCormack*¹⁴¹ provides an example of relatively minimal judicial elaboration of a constitutional standard. The Court held that in exercising its authority to judge the “Qualifications of its own Members,”¹⁴² the House of Representatives was limited to the qualifying factors listed in the constitutional text.¹⁴³ Based on the constitutional text, historical evidence of the Framers’ intent, and democratic values,¹⁴⁴ the Court reasoned that the list of factors was exclusive, and that the House was not free to disqualify members based on criteria not listed in the Constitution.¹⁴⁵ While this conclusion was by no means entirely self-evident or free from controversy, *Powell* nonetheless represents a fairly minimal judicial elaboration of a set of standards set forth in moderate detail in the constitutional text.

¹³⁷ 424 U.S. 319 (1976) (laying out due process balancing test for minimum procedural protections in various contexts).

¹³⁸ *Id.* at 332–35.

¹³⁹ See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property without due process of law . . .”).

¹⁴⁰ See *Mathews*, 424 U.S. at 335.

¹⁴¹ 395 U.S. 486 (1969).

¹⁴² U.S. CONST. art. I, § 5, cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .”).

¹⁴³ *Powell*, 395 U.S. at 550; see U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); *id.* art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”).

¹⁴⁴ *Powell*, 395 U.S. at 548.

¹⁴⁵ *Id.* at 550 (“[I]n judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.”).

As this brief overview of various constitutional doctrines demonstrates, there is no universally applicable standard for constitutional discernibility. Not only do extant constitutional doctrines run the gamut of discernibility, as they do with regard to manageability, but discernibility is even more nebulous a concept than manageability: How does one quantify the degree to which an implementing doctrine may stray from the constitutional principle it implements?

C. *The PPQD's Failure as "Doctrine"*

The preceding analysis has shown that Justice Scalia's PPQD is not "governed by *standard*, by *rule*"¹⁴⁶ in the way he thinks partisan gerrymandering doctrine should be.¹⁴⁷ The PPQD, which purports to be metadoctrine—doctrine about doctrine—governing what is permissible in the process of doctrine crafting, is not itself discernible and manageable in the way it claims regular constitutional doctrines are supposed to be.¹⁴⁸ No standard or rule exists that can determine manageability or discernibility with enough accuracy both to be predictive and to encompass the entire corpus of constitutional law.¹⁴⁹ Justice Scalia's PPQD determination, in the absence of such a rule, is ultimately based on a gestalt impression of the suitability of the Court's intervention in the gerrymandering context.¹⁵⁰ Accordingly, one commentator has noted that "it seems unlikely that any standard would have made any difference" to the *Vieth* plurality.¹⁵¹ The irony of the PPQD's application is that it purports to eliminate the unmanageable and indiscernible from the domain of constitutional doctrine on the

¹⁴⁶ *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (Scalia, J., plurality opinion).

¹⁴⁷ However, the preceding critique of Justice Scalia's application of the PPQD is not an attempt to argue that "anything goes" should be the rule in constitutional doctrine-craft. Nor is it an attempt to argue that judgments of doctrinal suitability should only be made based on precise standards or rules that can tell us exactly what is and is not discernible and manageable.

¹⁴⁸ See Fallon, *supra* note 98, at 1278 (making this claim).

¹⁴⁹ Professor Fallon lays out several proposed indicia of manageability, all of which are fairly uncontroversial. However, he ultimately concludes that "[a]ll [factors] raise questions of sufficiency. For example, exactly how much analytical bite, or how much predictability or consistency of judicial decisionmaking, is needed for a test to count as judicially manageable?" Fallon, *supra* note 98, at 1293. Like Professor Fallon, I do not know whether I can "formally prove the point," *id.*, that there exists no clear rule or standard governing manageability; however, the wide array of doctrinal standards, spanning a broad range of manageability, strongly suggest this is so.

¹⁵⁰ *Cf. id.* at 1278 ("In making this ultimate judgment [of whether a proposed standard qualifies as sufficiently manageable], the Court, willy-nilly, conducts a startlingly open-ended inquiry in which, among other things, it weighs the costs and benefits of adjudicating pursuant to particular proposed standards.").

¹⁵¹ Fuentes-Rohwer, *supra* note 19, at 1932.

basis of rationales that are themselves unmanageable and indiscernible.

Professor Bickel, the PPQD's chief proponent, acknowledged that this irony was inescapable. The PPQD was "different . . . in kind not in degree" from principled adjudication by means of traditional legal criteria.¹⁵² It was "something of prudence, not construction and not principle."¹⁵³ But while a law professor might be willing to admit candidly that the judiciary makes prudential judgments untamed by rules of law, a sitting Court generally would not feel so comfortable admitting that it has committed the very sin it condemns in order to condemn it.¹⁵⁴ The gap between what the Court is really doing and what the Court says it is doing and the costs this gap creates are the focus of the next two parts of this Note.

