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# Partisan Gerrymandering: A New Concept for Florida's 1992 Reapportionment

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# PARTISAN GERRYMANDERING: A NEW CONCERN FOR FLORIDA'S 1992 REAPPORTIONMENT

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*Gerrymandering—[t]he process of dividing a state . . . into authorized . . . political divisions, but with such a geographical arrangement as to accomplish a sinister or unlawful purpose.*[1]

*In an era in which the re-election rate for U.S. House members regularly exceeds 98 percent, there are but two sure ways to end a congressional career: indictment or redistricting.*[2]

IN 1992 the Florida Legislature must tackle a politically divisive issue that recurs every decade: reapportionment.[3] As mandated by the United States[4] and Florida Constitutions,[5] the Legislature must redraw the state's districts for legislative and congressional seats following each ten-year federal census.[6] Although the Legislature com-

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1. BLACK'S LAW DICTIONARY 812 (4th ed. 1957). The authors use the 1957 definition by choice. More recent editions of Black's define gerrymandering as "the process of dividing a state . . . into the authorized . . . political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose." BLACK'S LAW DICTIONARY 687 (abridged 6th ed. 1990).

2. Beiler, *The National Political Sweepstakes*, CAMPAIGNS & ELECTIONS, Jan.-Feb. 1989, at 13.

3. Technically, "reapportionment" is the redistribution among political subunits of available legislative and congressional seats and "districting" is the drawing of new constituency boundaries. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 78 n.6 (1985). In this Article, however, the authors, as do others, use the terms "reapportion," "apportion," and "redistrict" interchangeably. *See, e.g., id. See also In re* Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session; Constitutionality Vel Non, 414 So. 2d 1040, 1046 (Fla. 1982) [hereinafter *1982 Reapportionment Case*] ("reapportionment" and "apportionment" are synonymous).

4. U.S. CONST. art. I, § 2; U.S. CONST. amend. XIV, § 2.

5. FLA. CONST. art. III, § 16.

6. Now that the United States Bureau of the Census has released its 1990 nationwide head-count results, all 50 states will be reapportioning state and congressional districts in what has been called the "remaking of the nation's political landscape." Brace & Chapin, *Redistricting Roulette*, CAMPAIGNS & ELECTIONS, Mar. 1991, at 32.

pleted this task to the satisfaction of the Florida Supreme Court in 1982,[7] it must factor a new potential stumbling block into its 1992 reapportionment plan—that partisan gerrymandering may be found to violate the equal protection clause of the federal Constitution.[8] In past reapportionment years, the majority party was free—subject only to political constraints—to strengthen its hold on the Legislature and to further damage the minority's hopes for ever assuming control. In theory, at least, such deliberate behavior is now unconstitutional.

In its 1986 decision in *Davis v. Bandemer*,[9] the United States Supreme Court held for the first time that partisan gerrymandering was justiciable and was subject to certain federal constitutional constraints.[10] Consequently, such "deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes"[11] is no longer deemed to be only a political question[12] and is now reviewable by the courts.

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7. The Florida Supreme Court must declare the facial validity of any legislative reapportionment plan passed by the Legislature. FLA. CONST. art. III, § 16(c). The court does not review the congressional reapportionment plan that the Legislature passes at the same time.

8. The term "partisan" gerrymandering will be used in this Article, as opposed to "political" gerrymandering as used by the United States Supreme Court in Davis v. Bandemer, 478 U.S. 109 (1986). The authors adopt Professor Schuck's usage of "partisan" because of the greater clarity it provides in that "[a]ll types of gerrymandering—racial, geographical, partisan and other—are 'political' in the sense that they alter governmental structures in order to affect the exercise of power." Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1326 n.12 (1987); *see also* Mobile v. Bolden, 446 U.S. 55, 88 (1980) (Stevens, J., concurring in judgment) ("In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.").

9. 478 U.S. 109 (1986).

10. Challenges on grounds of racial discrimination were declared justiciable during the 1960s. *See, e.g.*, Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Unless otherwise stated, however, this Article only addresses gerrymandering as it affects political groups such as the Democratic or Republican parties. It should be noted, however, that racial inequities are often subsumed under the issue of partisan gerrymandering given the traditionally overwhelming Democratic voting preferences of blacks. Bandemer v. Davis, 603 F. Supp. 1479, 1490 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986); Backstrom, Robins, & Eller, *Partisan Gerrymandering in the Post-Bandemer Era*, 4 CONST. COMMENTARY 285, 285 & n.3 (1987) [hereinafter Backstrom]. Additionally, both racial and partisan gerrymandering have in common "an identifiable group that is the intended target of unconstitutional discrimination." Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After* Davis v. Bandemer, 136 U. PA. L. REV. 183, 197 (1987).

11. *Bandemer*, 478 U.S. at 165 (Powell, J., concurring in part and dissenting in part) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969)).

12. The political question doctrine states that the courts will not engage themselves in any case that involves a:

> textually demonstrable constitutional commitment of the issue to a coordinate politi-

Before *Bandemer*, reapportionment was one of the spoils of victory for the political party in power. Through the use of certain gerrymandering techniques, district lines could be drawn to give substantial benefits to the majority political party in subsequent elections.[13] The plurality in *Bandemer* held that there are constitutional limits on this process, but provided only vague and arguably meaningless guidelines for determining what constraints exist. Only after further court decisions in this area will we know to what extent *Bandemer* has actually limited partisan influences behind the reapportionment process.

The Legislature and the Florida Supreme Court must now determine how they will react to *Bandemer*'s potential effect on Florida's reapportionment process. This will be important not only because of the redistribution of existing legislative seats throughout the State that will occur due to changed population patterns, but also because Florida's growth during the past ten years relative to the rest of the nation has entitled it to four new congressional seats[14] that will be actively sought after by the major political parties.

This Article attempts to provide some guidance to the Legislature and the courts in the redistricting effort. To that end, parts I and II of this Article briefly review the history leading to the holding in *Bandemer* that partisan gerrymandering is justiciable and then discuss the

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cal 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.

*Bandemer*, 478 U.S. at 121 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)). Although the Supreme Court itself had never specifically held that partisan gerrymandering was non-justiciable on political question grounds, its affirmances in a number of lower court decisions supported an inference for that proposition. *Id.*

13. Common gerrymandering techniques include:

"Cracking"—A political or racial group constituting a dominate force because of its size is broken up by district lines and dispersed throughout several districts;

"Stacking"—Instead of splitting a large political or racial group by district lines, the group is combined with a larger opposition group;

"Packing"—A political or racial minority's representation is minimized by concentrating the group into as few districts as possible.

W. ESKRIDGE, JR. & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 99 (1988) [hereinafter ESKRIDGE & FRICKEY]. Through the use of these gerrymandering techniques, a numerically inferior but politically dominant party can create districts in which the votes of the subordinate political party are wasted. Comment, *supra* note 10, at 201.

14. COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, APPORTIONMENT POPULATION AND STATE REPRESENTATION, H.R. Doc. No. 18, 102d Cong., 1st Sess. 3 (1991) [hereinafter APPORTIONMENT POPULATION].

significance of that holding. Part III offers some guidelines for the Legislature to follow to help minimize the likelihood of a successful challenge to any plan it may produce. Part IV outlines the elements necessary to mount a successful partisan gerrymandering challenge, and part V contains some of our predictions of what to expect from the Florida Legislature as it addresses partisan gerrymandering for the first time since *Bandemer*. We have also included some of our own suggestions for how best to deal with the problems that partisan gerrymandering raises.

## I. How Did Partisan Gerrymandering Become Justiciable?

Although the term "gerrymander"[15] was coined in 1812,[16] it was not until the 1960s that the United States Supreme Court held that legislative districting plans were subject to constitutional constraints and to judicial review.[17] Before that time, the Court had refused to consider districting challenges on the grounds that such claims posed "political questions" and were outside the scope of the Court's jurisdiction.[18]

### *A. Pre-Bandemer Cases*

In the landmark case of *Baker v. Carr*,[19] the Court first announced that congressional reapportionment plans present justiciable questions. Subsequently, in *Wesberry v. Sanders*[20] and in *Reynolds v. Sims*,[21] the Supreme Court held that principles of equality mandate that all citizens be afforded full and effective participation in the

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15. It is important to note that the term "gerrymander," standing alone, does not necessarily involve any partisan connotations.

16. Miller & Packman, *The Constitutionality of Political Gerrymandering:* Davis v. Bandemer *and Beyond*, IV J. L. & Pol'y 697 (1988). "The term first arose in 1812, when Massachusetts Governor Elbridge Gerry (1744-1814) reluctantly signed a redistricting bill, creating a district shaped like a salamander." Shafritz, The Dorsey Dictionary of American Government and Politics 244 (1988).

17. Eskridge & Frickey, *supra* note 13, at 99.

18. The first claim that a congressional districting scheme was unconstitutional under the equal protection clause of the United States Constitution came in Colegrove v. Green, 328 U.S. 549 (1946), in which the Court held that redistricting was a political question and refused to consider the case. From that time until 1960, the Court summarily refused to consider eleven redistricting cases. Comment, *supra* note 10, at 191. *See supra* note 12.

19. 369 U.S. 186 (1962).

20. 376 U.S. 1 (1964) (applying population equality principles to congressional districting plans).

21. 377 U.S. 533 (1964) (applying population equality principles to state legislative districting plans).

election of both their congressional and state representatives.[22] Through these cases, the Court developed and enforced the "one person, one vote" doctrine.[23] The principles enunciated by the Court required the drafters of an apportionment plan to make a good faith effort to construct districts to ensure as nearly as practicable that the votes of citizens in one part of a state carried essentially the same weight as those in other parts of the state.[24] Although mathematical precision was not required, states would have to explain to the court's satisfaction any population deviations among districts.[25]

Review of reapportionment plans in these and subsequent cases was limited primarily to two constitutional inquiries: 1) ensuring that each elected legislator represented an approximately equal number of persons, and 2) ensuring that members of racial minorities were not excluded from the electoral process.[26] Although several justices in subsequent cases discussed whether political groups might be entitled to constitutional protection,[27] it was not until the Court's decision in *Bandemer* that the issue of partisan gerrymandering in reapportion-

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22. The Court, however, has treated equal representation rights differently between state legislatures and Congress based on the different clauses that govern each in the federal Constitution. On the congressional level, these rights are protected under article I, section 2. *See Wesberry*, 376 U.S. 1. On the other hand, rights as to state reapportionment schemes are protected under the equal protection clause of the fourteenth amendment. *See Reynolds*, 377 U.S. 533. Based on this difference, the Court has allowed considerably more deviation in state legislative districts than in congressional districts. *Compare* Brown v. Thomson, 462 U.S. 835 (1983) (Court upheld state legislative reapportionment that created an average deviation among districts of 16% and maximum deviation of 89%, but determined that, absent sufficient justification, anything over 10% was prima facie evidence of a constitutional violation) *with* Karcher v. Daggett, 462 U.S. 725 (1983) (New Jersey congressional apportionment scheme with population deviation of less than one percent struck because in congressional scheme there can be *no* population variation, absent justification, if such can be practicably avoided.)

23. Davis v. Bandemer, 478 U.S. 109, 119 (1986).

24. Reynolds v. Sims, 377 U.S. 533, 562, 566, 577 (1964).

25. Kirkpatrick v. Preisler, 394 U.S. 526, 536 (1969).

26. ESKRIDGE & FRICKEY, *supra* note 13, at 99.

27. For instance, in his dissent in Mobile v. Bolden, 446 U.S. 55, 120 (1980) (Marshall, J., dissenting), Justice Marshall indicated that political groups might have an independent constitutional claim to representation. The majority, however, stated that support for such a theory was totally absent in the Constitution. *Id.* at 79 n.26. Moreover, even if such support did exist, the majority foresaw numerous conceptual and practical difficulties with such an argument—most specifically, what would constitute a "political group"? *Id.*

Later, in a concurring opinion in Karcher v. Daggett, Justice Stevens stated:

> There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others . . . its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well.

462 U.S. 725, 749 (1983) (Stevens, J., concurring). Because the majority chose to rule on other grounds, Justice Stevens' opinion was not adopted by the majority.

ment plans and its effect on political groups was found to be justiciable.

### B. *Davis v. Bandemer*

While Justice White, writing for the Court,[28] acknowledged that there previously may have been some uncertainty as to whether partisan gerrymandering claims presented political or justiciable questions, he wrote that he did not believe that a finding of justiciability was inconsistent with the Court's prior decisions.[29] The *Bandemer* holding was framed in terms similar to those used in the Court's prior decisions that held other voting-rights actions justiciable.[30] Whereas those prior cases held that all *individuals* are entitled to equal representation, the majority in *Bandemer* broadened the scope of those holdings and held that political *groups* are also entitled to equal representation.[31] To protect that right, the Court held that partisan gerrymandering claims may present questions that fall within the Court's jurisdiction.[32]

## II. What is the Significance of Partisan Gerrymandering Claims Being Justiciable?

The Court's holding in *Bandemer* that partisan gerrymandering claims are justiciable answers only the first part of the inquiry. The Court still had to consider what elements a petitioner must show before the courts should find that a districting scheme so infringes on the rights of a political group that the plan must be declared unconstitutional.

### A. *Bandemer's Vague Standards*

In this regard *Bandemer* is significant both for what it says and for what it does not say. What *Bandemer* says is that partisan gerrymandering is justiciable. What *Bandemer* does not say is what evidence will be sufficient to show that such partisan gerrymandering has risen to the level of a constitutional violation.

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28. Six justices of the United States Supreme Court (White, Brennan, Marshall, Blackmun, Powell, and Stevens) held that partisan gerrymandering presented a justiciable issue.