III

COSTS TO FUTURE LITIGANTS OF THE PPQD'S ATTEMPT TO APPEAR DOCTRINAL

The arbitrariness of the PPQD's application in *Vieth* is at odds with the language it uses because the PPQD has become "doctrinalized."¹⁵⁵ PPQD opinions such as *Vieth* wrap themselves in the language of ordinary constitutional doctrine to avoid admitting the role that judges' unconstrained prudential judgments play in these cases. But unless litigants are to disregard this language as little more than a wink and nod to the savvy observer, they will react to a "doctrinalized" PPQD holding as they would any other holding based on the application of a doctrinal test.

This Part explores future litigants' possible reactions to such an opinion and argues that the PPQD creates serious costs for future liti-

¹⁵² Bickel, *supra* note 17, at 46.

¹⁵³ *Id.* Nor would it fit within the "four corners" of *Marbury v. Madison*'s theory of judicial review, which emphasized the Court's lack of discretion over which cases or controversies it would decide. *Id.*; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–74 (1803) ("This [judicial] power is expressly extended [by the Constitution] to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.").

¹⁵⁴ But see Richard A. Posner, *Reasoning by Analogy*, 91 CORNELL L. REV. 761, 768–69 (2006) (book review) ("We judges could be more candid than most of us are without sacrificing legitimacy.").

¹⁵⁵ See Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1206–13, (2002) (arguing *Baker v. Carr* marks beginning of PQD's becoming "doctrinaliz[ed]," where Court masks its prudential judgments by dressing them as legal rules); cf. Seidman, *supra* note 16, at 472 (arguing that otherwise political cases "look like constitutional law because they are, themselves, heavily doctrinalized").

gants. Future litigants might take the Court at its word and continually expend resources trying to hit the justiciability mark by suggesting new doctrinal tests that better balance discernibility and manageability when in fact no such mark exists. Braver litigants will instead argue that the Court's substantive notions of discernibility and manageability are erroneous. But because litigants are responding to "doctrinalized" PPQD rationales rather than confessedly prudential judgments, these strategies result in wheel-spinning and the insulation of the Court from criticism of the prudential considerations implicit in the *Vieth* plurality opinion.

A. *The Invitation To Continually Propose New Standards
and Argue Imponderable Questions*

In many ways, Justice Kennedy's concurring opinion in *Vieth* is more honest than the plurality's because it openly calls on litigants to continue to propose standards. Concurring in the judgment, he states that "[t]he failings of the many proposed standards . . . make our intervention improper. If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief."¹⁵⁶ Though Justice Scalia excoriates him for refusing to make a final decision,¹⁵⁷ Justice Kennedy's wait-and-see approach more adequately captures the spirit of the plurality's PPQD logic, if the plurality is to be taken at its word.

The *Vieth* plurality's reasoning is fallacious:¹⁵⁸ The fact that no manageable standard had yet been proposed, despite innumerable attempts over a span of eighteen years,¹⁵⁹ logically cannot prove that no such standard is possible.¹⁶⁰ The practical problem with this error,

¹⁵⁶ *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring in the judgment).

¹⁵⁷ See *id.* at 301–05 (plurality opinion) (criticizing Justice Kennedy for failing to take more final, categorical approach in finding gerrymandering cases nonjusticiable).

¹⁵⁸ The negative proof fallacy consists of an argument that "there is no evidence of *x*; therefore, not-*x*." Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 795 (1988) (describing Rehnquist opinions as demonstrating negative proof fallacy).

¹⁵⁹ Though eighteen years may seem long at first blush, thereby strengthening the majority's inference (though unable to dissolve the basic logical fallacy), Justice Kennedy noted that the long time period is not in fact very probative of the potential for developing manageable standards, for "during these past 18 years the lower courts could do no more than follow" the *Bandemer* standard. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment).

¹⁶⁰ The *Vieth* plurality's argument follows Andrew McClurg's model of the negative proof fallacy, see *supra* note 158, where the existence of manageable standards is *x*, and the plurality's conclusion that such standards do not exist is not-*x*. Cf. I. Kant, *Ueber den Gemeinspruch: Das Mag in der Theorie Richtig Sein, Taugt Aber Nicht Für die Praxis* [*On*

especially when combined with the plurality's exposition on the concepts of manageability and discernibility, is that it encourages litigants to propose new standards. Litigants will believe that if they formulate a standard that is discernible and manageable enough, the Court will adopt it despite its prior dismissiveness, due to the error in the plurality's logic. Furthermore, the range of possible standards to propose is limitless?if a five-part test doesn't work, why not try ten? Why not add an intent requirement here, a numerical quantifier there, and so on, ad infinitum? Justice Kennedy's wait-and-see approach is willing to admit that if what is really occurring is a failure of plaintiffs' proposals to measure up to a preexisting standard of manageability and discernibility, there is no reason to stop making proposals until the standard is met. Due to the plurality's logical fallacy, even without Justice Kennedy's express recognition that new standards would be entertained in the future, litigants who adhered to the plurality's reasoning would continue to propose new standards until one was deemed acceptable. As I will argue, this is a negative development because litigants will waste resources proposing new tests to a Court that is not truly open to them.

Since *Vieth*, the Court has reconsidered partisan gerrymandering only once, in *League of United Latin American Citizens v. Perry* (*LULAC*).¹⁶¹ However, the Court did not revisit the question of general justiciability¹⁶² and only examined the specific issue of whether mid-decade redistricting done solely for partisan gain was presumptively unconstitutional.¹⁶³ The Court rejected this proposal as unmanageable for a similar reason as in *Vieth*—the proposal failed to “show a burden, as measured by a reliable standard, on the complainants’

the Proverb, That May Be True in Theory, But Is of No Practical Use], BERLINISCHE MONATSSCHRIFT, Sept. 1793, at 201 (“For the argument that something has until now been unsuccessful and therefore shall never be successful does not justify abandoning . . . [attempting it] unless, of course, its attainment is demonstrably impossible.”), reprinted in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 61, 87 (Ted Humphrey trans., 1983).

¹⁶¹ 548 U.S. 399 (2006).

¹⁶² *Id.* at 414 (“We do not revisit [the *Vieth* plurality’s] justiciability holding but do proceed to examine whether appellants’ claims [that redistricting done mid-decade should be treated as presumptively unconstitutional] offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”); see also *id.* at 416–17 (describing appellants’ claims).

¹⁶³ *Id.* at 418–19. The Court ultimately rejected such a presumption. *Id.* (“The sole intent standard offered here is no more compelling when it is linked to the circumstance that [the redistricting plan] is mid-decennial legislation. The text and structure of the Constitution and our case law indicate there is nothing inherently suspect about a legislature’s decision to replace mid-decade a court-ordered plan with one of its own. . . . [T]he fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders.”).

representational rights.”¹⁶⁴ Had other proposed standards been considered by the Court, there is no indication they would have received a more enthusiastic reception than the multitude of previously proposed standards.

The other available option after *Vieth*, pursued by certain amici in *LULAC*,¹⁶⁵ is to argue that the Court’s substantive notions of manageability and discernibility are mistaken. The pursuit of this option likely arises from reading the *Vieth* plurality opinion as saying that, given the vagueness of the constitutional guarantee in *Vieth*, any standard that can be discerned is not manageable, and any manageable standard is not discernible. This double-bind dooms the constitutionality of partisan gerrymandering to remain forever nonjusticiable. This view of the plurality opinion puts more emphasis on the concepts of manageability and discernibility themselves rather than the proposed standards.

But litigants reading the *Vieth* plurality in this manner will face similar hurdles. They will argue that the *Vieth* plurality’s notions of manageability and discernibility cannot be squared with the many times and circumstances when the court *has* adopted a doctrinal standard.¹⁶⁶ Thus, one amicus brief in *LULAC* protested that “[j]udicial standards . . . should [not] be evaluated . . . against abstract ideals of doctrinal perfection neither available nor applied in enforcing the Constitution’s other fundamental structural commitments.”¹⁶⁷

The fact that little can be argued intelligibly about the abstract concepts of manageability and discernibility in court is another cost of being unable to critique the unstated prudential judgments motivating the *Vieth* plurality. The PPQD, in presenting itself as doctrine, implicitly claims that the concepts of manageability and discernibility upon which it rests are applicable to all of constitutional doctrine.¹⁶⁸ As

¹⁶⁴ *Id.* at 418. The Court also rejected an amicus brief’s supplement to the appellant’s proposal, which would have had the Court examine hypothetical election results if the vote tallies of the majority and minority parties were switched. *Id.* at 419–20. The Court rejected this standard for failing to “provid[e] a standard for deciding how much partisan dominance is too much.” *Id.* at 420. These were the only standards considered, and the Court did not examine partisan gerrymandering outside of the mid-decade redistricting context.

¹⁶⁵ See *infra* note 167 and accompanying text (citing amici).

¹⁶⁶ See *supra* Part II (arguing that concepts of manageability and discernibility cannot be applied to entire corpus of constitutional law).

¹⁶⁷ Brief of Samuel Issacharoff, Burt Neuborne, & Richard H. Pildes as Amici Curiae in Support of Appellants at 27, *LULAC*, 548 U.S. 399 (No. 05-204), 2006 WL 53993, at *27. While this amicus brief did not make a Fourteenth Amendment argument, its manageability argument readily applies to the proposals in *Vieth*.