29. Davis v. Bandemer, 478 U.S. 109, 118-27 (1986).

30. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

31. *Bandemer*, 478 U.S. at 124.

32. *Id.*

In *Bandemer*, Indiana's Democrats contended that the state legislative reapportionment scheme was purposefully designed by Indiana's Republicans to disadvantage Democrats in violation of their fourteenth amendment guarantees of equal protection.[33] The district court agreed.[34] In declaring the plan unconstitutional, the district court looked at a number of factors,[35] including the bizarre district configurations, the absence of any concern for traditional political subdivisions or communities of interest, the lack of any rational explanation for those deviations, and the unfair procedures that had been used in developing the plan.[36] Most importantly, however, the district court noted that the results of the first election following the reapportionment plan reflected that the Democrats had received 51.9% of the total vote in the election for the state House of Representatives, but had captured only forty-three of the 100 House seats.[37]

Although holding for the first time that the issue of partisan gerrymandering is justiciable,[38] a divided United States Supreme Court[39] reversed the district court and determined that the Democrats had failed to establish the two elements necessary for a successful showing of partisan gerrymandering: 1) intentional discrimination against an

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33. Bandemer v. Davis, 603 F. Supp. 1479, 1482 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986). It should be noted that claims of unconstitutional race-based gerrymandering may be brought under the Voting Rights Act as well as under the fourteenth amendment. 42 U.S.C. §§ 1971-1973 (1988). Partisan gerrymandering is not covered by the Voting Rights Act.

34. *Bandemer*, 603 F. Supp. at 1496.

35. For a detailed discussion of these factors, see *infra* notes 117-42 and accompanying text.

36. *Bandemer*, 603 F. Supp. at 1493-95. The district court found that the Democrats had been totally excluded from the reapportionment process. For example, the Democrats were not allowed to participate in the map-making process of drawing the district lines, and the details of the plan were not revealed to the Democrats until the final hours of the legislative session in which the plan was adopted. *Id.* at 1495. For a further discussion of the factors listed here, see *infra* notes 117-42 and accompanying text.

37. *Bandemer*, 603 F. Supp. at 1485.

38. Davis v. Bandemer, 478 U.S. 109, 143 (1986).

39. Although a majority of the Court found partisan gerrymandering a justiciable issue, the Court split 7-2 on the constitutionality of Indiana's reapportionment plan. Even then, the Court was unable to reach a majority consensus. Justices White, Brennan, Marshall, and Blackmun held that partisan gerrymandering was justiciable but ruled that the *Bandemer* plaintiffs had failed to prove an equal protection violation. *Id.* Justices O'Connor, Burger, and Rehnquist joined in separate opinions concurring only in the result because those justices believed that the issue was not even justiciable. *Id.* at 144. Justices Powell and Stevens concurred in the holding of justiciability but would have held that the plaintiffs had established an equal protection violation. *Id.* at 161. With Burger, Brennan, and Marshall having since resigned from the Supreme Court, it is difficult to predict whether the Court's new makeup will lead to a retreat from its justiciability findings in *Bandemer*. It is probable, however, that the new, more conservative justices will side with Justices O'Connor and Rehnquist in future partisan gerrymandering decisions—thus ensuring that no partisan gerrymandering challenge plaintiff will ever be successful.

identifiable political group, and 2) an actual discriminatory effect on that group.[40] The plurality indicated that the first prong—intent—should not be difficult to prove.[41] For example, the plurality stated that if a group was able to establish discriminatory effects, the record developed should also support a finding of intent.[42] The plurality noted that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[43] Nonetheless, the plurality required that discriminatory intent must still be established.[44]

To satisfy the second element of the plurality's partisan gerrymandering test—discriminatory effects—the plurality held that the prevailing party would have to establish that the electoral system had been arranged in such a manner as to "consistently degrade a voter's or a group of voters' influence on the political process as a whole."[45] Before a single district's lines could be invalidated, a court would have to find that the members of the affected group had been denied the opportunity to participate in the electoral process. Examples cited included denial of a group's opportunity to nominate candidates, to register to vote, or to vote.[46] For a court to invalidate an entire statewide apportionment plan, a plaintiff would have to establish that the electoral system has "continually frustrated" the "will of a majority of the voters or effectively denied a minority of voters a fair chance to influence the political process."[47]

In applying the statewide standard to the facts in *Bandemer*, the plurality held that the facts were insufficient to satisfy the "continued frustration" standard.[48] First, the plurality looked at the disparity between the number of votes the Democrats received and the number of seats they captured.[49] Because Indiana was a "swing

40. *Bandemer*, 478 U.S. at 128, 140.
41. *Id.* at 129.
42. *Id.* at 127.
43. *Id.* at 129.
44. Davis v. Bandemer, 478 U.S. 109, 129 n.11 (1986).
45. *Id.* at 132.
46. *Id.* at 133.
47. *Id.*
48. *Id.* at 134.
49. Many commentators believe that use of such a proportional representation test is inappropriate in that a system with single-member districts is, by definition, a winner-take-all system. In such a system, a perfectly legitimate districting scheme may result in a party capturing significantly different percentages of votes and seats. *See, e.g.*, M. JEWELL & S. PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES, 20-24 (1986); Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 52-54 (1985); Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185 (1985); Schuck, *supra* note 8, at 1361-77.

state,"[50] in which each party's success varied from election to election, the plurality determined that reliance on a single election to prove unconstitutional discrimination would be inconclusive and unsatisfactory.[51] Instead, the plurality indicated that the Indiana Democrats must prove that they would be confined to a minority status throughout the decade because of the districting scheme.[52]

As to the other evidence evaluated by the district court,[53] the plurality stated that those factors would be relevant to a finding of intent to discriminate. Without proof that the redistricting disadvantaged the complaining party at the polls, however, such evidence would be insufficient to also prove discriminatory effects.[54] In sum, a reapportionment plan will be found unconstitutional only when a history of actual or projected disproportionate election results appears in conjunction with unjustifiable factors showing an intent to discriminate.[55]

The *Bandemer* decision has generated much commentary and controversy because it provided only limited guidelines for use in future litigation.[56] The Court failed to establish standards for identifying "continued degradation" and "adequate opportunity to participate in or fair chance to influence the electoral process." Thus, the decision raised many new questions to which it provided no certain answers. Some believe that the incompleteness of the decision will subject nearly every reapportionment plan of the 1990s to litigation, in attempts to decipher what evidence will suffice to successfully challenge a reapportionment plan on partisan grounds.[57] Attempts to provide guidelines for legislatures in developing reapportionment plans, and for courts to use in evaluating those plans, have produced a variety of proposed criteria for filling in the numerous gaps left by the

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50. A "swing state" is a state "that has supported both major parties over short periods of time, usually following national trends or candidates." Comment, Davis v. Bandemer: *Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443, 447 n.17 (1988).

51. Davis v. Bandemer, 478 U.S. 109, 135 (1986).

52. *Id.* at 135-36.