¹⁶⁸ See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (providing universalist description of PPQD’s aims); see also *supra* note 99 and accompanying text (quoting *Vieth*, 541 U.S. at 278).

argued above, such a metadoctrine that can apply to all of constitutional law may be impossible to create; at the least, the *Vieth* plurality does not accomplish it.¹⁶⁹ By inviting future litigants to argue for a new understanding of the meanings of “manageability” and “discernibility” in the abstract that can make sense of the entirety of constitutional law, litigants are sent on a wild goose chase. Not only are lawyers and judges unaccustomed to conducting in-court legal debate about issues at such a high level of abstraction, the PPQD diverts them to arguing the arcane question of what manageability and discernibility are, rather than how an individual case should be decided.¹⁷⁰

But, the most direct costs imposed by this feature of the PPQD are the wasted litigation costs spent on devising and arguing for new standards; while the PPQD attempts to shut off litigation, the logical fallacy noted above cannot help but invite more litigation. Admittedly, had a majority of the Court endorsed the *Vieth* plurality’s PPQD holding, it almost certainly would not have granted certiorari to future challenges proposing new standards. But nothing in the reasoning of the opinion itself discourages litigants from proposing new standards.

Even if litigants do internalize the message to stop trying, the Court’s failure to state forthrightly the rationale upon which its decision rests also deprives litigants and the public of an honest opportunity to critique the Court’s rationale, an opportunity which serves several valuable interests. Having to face critique of the rationales upon which its decisions rest constrains the judiciary; when judges reveal the grounds for their decisions, the decisions can be “debated, attacked, and defended,”¹⁷¹ a process with the potential to affect future rulings. But when Justices claim a decision rests on a doctrinalized PPQD that cannot in fact be applied to other areas of constitutional doctrine, any critique will not address the gestalt prudential judgment upon which the decision rests, thus shielding the Justices from any real reconsideration of their course of action.

¹⁶⁹ See *supra* Part II (critiquing *Vieth* plurality’s use of concepts of doctrinal manageability and discernibility).

¹⁷⁰ See *supra* note 167 and accompanying text (arguing litigants are poorly suited to argue “abstract ideals of doctrinal perfection” (quoting Brief of Samuel Issacharoff et al. as Amici Curiae in Support of Appellants, *supra* note 167, at 27)). This option, because it requires such abstract arguments, is probably even less appealing to litigants than simply proposing yet another concrete standard; however, neither approach seems to hold much promise of success.

¹⁷¹ Shapiro, *supra* note 103, at 737 (“A requirement that judges give reasons for their decisions—grounds of decision that can be debated, attacked, and defended—serves a vital function in constraining the judiciary’s exercise of power.”).

As Professor Shapiro has noted in this context, “judges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail.”¹⁷² This removes one of the most important quasi-popular constraints on the unelected Supreme Court—the possibility of working for genuine change in Supreme Court jurisprudence through critique. This tradition of critique is based on the understanding that the Court is not “final because [it is] infallible,” but is “infallible only because [it] is final.”¹⁷³ Thus, a further irony of the PPQD is that although it is designed to act as a check on the judiciary’s power, by enlisting obfuscation as an ally it produces the opposite result.¹⁷⁴

IV

A COMPARISON TO THE RATIONAL BASIS REVIEW STANDARD

An advocate of the PPQD might protest that whatever the costs of the PPQD as deployed in *Vieth*, they are outweighed by the benefits of preserving the appearance of a legitimate and restrained judiciary. Even if the PPQD cannot be universally applied as “doctrine” to every area of constitutional law, the judiciary should have the option of presenting the PPQD as such to avoid disclosing that its decisions are based solely on a gestalt prudential impression. To state this honestly would cost the judiciary too much in the way of legitimacy,¹⁷⁵ which is precisely what the Court is trying to preserve in deploying the PPQD in the first place.

This Part answers this fundamental critique by arguing that judges have a better option when they wish prudentially to avoid issues but cannot justify this decision on universally applicable doc-

¹⁷² *Id.*; see also Micah Schwartzman, Essay, *Judicial Sincerity*, 94 V.A. L. REV. 987, 991 (2008) (“Unless judges are sincere, the grounds for their decisions cannot be scrutinized in the public domain. . . . [T]hose subject to adjudication cannot determine whether the reasons given to them are sound. Whether or not citizens agree with the reasons given . . . , they must have the opportunity to understand and evaluate those reasons.”).

¹⁷³ *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.”); see also Schwartzman, *supra* note 172, at 1012 (“If judges were infallible, then public justification might not be necessary. But that is obviously not the case.”).

¹⁷⁴ However, see the Conclusion for an important qualification of this judicial-transparency critique.