53. The evidence included the legislative procedures and intent behind the redistricting scheme, the shapes of the districts and their conformity with political subdivision boundaries, the population disparities, and the statistics tending to show vote dilution. *Id.* at 138.

54. *Id.* at 140.

55. *Id.* at 140-41.

56. *See, e.g.*, POLITICAL GERRYMANDERING AND THE COURTS (B. Grofman ed. 1990); Backstrom, *supra* note 10; Brace & Chapin, *supra* note 6, at 33; Comment, *supra* note 10.

57. *See, e.g.*, Browdy, *Computer Models and Post-Bandemer Redistricting*, 99 YALE L.J. 1379, 1380 (1990).

Court.[58] Several of these suggestions are discussed in subsequent portions of this Article.

### B. How the Florida Supreme Court May Treat Partisan Gerrymandering

Florida's courts have not yet addressed partisan gerrymandering in the reapportionment process because partisan gerrymandering was believed to be nonjusticiable until *Bandemer* was decided in 1986—several years after the Florida Supreme Court last addressed reapportionment in the State.[59] Therefore, the application and interpretation of *Bandemer* in Florida will be first tackled by the Florida Supreme Court in 1992.[60] Nevertheless, how the supreme court has reacted to reapportionment review in the past may provide insight as to how it will incorporate the issues raised by *Bandemer* into future decisions.

As required by the 1968 Florida Constitution,[61] the Florida Supreme Court reviewed the 1972 and 1982 joint resolutions of apportionment to render declaratory judgments as to the plans' constitutionality;[62] it upheld both plans as not violative of any constitutional limitations.[63] For our purposes there are two important as-

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58. *See, e.g., infra* notes 70-142 and accompanying text.

59. The last such decision was *1982 Apportionment Case, supra* note 3, at 1046.

60. The Florida Supreme Court must declare the facial validity of any reapportionment plan, according to article III, section 16(c) of the Florida Constitution, and it has previously retained exclusive state jurisdiction to hear any subsequent challenges to application of the plan. *1982 Apportionment Case, supra* note 3, at 1052; *In re* Apportionment Law Appearing as Senate Joint Resolution Number 1305, 263 So. 2d 797, 808 (Fla. 1972) [hereinafter *1972 Apportionment Case*].

61. As previously indicated, reapportionment in Florida is governed by article three, section sixteen of the state constitution. This section was added in the 1968 revision in order to rectify continual problems encountered in enforcing the original apportionment provisions of the 1885 constitution. It was intended to provide a "fail-safe" system by which the Legislature could apportion the state into electoral districts without intrusion from the federal government. Levinson, *Florida Constitutional Law*, 28 U. MIAMI L. REV. 551, 573 (1974).

The current system requires the Legislature to apportion the state at its regular session in the second year following each decennial census. Within 15 days of passage of a joint resolution of apportionment, the Attorney General must petition the supreme court for a declaratory judgment on the constitutional validity of the plan. If the supreme court finds the apportionment plan invalid, the Governor by proclamation must reconvene the Legislature within five days of the court's judgment. The Legislature then has an additional 15 days in which to adopt a new joint resolution of apportionment. Once again the Attorney General must petition the supreme court for a declaratory judgment on the apportionment plan's constitutional validity. Should the Legislature fail to adopt a resolution of apportionment, or should the supreme court find the plan invalid, the supreme court itself will apportion the state within 60 days of the Attorney General's petition. FLA. CONST. art. III, § 16.

62. FLA. CONST. art. III, § 16(c). *See 1972 Apportionment Case, supra* note 60, at 808 ("The Florida Constitution requires that we determine whether the apportionment plan on its face is in accord with the Constitutions of Florida and of the United States.").

63. *1972 Apportionment Case, supra* note 60, at 809.

pects of these apportionment cases. The first is that the supreme court adopted a very deferential standard of review each time.[64] This deferential standard is significant because it may indicate that the court is inclined to defer to the judgment of the Legislature to the greatest extent possible in its exercise of this inherently legislative function.[65]

The other important aspect was the supreme court's declaration that "[t]here are no provisions in the Florida Constitution relating to apportionment of the Legislature more stringent than those of the United States Constitution."[66] This declaration may be useful in analyzing future challenges on partisan gerrymandering grounds.[67] If the court is unwilling to interpret the state constitution as providing greater protections than the federal Constitution, as it has done in the past in other contexts,[68] Florida should be governed by the vague, arguably meaningless standards set forth in *Bandemer*.[69]

## III. What Should the Florida Legislature Do?

This section of the Article is premised on the assumption that the Legislature will want to take action to help ensure that any plan it develops will be constitutional. Although it is not clear how Florida's supreme court will interpret and apply *Bandemer*, it *is* clear that a new basis for constitutional attacks on reapportionment plans has been recognized and that the issue of partisan gerrymandering will soon be addressed in Florida. Moreover, it is inevitable that the 1992

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64. The court said:

> At the outset, we emphasize that legislative reapportionment is primarily a matter for legislative consideration and determination. Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites. If these requisites are met, we must refrain, at this time, from injecting our personal views into the proposed reapportionment plan. Even though we may disagree with the legislative policy in certain areas, the fundamental doctrine of separation of powers and the constitutional provisions relating to reapportionment require that we act with judicial restraint so as not to usurp the primary responsibility for reapportionment, which rests with the legislature.

*1972 Apportionment Case*, *supra* note 60, at 799-800. *See also 1982 Apportionment Case*, *supra* note 3, at 1052.

65. *1972 Apportionment Case*, *supra* note 60, at 808.

66. *Id.* at 807.

67. For a different approach taken by a state supreme court, see Kenai Peninsula Borough v. Alaska, 743 P.2d 1352 (Alaska 1987), in which a partisan gerrymandering claim was decided under both the federal and the Alaska constitutions. In evaluating that claim, the Alaska Supreme Court stated that Alaska's state constitution requires a stricter standard of review than does the federal Constitution. *Id.* at 1371.

68. *See, e.g.*, Shriners Hospitals for Crippled Children v. Zrillic, 563 So. 2d 64 (Fla. 1990); *In re* T.W., 551 So. 2d 1186 (Fla. 1989).

69. *See supra* notes 33-58 and accompanying text.

reapportionment process will be monitored closely by a variety of independent organizations, and legislators are undoubtedly already aware of threats that they "will be held accountable for unduly favoring their parties and fellow incumbents."[70]

Approaching the problem practically, perhaps the best way to ensure that a plan will not be declared invalid is for the Legislature to avoid, from the outset, partisan considerations in the reapportionment process. The Legislature could accomplish this by setting and applying neutral standards, such as those outlined below, that should help eliminate in subsequent litigation many potential bases for attack on the discriminatory intent prong.

Threat of potential litigation, however, is not the only concern. Equally important are concerns regarding public perception of the integrity of the reapportionment process. Some argue that dilution of fair competition between the major contenders for political power may erode popular support for the government and its laws.[71] Also, given the recent tension and publicity regarding legislative morality and the acceptance of unreported gifts, partisan gerrymandering may exacerbate an already deteriorating public confidence in the Legislature itself.[72] Thus, implementation of neutral standards in the reapportionment process could be helpful not only in the sphere of partisan gerrymandering, but in the realm of public confidence as well.