¹⁷⁵ See, e.g., Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1388 (1995) (arguing that full disclosure of certain kinds of prudential reasoning would diminish institutional legitimacy).

trinal grounds, such as those upon which the PPQD purports to be based.¹⁷⁶ Namely, judges should craft a stringent doctrinal standard, such as the rational basis review standard for the review of economic and social legislation under the Equal Protection Clause.¹⁷⁷ This option presents none of the costs of the PPQD outlined in Part II. A stringent doctrinal standard would preserve the Court's ability to act in egregious cases, an option the PPQD shuts off by stating that an issue is definitively nonjusticiable.¹⁷⁸ While it is hard for the Court to go back on a bold PPQD statement while maintaining institutional legitimacy, a stringent doctrinal standard does not present the same legitimacy costs to changing courses because the Court has not said it will *never* rule on the matter.¹⁷⁹

Though using a stringent doctrinal standard and using PPQD similarly entail that claims will not be granted, they produce different effects down the road. One of the longstanding critiques of the PQD is that a political question holding is a merits holding in disguise.¹⁸⁰

¹⁷⁶ See Tushnet, *supra* note 155, at 1213 (“As Bickel understood, however, prudent judgment cannot be captured in rules.”).

¹⁷⁷ The argument that stringent doctrinal standards are superior to the PPQD elaborates on an argument made in passing long before *Vieth* in Robert L. Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 448 (1951). These two options are treated as the only options on the table throughout the following discussion because they are in many important respects the two most similar means of avoidance. If the PPQD is being considered as a Justice's best option, it will generally mean that less conventional means of avoidance, such as standing doctrine and discretionary certiorari grants, are not available for whatever reason. The PPQD involves a relatively large expenditure of judicial capital because it requires a Justice to write an opinion explaining why a question is *definitively nonjusticiable for all time*, as opposed to a decision resting on standing grounds, which need only explain why the question is nonjusticiable *at the moment*. It is fair to assume that either a Justice affirmatively wants to cut off litigation in an area by adopting a PPQD holding or that it is seen as the only available means of avoidance.

Similar to the PPQD, a stringent doctrinal standard effects a cessation of litigation and renders a kind of “final” answer to a legal question in the way a standing decision does not. However, a stringent doctrinal standard is less extreme because the need to justify definitive nonjusticiability is not present. In comparing the PPQD and stringent doctrinal standards, this Note argues that these differences and others are important in tipping the balance in favor of a stringent doctrinal standard. However, it should be emphasized that this Note remains agnostic as to what the *best* option would be in any given case if all options, including non-avoidance, were on the table.

¹⁷⁸ See *supra* notes 13–18 and accompanying text (discussing distinction between merits holding and PPQD's nonjusticiability holding).

¹⁷⁹ See Karlan, *supra* note 3, at 687 (“[T]his kind of exit [through use of a stringent doctrinal standard], unlike a more explicit declaration of nonjusticiability, fully preserves the Court's ability to reenter the field should circumstances or doctrine or the Justices' view of the Constitution change.”).

¹⁸⁰ See, e.g., Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 713 (1993) (arguing that political question holding is really merits ruling in disguise).

Given these criticisms, one might question whether there is a material difference between the PPQD and a stringent doctrinal standard. But a merits holding based on a standard very favorable to the actor whose conduct is challenged can be prodded, tested, argued against, and questioned by new sets of facts. PPQD holdings are not susceptible to these kinds of challenges because there is no announced standard to meet.

There are several notable constitutional standards that are essentially impossible to meet in practice.¹⁸¹ Perhaps the most important of these is rational basis review. Since the New Deal, courts have been extremely leery of invalidating economic legislation on equal protection or due process grounds, and rational basis review has been used to uphold nearly all challenged economic legislation that does not implicate a protected class or a fundamental right.¹⁸² The rational basis test looks to whether the legislation bears a “rational” relationship to a “legitimate” government interest, and both of these terms have been interpreted extremely broadly in favor of the government.

For example, in the famous *Carolene Products* case,¹⁸³ the Court upheld economic legislation designed solely to benefit the dairy industry on the grounds that it was rationally related to the legitimate government interest of public health.¹⁸⁴ One of the most archetypal examples of the rational basis test’s extreme deference came in *Williamson v. Lee Optical Co.*,¹⁸⁵ in which the Court upheld an Oklahoma law that made an optometrist’s prescription a prerequisite to having eyeglasses repaired, resulting in economic detriment to opti-

¹⁸¹ Professor Karlan lays out a typology of constitutional exit strategies by which the Court has abandoned active adjudication of a particular set of cases, several of which are stringent doctrinal standards. Karlan, *supra* note 3, at 673–75. For example, Karlan examines how the Court exited the field of policing individual obscenity cases in the 1960s. *Id.* at 680–85. The Court reversed course in *Miller v. California*, 413 U.S. 15 (1973) and created a stringent doctrinal standard instead, “leaving the question largely up to the individual juries that render general verdicts” by modifying the constitutional obscenity standard to depend on local community standards of decency rather than national ones. Karlan, *supra* note 3, at 684. While there was still appellate review, vesting local juries with the authority to decide on local standards of decency entailed that few jury rulings would be struck down. *But see* *Jenkins v. Georgia*, 418 U.S. 153, 160–61 (1974) (imposing minimum threshold on what material juries could deem obscene).