### *A. Recommendations for Avoiding the Appearance of Impropriety*

Some commentators doubt whether a truly neutral reapportionment design is actually possible, or even desirable.[73] The self-interest of political incumbents in seeking to protect their seats,[74] ambitions

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70. Brace & Chapin, *supra* note 6, at 34.

71. Backstrom, *supra* note 10, at 294-95.

72. *See, e.g.*, the highly publicized sexual harassment charges and settlement involving Representative Fred Lippman, Democrat, Hollywood and the recent misdemeanor charges filed against at least 24 past and present legislators to date for alleged unreported gifts and trips. Tallahassee Democrat, Dec. 5, 1990, at 1A, col. 4; St. Petersburg Times, July 2, 1991, at 1B, col. 2.

73. *See, e.g.*, Comment, *supra* note 50, at 491 ("Every districting scheme is a reflection of an individual's or a group of individuals' political preferences. That is an intentional, unavoidable, and even desirable part of our American political tradition.").

74. The Supreme Court has indicated that it may be permissible to draw district lines in such a way as to protect incumbents by minimizing the number of races between incumbents after a reapportionment. White v. Weiser, 412 U.S. 783, 797 (1973); Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966). However, if there is a partisan bias in the way in which incumbents are protected or forced to run against each other, this may be prima facie evidence of impermissible partisan gerrymandering. Grofman, *supra* note 3, at 151.

to "move up the political ladder," and heavy lobbying by political organizations all create great pressures for partisan manipulation.[75] Also, there may be a strong lure for the majority party to implement unfair procedures or standards against the other party[76] through the majority's control of the legislative leadership positions and its power to appoint committee chairs.[77] This power, in turn, allows the majority party to dominate the rules and the agenda, which creates the appearance of improper skewing of the reapportionment process.[78]

The facts in *Bandemer* are a prime example of the majority party using its power to bias the reapportionment process. There, the Republican majority was able to exclude the Democratic minority from virtually the entire process. No Democratic legislators were allowed to serve on the committees that designed the plan, and the consultant's statistical formulations for the plan were performed at the state Republican Committee Headquarters.[79] Also, the plan was not revealed to the Democrats until the last week of the legislative session.[80] Until that time, the Democrats had not had a chance to review it.[81] These and other techniques are not terribly uncommon as one political party tries to gain an unfair advantage over the other in the reapportionment process.[82]

Nevertheless, open government and advances in automation today provide the public and the courts with new opportunities for review of the process.[83] Because of this increased scrutiny, efforts to establish neutral standards yielding truly competitive elections between political parties may be even more important. A number of proposals have been advocated for eliminating partisan discrimination and for developing and applying neutral criteria in the redistricting process. Several are discussed below. Admittedly, some suggestions may not be genuinely practical, but each deserves mention.

### *1. Independent or Nonpartisan Commissions*

Delegating redistricting to an independent or nonpartisan commission has been suggested as one method for removing partisan manip-

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75. Brace & Chapin, *supra* note 6, at 33.
76. Backstrom, *supra* note 10, at 293.
77. *Id.*
78. *Id.*
79. Bandemer v. Davis, 603 F. Supp. 1479, 1483-84 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109 (1986).
80. *Id.* at 1484.
81. *Id.*
82. Backstrom, *supra* note 10, at 293-94.
83. Browdy, *supra* note 57, at 1381.

ulation from the reapportionment process.[84] Commentators suggest, however, that no commission is truly impartial. Commission members are generally appointed by the top legislative leaders of each party, thus creating a *bi*partisan, rather than a *non*partisan, commission.[85] Moreover, even if such commissions were totally independent, heavy lobbying by all sides could still greatly influence the process.[86] Nevertheless, an independent commission that avoids outside influences to every extent possible may help eliminate discriminatory intent.

Critics of independent commissions argue that such an approach may actually result in far greater partisan inequities than otherwise result when reapportionment is performed by a political body such as a legislature.[87] Although such imbalances may be unintentional, they could result because of the uneven partisan concentrations throughout the state. Having the plan prepared by legislators who are concerned with protection of their own seats may go a long way toward ensuring more proportional partisan representation than may otherwise arise if such factors are ignored.[88]

Interestingly, Florida's voters were presented with a proposed constitutional amendment in 1978 that would have established an independent reapportionment commission; the voters, however, rejected the amendment.[89] The 1978 Constitutional Revision Commission's proposed amendment would have established a seven-member independent commission; none of the members would have been elected public or party officers or employees of the state Legislature.[90] Pro-

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84. Brace & Chapin, *supra* note 6, at 33.

85. *Id.* at 33-34.

86. *Id.*

87. *See* Lowenstein & Steinberg, *supra* note 49, at 69-73; Morrill, *A Geographer's Perspective*, in POLITICAL GERRYMANDERING AND THE COURTS 212, 227-228 (B. Grofman ed. 1990); Cain, *Perspectives on* Davis v. Bandemer*: Views of the Practitioner, Theorist, and Reformer*, in POLITICAL GERRYMANDERING AND THE COURTS 117, 137 (B. Grofman ed. 1990).

88. *See* Schuck, *supra* note 8, at 1341; Morrill, *supra* note 87, at 220-232.

89. *See* DIV.OF ELECTIONS, DEP'T OF STATE, TABULATION OF OFFICIAL VOTES: FLORIDA GENERAL ELECTION (Nov. 1978) [hereinafter 1978 TABULATION]. The Constitutional Revision Commission's proposal to revise article III, section 16, was rejected by 53% of Florida's voters. *Id.* at 25.

90. The full text of the 1978 Constitutional Revision Commission's reapportionment proposal reads as follows:

> SECTION 16. Legislative and congressional reapportionment.—
>
> (a) REAPPORTIONMENT MANDATE. In each year ending in one, the state shall be divided into: as many congressional districts as there are United States Representatives apportioned to the state; not less than thirty or more than forty senate districts; and not less than eighty or more than one hundred and twenty representative districts. All legislative districts shall be single-member districts.
>
> (b) REAPPORTIONMENT COMMISSION. In each year ending in zero and at

ponents argued that the commission would have acted impartial-

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any other time of court-ordered reapportionment, a commission shall be established to prepare a reapportionment plan for congressional and state legislative districts. The commission shall consist of seven electors, none of whom may be elected public or party officers or employees of the state legislature. The president of the senate, the speaker of the house of representatives, the minority leader of the senate, the minority leader of the house of representatives, and the chairperson of the political party which received the second highest vote in the last gubernatorial election shall each submit to the governor and make public a list of not less than three persons. By July 1 of the same year, the governor shall appoint one person from each list and one additional person. Within thirty days after the appointments have been made, the six commissioners shall select by a vote of at least four commissioners a seventh commissioner, who shall serve as chairperson. Failure to select the seventh commissioner within the time prescribed shall constitute an impasse which shall automatically discharge the commission. A new commission shall then be appointed in the same manner as the original commission. The legislature shall establish by law the qualifications of commissioners, the procedures for their selection and for the filling of vacancies, and the duties and powers of the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.