¹⁸² In these latter situations, strict scrutiny review is usually used. Strict scrutiny review is almost always outcome determinative in the other direction, leading to legislation’s being struck down rather than upheld.

¹⁸³ *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

¹⁸⁴ *Id.* at 146–47. Professor Geoffrey Miller has criticized the Court’s holding in *Carolene Products*, arguing that “[t]he statute upheld in the case was an utterly unprincipled example of special interest legislation. The purported ‘public interest’ justifications so credulously reported by Justice Stone were patently bogus.” Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 S. CT. REV. 397, 398–99.

¹⁸⁵ 348 U.S. 483 (1955).

cians who could not write prescriptions but felt equally qualified to repair eyeglasses.¹⁸⁶ Though it was difficult to suss out exactly how this legislation furthered a concern for public health, the Court noted that the “law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”¹⁸⁷

But despite the fact that rational basis review is one of the hardest standards for a plaintiff to meet in all of constitutional law, the standard is not contentless. It is based on principles circumscribing the outer limits of deference to legislative judgment, namely legitimacy of aims and minimal rationality. And given the sheer breadth of cases the doctrine covers, it should not be surprising that it has occasionally been used to strike down legislation. The Court has used even the “traditional” rational basis test to strike down economic legislation,¹⁸⁸ but it has more prominently used a more searching version of the test, commonly referred to as “rational basis with bite,” for this purpose.¹⁸⁹

Commentators often refer to traditional rational basis review and rational basis review with bite as virtually two separate doctrines.¹⁹⁰ Rational basis with bite typically has been applied only in cases involving discrimination against “quasi-suspect” classes that do not trigger heightened scrutiny but are still prone to discrimination, such as the mentally retarded,¹⁹¹ illegal immigrants,¹⁹² and homosexuals.¹⁹³ But even if rational-basis-with-bite review differs in application, the test formulation itself is the same as that of traditional rational basis, and is premised on the same values, namely legitimacy of aims and rationality.¹⁹⁴ For instance, the rational-basis-with-bite case striking

¹⁸⁶ *Id.* at 486–88.

¹⁸⁷ *Id.* at 487–88.

¹⁸⁸ See *Morey v. Doud*, 354 U.S. 457, 468–69 (1957) (striking down law under traditional rational basis review because it exempted only American Express brand money order from regulation), *overruled by* *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (“*Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous.”).

¹⁸⁹ See *infra* notes 191–93 (listing prominent rational-basis-with-bite cases).

¹⁹⁰ See, e.g., Shawn P. Wieland, *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test To Address Varnum v. Brien*, 94 IOWA L. REV. 413, 419 (2008) (discussing differences between traditional rational basis and rational basis with bite).

¹⁹¹ See *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

¹⁹² See *Plyler v. Doe*, 457 U.S. 202 (1982).

¹⁹³ See *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁹⁴ Many believe that no law can fail traditional rational basis review, so any deviation from this expectation is labeled “rational basis with bite.” The two are generally differentiated on the basis that in traditional rational basis review, the Court itself will supply hypo-

down punitive laws aimed only at harming hippies¹⁹⁵ reasoned that “a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”¹⁹⁶

Justice Kennedy’s majority opinion in *Romer v. Evans*,¹⁹⁷ a prime example of rational basis with bite used to protect a quasi-suspect class, also extensively utilized the values and terms of the traditional rational basis standard. He admitted that “even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous,” it will generally be upheld under traditional rational basis review.¹⁹⁸ Nonetheless, Kennedy wrote against a backdrop of developed constitutional doctrine about legitimate interests, such as public health and safety and economic improvement. These past data points allowed Kennedy to conclude that disadvantaging one particular group of citizens was not a legitimate interest.¹⁹⁹ As Kennedy wrote:

[Even broad laws] can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. [This law,] however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them . . . injuries that outrun and belie any legitimate justifications that may be claimed for it.²⁰⁰

It is not implausible that the New Deal Court might have held the constitutionality of economic and social legislation nonjusticiable for a lack of manageable standards just as the *Vieth* plurality did for gerrymandering. As in the partisan gerrymandering context, rational basis

thetical government interests that would legitimize the law, while in rational basis with bite, the Court looks only to the *actual* interests considered by the legislature. *Compare* Wieland, *supra* note 190, at 419 (“In practice, if a court can think of any plausible government interests and can conceive of reasons to support the government’s methods for achieving those interests, the law stands [under traditional rational basis review].”), *with id.* at 421 (arguing that in applying rational basis with bite, the Court strikes down laws without considering “possible legitimate goals” beyond those asserted by the government actor in question).

¹⁹⁵ See *USDA v. Moreno*, 413 U.S. 528, 534 (1973).

¹⁹⁶ *Moreno*, 413 U.S. at 534; see also *Romer*, 517 U.S. at 634–35 (quoting *Moreno*, 413 U.S. at 534).

¹⁹⁷ 517 U.S. 620 (1996).

¹⁹⁸ *Id.* at 632.

¹⁹⁹ *Id.* at 635; see also *supra* notes 111–19 and accompanying text (discussing value of having past constitutional data points to consult when crafting opinions). I make no claim as to the role of gestalt judgments in other areas of law, including in traditional rational basis and rational-basis-with-bite cases. I claim only that because traditional rational basis and rational-basis-with-bite cases proceed from an announced doctrinal standard, they provide more analogical and precedential ammunition with which to triangulate a legal answer to a novel set of facts. This is not the case in PPQD cases, in which no standard whatsoever is announced.

²⁰⁰ *Romer*, 517 U.S. at 635.

review requires some underlying vision of what a “legitimate” government interest must be, and also requires unelected judges to impose this vision on the democratically elected branches.²⁰¹ And at the dawn of modern equal protection jurisprudence, there was very little legitimate legal interpretive authority from which to draw. The text of the Equal Protection Clause does not provide any guidance about what constitutes a “legitimate” interest, and the legislative history does not provide sufficient guidance given the often clashing views of the Fourteenth Amendment’s main proponents.²⁰² Thus, doctrine was needed to implement the broad constitutional guarantee of “equal protection of the laws” to make it manageable.²⁰³

If the *Vieth* PPQD plurality opinion had been written not about partisan gerrymandering in 2004 but about review of economic legislation in the late 1930s, later holdings like *Romer* would have been much more difficult—if not impossible—to achieve. Rather than simply adding teeth to a preexisting substantive standard, a litigant would have had to either propose an entirely new acceptable standard or argue that the Court’s abstract notions of discernibility and manageability were erroneous.²⁰⁴ These are very different types of arguments than those made in *Romer*; they must necessarily work in the dark, as they do not have the same argumentative ammunition available to them. They do not have robust case law applying principles, such as legitimacy and rational relation, from which litigants could argue by analogy, distinguish, and hold the Court accountable for its past pronouncements by requesting that it apply a similar principle in the case at bar.

In addition, substantive standards—even when vaguely worded or difficult to meet in practice—can deter rights violations when internalized by political actors.²⁰⁵ Thus, a stringent doctrinal standard such as rational basis review preserves for the Court the option of applying the doctrine more aggressively when confronted with egregious cases, and further may discourage rights violations by articulating standards

²⁰¹ See *supra* note 74 and accompanying text (discussing Justice Frankfurter’s belief that adjudicating apportionment claims would necessarily involve arbitrary judicial choice of preferred political theory).

²⁰² See generally BREST ET AL., *supra* note 33, at 307–10 (discussing disagreements amongst representatives regarding Fourteenth Amendment’s meaning and scope).

²⁰³ See *supra* notes 131–33 and accompanying text (discussing importance of Court’s role in fashioning workable doctrine from broad or vague constitutional guarantees).

²⁰⁴ See *supra* Parts II–III (discussing failings of *Vieth* plurality opinion and limited options opinion presents for future litigants).

²⁰⁵ See Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 68 (2004) (demonstrating that even vague prohibitions can sometimes be internalized by political actors).

and principles by which to judge them. By contrast, a PPQD holding both effectively and symbolically gives political actors carte blanche.

Perhaps most importantly, a stringent doctrinal standard does not entail the same costs engendered by the PPQD's disingenuous claim to being "doctrinal."²⁰⁶ While a stringent doctrinal standard accomplishes a similar retreat from active adjudication as PPQD, it does not impose the wasteful cost of inviting litigants to continually propose new doctrinal standards in the hope of finding one that is perfectly discernible and manageable. As with any merits standard, litigants could always propose replacements to a stringent doctrinal standard—but unlike in PPQD cases, their ability to do so is not a condition of the justiciability of their claims.²⁰⁷ In addition, a stringent doctrinal standard does not require litigants to argue about abstract concepts of manageability or discernibility. With a merits standard already in place, litigants need not refer to these highly abstract notions in order to discuss how the standard should be applied.

While it is true that a future Court could always simply overrule a nonjusticiability holding, the legitimacy costs of doing so diminish the likelihood of the Court taking such action. The Court's institutional efficacy and independence depend on its legitimacy, which "would fade with the frequency of its vacillation."²⁰⁸ Alternatively, the Court could effectuate a "stealth overruling" by ruling that the same claim which was nonjusticiable under constitutional clause A is now justiciable under constitutional clause B. For example, such a strategy was used in the transition from *Colegrove's* Guarantee Clause holding²⁰⁹ to *Baker's* Equal Protection Clause holding,²¹⁰ but this bit of legerdemain impressed few sophisticated observers.²¹¹ It is doubtful that these kinds of moves, if used more frequently, would do more to preserve legitimacy than simply overruling a PPQD holding outright.

²⁰⁶ See *supra* Parts II–III (critiquing PPQD as deployed by *Vieth* plurality).