(c) REAPPORTIONMENT STANDARDS.

(1) Congressional districts and state legislative districts for each respective house shall be as nearly equal in population as is practicable, based on the population reported in the federal census taken each year ending in zero. In no case shall a congressional district have a population which varies by more than one percent from the average population of all congressional districts in the state. In no case shall a single state legislative district have a population which varies by more than five percent from the average population of all districts of a house. In no case shall the average of the absolute values of the population deviations of all districts of the respective house vary by more than two percent from the average population of all districts. Any population variance must be justifiable as necessary for compliance with one or more of the other standards set forth in this section. The commission shall have the burden of justifying any variance between the population of a district and the average population of all districts.

(2) Districts shall be composed of convenient contiguous territory and, consistent with subsection (1), shall be drawn to coincide with the boundaries of local political subdivisions.

(3) Districts shall be compact in form. The aggregate length of all district boundaries shall be as short as practicable consistent with the standards contained in subsections (1) and (2). In no case shall the aggregate length of the boundaries of all districts of a house, as well as of all districts within a local political subdivision that has a population sufficient to establish two or more districts, exceed by more than five percent the shortest possible aggregate length of all the districts under any other plan that is consistent with the other standards contained in this constitution.

(4) The commission shall prepare a plan that is equitable to all electors. In preparing a plan, the commission shall not use demographic information or information about incumbent legislators, the political affiliations of registered voters, or previous election results for the purpose of favoring any political party, incumbent legislator, or any other person or group.

(5) No district shall be drawn for the purpose of diluting the voting strength of any language or racial minority group.

(d) JUDICIAL REVIEW OF APPORTIONMENT. Within 15 days after the submission of an apportionment plan by the commission, the Attorney General shall petition the supreme court of the state for a declaratory judgment determining the

ly.[91] Regardless of whether the proposal was rejected on its merits or because it was included on a politically controversial ballot that contained, among other proposed amendments, a proposal to legalize casino gambling and a state version of the ill-fated Equal Rights Amendment,[92] Florida citizens declined the opportunity to establish a constitutionally-mandated independent reapportionment commission.

Absent the adoption of an amendment to the constitution, it is unclear whether an independent reapportionment commission would even be constitutional in Florida. Article III, section 16 of the Florida Constitution says that "the legislature" shall reapportion the State by joint resolution.[93] It may be possible for the Legislature to delegate the initial line-drawing function to a separate commission. However, because the Legislature would eventually have to approve the commission's plan anyway, it is unlikely that such an approach would do much to remove the politics from the process. Nonetheless, if the goal is merely to avoid the appearance of improper partisan considerations to avoid a later finding of discriminatory intent, then there may be those for whom an independent commission would serve that purpose.

### 2. *Computerized Districting*

Computers play a major role in the redistricting process.[94] The Bureau of the Census can now provide a detailed computerized map of the entire nation[95] that, when combined with precinct-level election

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validity of the apportionment plan. The supreme court, in accordance with its rules, shall permit adversary interests to present their views, and, within 60 days from the filing of the petition, shall enter its judgment. Should the supreme court determine the apportionment plan to be invalid in whole or in part, the governor shall reconvene the commission which shall, within 30 days, adopt an apportionment plan conforming to the judgment of the supreme court. A revised plan shall be subject to judicial review by the supreme court in the same manner as the original plan.

Revision No. 3: *Revision of Article III, § 16 Legislative (Single-member Districts and Reapportionment Commission)*, November 1978 General Election Ballot at 13-14.

91. Kiser & Robinson, *Pro: Article III, § 16—New Constitutional Reapportionment Deserves Support*, 52 FLA. B.J. 624 (1978).

92. *See* DIV. OF ELECTIONS, DEP'T OF STATE, *Official Ballot, General Election*, Nov. 7, 1978 ("Amendment No. 9: Article X, Sec. 15, Casino Gambling"; "Revision No. 2: Revision of Article 1, Sec. 2, Declaration of Rights (Sex)").

93. FLA. CONST. art. III, § 16(a).

94. Although the redistricting maps were hand-drawn in Florida's 1982 reapportionment, sophisticated computer equipment has been purchased by the Florida Legislature to generate its 1992 redistricting maps. Peck, *Project 500 and the 1991 Initiative: The Party Committees are Taking Aim at State Seats*, CAMPAIGNS & ELECTIONS, Jan. 1989, at 15.

95. *See* Atwater, *Altered States: Redistricting Law and Politics in the 1990s*, VI J.L. & POL'Y 661, 664 (1990) (The Bureau of the Census has created a geographic information system known as "TIGER" that is the first computerized map of the entire nation.).

data and new software for redistricting,[96] allows districts to be designed with virtually any configuration of demographic and political characteristics. This allows plan developers to relatively easily favor one group over another—partisan or otherwise—with a few simple keystrokes.[97]

To help avoid such discrimination, legislators could establish limitations on the criteria to be used in the development of any reapportionment plan.[98] For example, the inclusion of partisan registrations or past precinct-level voting patterns in the data base could be prohibited—as it was in 1982. Also, because some of the data are complex and the statistics are often conflicting, the criteria and standards to be included in the reapportionment plan could be ranked, with appropriate values and weights assigned to each.[99] An adequate record of all criteria and data used, and the weights assigned, would help ensure satisfactory review and would allow for potential replication by those who may question the legitimacy of certain plans.[100] Adherence to such a program would also provide less room for manipulation and would help establish uniformity and accountability.[101]

Many of these suggestions, however, may be difficult to actually implement, and critics maintain that any purportedly politically neutral computerized plans will still fall prey to political motivation.[102] Further, such plans may produce bizarre results. As noted by the Court in *Bandemer*:

> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most

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96. A variety of software programs now exist for obtaining political and population data, as well as software programs for developing districting plans. Consider the following advertisements: *Define Political Boundaries with Speed and Ease—District Analyst—The Microcomputer Based Geographic Information System*, CAMPAIGNS & ELECTIONS, Feb. 1991, at 89 (advertising districting software that incorporates official census data, past electoral results, and Census Bureau TIGER files into an interactive geographic information system); *Don't Worry, Be Mappy*, CAMPAIGNS & ELECTIONS, Oct. 1989, at 39 (advertising map-making software that assists in manipulating demographic information and graphically illustrates its geographic impact); *Reapportionment . . . Make the Right Decision*, CAMPAIGNS & ELECTIONS, Dec. 1988, at 29 (advertising reapportionment software).

97. Atwater, *supra* note 95, at 664.

98. Browdy, *supra* note 57, at 1387.

99. *Id.*

100. *Id.*

101. *Id.*

102. Anderson, *Texas Legislative Redistricting: Proposed Constitutional and Statutory Amendments for an Improved Process*, 43 SW. L.J. 719, 727 (1989).

> grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.[103]

A good illustration of this "politically mindless approach" can been seen in Iowa's 1980 reapportionment experience.[104] The Iowa Legislature was statutorily prohibited from including voter political affiliation or the addresses of incumbent legislators in its reapportionment process.[105] Iowa was represented by six members of Congress—three Republicans and three Democrats.[106] The nonpartisan computerized reapportionment plan would have resulted in disproportionate displacement of the Republican incumbents because it placed two of the three Republican members in the same district, forcing them to run against each other for reelection.[107] The Iowa Legislature rejected the plan.[108]

It is noteworthy that the rejected 1978 proposed amendment to Florida's constitution contained a similar requirement prohibiting the use of political data by the proposed independent reapportionment commission in development of reapportionment plans.[109] The proposal prohibited the commission's use of: 1) demographic information or information about incumbent legislators, 2) the political affiliations of registered voters, and 3) previous election results, for the purpose of favoring any political party, incumbent legislator, or any other person or group.[110] Obviously, the previous rejection of the proposed constitutional revision does not prohibit Florida's Legislature from future consideration of applying neutral criteria. But given results like Iowa's, incumbent legislators will be extremely careful in evaluating and determining how they will decide what criteria to use or prohibit in designing a new districting plan. Nevertheless, as with the suggestions on an independent commission, data restrictions and guidelines may be appropriate topics for discussion if the goal is to avoid improper partisan considerations.

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103. 478 U.S. 109, 129 (1986) (quoting Gaffney v. Cummings, 412 U.S. 735, 752-53 (1973).
104. Anderson, *supra* note 102, at 727.
105. *Id.*; *see* IOWA CODE ANN. § 42.2 (West Supp. 1989).
106. Anderson, *supra* note 102, at 727.
107. *Id.*
108. *Id.*
109. *See* 1978 TABULATION, *supra* note 89. The full text of the proposed amendment is reproduced in *supra* note 90.
110. *See supra* note 90.

### 3. *Public Access to Computer Data and Software*

Greater public access to the Legislature's computerization mechanisms has also been suggested to further eliminate partisan manipulation in the reapportionment process. By giving interested groups access to reapportionment data and redistricting software, each group could develop its own reapportionment plan.[111]

In response to such a suggestion, Florida's Senate and House Reapportionment Committees are developing redistricting computer disks that are available to the public.[112] Although Florida's open government provisions already ensure access to most public records,[113] providing reapportionment data in this easily accessible form may encourage greater participation by the public in the redistricting process.[114] This public participation may, in turn, allow the Legislature to choose from a greater variety of plans and to receive more informed input from constituents.[115] If more than one plan appeared to be fair, the plans could be compared against such criteria as compactness, adherence to subdivision lines and communities of interest, and reasonably neutral treatment of incumbents.[116] The Legislature could then select the plan that it perceived to be best.

It is possible, however, or perhaps even likely, that no plan produced by an outside group would be acceptable because each plan would be specifically biased to reflect the priorities of the particular group submitting the plan. Additionally, the sheer number of plans submitted might also prohibit a truly fair selection. As such, the availability of the reapportionment data to the public may do relatively little to actually assist in the process of choosing an adequate redistricting plan.

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111. Atwater, *supra* note 95, at 662.

112. St. Petersburg Times, July 2, 1991, at 4B, col. 1. When combined with the Senate Committee's noncomputerized county map series or the House Committee's atlas, the computer disks will allow assignment of various census data, and possibly voter registration data, to districts to easily calculate district level statistics. In addition, the Senate Reapportionment Committee plans to make a terminal available to the public to allow public access to the Committee's more sophisticated redistricting software. Telephone interview with John Guthrie, Staff Dir., Fla. S. Comm. on Reapp. (July 25, 1991); telephone interview with George H. Meier, Staff Dir., Fla. H.R. Comm. on Reapp. (July 25, 1991).

113. For a more detailed discussion of Florida's Government in the Sunshine, see *infra* notes 216-22 and accompanying text.

114. At least this is the hope of some legislators. *See* St. Petersburg Times, July 2, 1991, at 4B, col. 1.

115. *Id.*

116. Backstrom, *supra* note 10, at 316.

### 4. *Prima Facie Evidence of an Intent to Gerrymander*

Several commentators have recommended plans for "fair representation" or have suggested indicia that are prima facie evidence of impermissible partisan gerrymandering.[117] Generally, the indicia are

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117. For example, Grofman gives twelve features of single-member district plans that provide prima facie evidence of intentional political gerrymandering:

> 1. Packing the voting strength of a group to insure that much of it is wasted in districts that are won by lopsided margins—in particular, packing opposition voting strength to a greater degree than the voting strength of the group controlling the districting process.
> 2. Fragmenting or submerging the voting strength of a group to create districts in which that group will constitute a permanent (or near certain) minority.
> 3. Reducing the reelection likelihood of some of a group's incumbents by altering district boundaries to put two or more incumbents from the group into the same district.
> 4. Reducing the election (or reelection) likelihood of some of a group's representatives by altering district boundaries to cut up old districts to make it impossible for these incumbents to continue to represent the bulk of their former constituents.
> 5. Reducing the election (or reelection) chances of group representatives in previously marginal/competitive districts by, whenever practicable, reducing that group's voting strength in these districts.
> 6. Enhancing the election (or reelection) chances of representatives of the group in control of the districting process by preserving old district lines for its own incumbents to the greatest extent practicable, so that they benefit from name recognition and other advantages of incumbency status (such as previous campaign organization and personal-contact networks).
> 7. Enhancing the election (or reelection) chances of representatives of the group in control of the districting process by manipulating district boundaries, whenever practicable, to shore up the controlling group's voting strength in previously marginal/competitive districts.
> 8. Manipulating district boundaries to create an advantage in the open districts (i.e., districts with no incumbent running) for the group controlling the districting.
> 9. Unnecessarily disregarding compactness standards in drawing district lines.
> 10. Unnecessarily disregarding city, town, and county boundaries in drawing district lines.
> 11. Unnecessarily disregarding communities of interest in drawing district lines.
> 12. Unnecessarily disregarding equal population standards in drawing district lines.