²⁰⁷ See *supra* notes 156–60 and accompanying text (arguing that logical fallacy in *Vieth* plurality's PPQD argument, as well as Justice Kennedy's hope that standards might one day be found, invites proposals of new doctrinal standards).

²⁰⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992); see also *id.* at 867 (“[T]o overrule . . . in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question.”).

²⁰⁹ *Colegrove v. Green*, 328 U.S. 549, 552, 555 (1946) (holding malapportionment claim nonjusticiable under Guarantee Clause).

²¹⁰ *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding similar malapportionment claim justiciable under Fourteenth Amendment).

²¹¹ See, e.g., Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 107 (2000) (“[I]t is hard to avoid the conclusion that the fateful decision to shift ground to equal protection [in *Baker*] was made for no reason other than to avoid the appearance of a departure from [*Colegrove*].”).

A stringent doctrinal standard is also less costly than other available doctrinal openings. It is true that if the New Deal Court had held the constitutionality of economic legislation nonjusticiable under the Equal Protection Clause, rather than subject to rational basis review, while maintaining review over legislation impacting suspect classes, the Court could simply have expanded its list of suspect classes in egregious cases. But this approach provides less flexibility by forcing the court to go “all out” and impose the full panoply of suspect-class protections on a brand new class, a bold move for which the votes may not be present.²¹² Furthermore, relying on other doctrinal openings to combat egregious cases has been unsatisfactory in the partisan gerrymandering context; using race and miniscule deviations from the equipopulational principle as a proxy has not allowed the Court effectively to address partisan gerrymandering head-on, on its own unique terms.²¹³

This proposal is not a plea for a return to the much maligned *Bandemer* era. *Bandemer*'s primary sin was not that it was a hard standard for plaintiffs to meet—although it certainly was—but that its holding was utterly confusing to lower courts and litigants.²¹⁴ The product of a fractured Court, *Bandemer* contained hints toward both future leniency and more searching inquiry.²¹⁵ In contrast, even when certain applications of rational basis review have surprised commentators, it has remained clear that the fundamental essence of the test

²¹² For example, to do so in *Romer* would have struck down numerous federal provisions rather than simply the provision at hand. Regardless of the many good arguments for doing so, it is mentioned here only to demonstrate that it takes a greater commitment of judicial capital to expand the list of suspect classes than it does to render a rational-basis-with-bite decision.

²¹³ See *supra* notes 75–78 and accompanying text (discussing political districting and racial gerrymandering cases). Thus, commentators have decried the Court's approach in *Karcher v. Daggett*, 462 U.S. 725, 727 (1983), which used a miniscule deviation from the equipopulational principle to strike down a badly gerrymandered plan as inadequate and disingenuous. See, e.g., Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1459 (2008) (“The *Karcher* case demonstrated that the one-person, one-vote principle provided scant guidance for how courts should treat partisan gerrymandering. Indeed, this principle has had unexpected, and even unfortunate, consequences for partisan gerrymandering.”).

²¹⁴ See *supra* notes 84–89 and accompanying text (discussing how *Bandemer*'s abstract standard proved difficult for lower courts to apply in practice).

²¹⁵ See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (“[T]he power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.”); *id.* at 133 (“[A] finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.”).

remains deferential.²¹⁶ This clarity, essential for the Court to fashion an effective “exit strategy,”²¹⁷ was missing in both *Bandemer* and *Vieth*.

CONCLUSION

Admittedly, this Note’s suggestion of adopting a stringent doctrinal standard instead of the PPQD would have the Court trade one kind of dishonesty for another. Instead of honestly declaring it would rather not rule on the merits by dishonestly wrapping such a declaration in the garb of universally applicable metadoctrines, the Court would be dishonestly declaring that it will actively adjudicate in an area of law by crafting a doctrine that honestly, if not utterly obviously, indicates that the Court will almost never intervene.

But both judicial honesty and dishonesty come with costs, and this Note has attempted to demonstrate that the costs of a stringent doctrinal standard are far less severe than those of the PPQD. The grounds of a decision implementing a stringent doctrinal standard are available to critique, and its rationales can be tested in future cases because a merits standard has been imposed. Honest change can be wrought in egregious cases because the Court has not definitively removed itself from adjudication. Litigants are not sent on wild goose chases for more manageable standards or better definitions of the concepts of manageability and discernibility. And most importantly for the judicial avoider, the Court is able to withdraw from active adjudication while still maintaining the flexibility to step in should changed circumstances or egregious constitutional rights violations require them to do so.

²¹⁶ Viewing both traditional rational basis and rational basis with bite as one doctrine—or two closely interrelated doctrines, in that they purport to deploy the same or similar doctrinal test—the test remains essentially deferential. While the few times it is applied “with bite” it takes on more searching scrutiny, the vast majority of rational basis cases are still “without bite.”

²¹⁷ See *supra* notes 3, 181 (discussing constitutional exit strategies).