Grofman, *supra* note 3, at 117-18. *See also* Lijphart's sixteen criteria for "fair representation":

> 1. Representation must be equal for each citizen [one person, one vote] . . . . 2. The boundaries dividing the electoral districts must coincide with local political boundaries as much as possible. 3. Electoral districts must be compact and contiguous. . . . 4. The boundaries . . . should be drawn in such a way as to provide representation for political minorities . . . [and for 5.] ethnic and racial minorities . . . . 6. The electoral system should not be biased in favor of any political party . . . [or in favor of any 7.] racial or ethnic group . . . . 8. The electoral system should have a wide range of responsiveness to changes in the electorate's party preferences . . . . [9. T]he rate at which a party wins seats per unit gain in the percentage of its vote should be constant . . . . 10. There should be proportionality between the share of the seats won by any particular ethnic or racial group and its vote share . . . . 11. The system should be competitive . . . . 12. Each citizen should have equal power to affect the outcome of elections . . . [and 13. e]ach citizen's vote should be 'used' as much as

those that the Court discussed in *Bandemer*: multi-member versus single-member districts, disregard for considerations of compactness, contiguity, respect for communities of interest, equal population standards, and respect for established political boundaries.[118] By adhering to a plan for fair representation and avoiding a plan that evidences an intent to gerrymander, the Legislature may avoid many partisan concerns and bases for attack. Thus, several of these factors are discussed in more detail below.[119]

### *a. Multi-Member v. Single-Member Districts*

Although not unconstitutional *per se*,[120] use of multi-member districts may signal an intent to gerrymander.[121] For example, the district court in *Bandemer* found that the inconsistent use of multi-member districts provided ample evidence of intent to gerrymander.[122] While the Supreme Court was suspicious of the Legislature's use of multi-member districts, it did not find the plan to be so consistently unfair as to rise to the level of a constitutional violation.[123] Nevertheless, given the Court's suspicions, use of multi-member districts and changes from single-member to multi-member districts may still be probable indicators of discriminatory intent.

It is unlikely that such evidence will be present in Florida's reapportionment scheme. Although multi-member districts are permitted by the Florida Constitution,[124] the current system of single-member districts has been recognized as being fairer to Florida's citizens[125]

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possible toward the election of a candidate and the 'wasted' vote should be minimized.

Browdy, *supra* note 57, at 1384-85 n.35 (quoting Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, in REPRESENTATION AND REDISTRICTING ISSUES, 143, 145-46 (B. Grofman ed. 1982)).

118. Davis v. Bandemer, 478 U.S. 109, 167-68 (1986) (Powell, J., concurring in part and dissenting in part).

119. Equal population standards are not detailed in this section on avoiding the appearance of partisan gerrymandering because strict requirements governing population deviations are already mandated. For a discussion on population deviations see *supra* notes 20-25 and accompanying text.

120. *See 1972 Apportionment Case*, *supra* note 60, at 805.

121. Backstrom, *supra* note 10, at 299.

122. *Bandemer*, 478 U.S. at 139.

123. *Id.* at 138-39.

124. FLA. CONST. art III, § 16(a) ("districts of either contiguous, overlapping or identical territory"); *1972 Reapportionment Case*, *supra* note 60, at 805.

125. *1982 Apportionment Case*, *supra* note 3, at 1053 (Fla. 1982) (McDonald, J., concurring) ("Heeding suggestions at public hearings, the legislature adopted single-member districts; both the house and the senate were unselfish and statesmanlike in this regard.")

and has probably become accepted as a norm unlikely to be changed.

*b. Compactness and District Shapes*

A district area that "twists and turns and reaches to include or exclude certain sub-units" is not compact,[126] and egregious irregularities may indicate an intent to discriminate.[127] Of course, it was a plan of this type that originally resulted in the notion and definition of gerrymandering.[128] This feature is probably still the one most commonly associated with gerrymandering, and it often is the most easily recognizable without the use of statistics. In *Bandemer*, the district court noted the "bizarre" configurations of the Indiana districts.[129] However, because the district court felt these configurations were unnecessary in that case to prove intent, the matter of compactness was not considered.[130] Nevertheless, as noted by the Supreme Court, when evaluated in conjunction with other factors, such as measures of vote dilution or packing, compactness may well be indicative of impermissible intent.[131] In evaluating compactness it is important to note that because compact-looking plans can be developed easily, compactness alone should never serve as the sole test for determining whether intentional gerrymandering is present.[132]

One of the greatest problems in evaluating the compactness of districts may be the lack of standards as to what a "noncompact" district is. Although gross irregularities in district shapes are generally seen as noncompact, the standards for identifying compactness have not been adequately defined and applied.[133] In his concurrence in *Karcher v. Daggett*, Justice Stevens stated:

> One need not use Justice Stewart's classic definition of obscenity—"I know it when I see it"—as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation.[134]

Yet in recognizing the difficultly of developing and evaluating a particular compactness measure,[135] he seemed to be using the "I know it

126. Backstrom, *supra* note 10, at 300.
127. Morrill, *supra* note 87, at 215.
128. *See supra* note 16.
129. Bandemer v. Davis, 603 F. Supp. 1479, 1493 (1984), *rev'd*, 478 U.S. 109 (1986).
130. Backstrom, *supra* note 10, at 300.
131. *See* Davis v. Bandemer, 478 U.S. 109, 141 (1986).
132. Backstrom, *supra* note 10, at 301.
133. Karcher v. Daggett, 462 U.S. 725, 757 (1983).
134. *Id.* at 755 (Stevens, J., concurring) (citation omitted).
135. *Id.* at 757-58.

when I see it" standard himself. Justice Stevens simply concluded that "drastic departures from compactness are a signal that something may be amiss."[136]

Florida has no requirement for compact districts. The only requirement in Florida's constitution addressing the shape of districts is that they must be of "either contiguous, overlapping or identical territory."[137] Presumably, however, the court would take notice of unusually shaped districts or district boundaries that bear no apparent relationship to political subdivisions, communities of interest, or other neutral factors.

### c. *Deviations from Established Political Boundaries and Communities of Interest*

County and municipal boundaries have traditionally provided a starting point for developing representational plans because local governments make up vital, legal, and familiar communities of interest.[138] Because of this, some believe that unnecessary and unjustified cutting of subdivision lines may help indicate discriminatory intent.[139] Legislators should try to avoid splitting such communities except to the extent that populations are larger than permissible in a single district and must, therefore, be divided.[140]

Division of other communities of interest, other than those defined by race or ethnicity, is often difficult to evaluate.[141] Attempting to define communities of interest in terms of political parties would most likely consist of identification of urban, suburban, and rural areas in conjunction with the political affiliations normally associated with the groups in those areas.[142] To the extent that there are such strong correlations, the unusual and unnecessary division of these communities may also be used to show discriminatory intent.

## *B. The Bottom Line*

In sum, numerous alternatives and suggestions exist to assist in diluting or eliminating partisan considerations in the reapportionment process. Of those suggested above, several are worthy of implementation by Florida's Legislature. In reality, however, others are not. For

136. *Id.* at 758.
137. FLA. CONST. art III, § 16(a).
138. Morrill, *supra* note 87, at 215.
139. Backstrom, *supra* note 10, at 301.
140. *See 1982 Reapportionment Case*, *supra* note 3, at 1053.
141. Morrill, *supra* note 87, at 215.
142. *Id.* at 216.

example, because Florida's Legislature will ultimately choose the final reapportionment plan, delegation to an independent reapportionment commission is not likely to produce meaningful results. The Legislature will surely veto any plan that totally ignored or distorted incumbent districts, no matter how objective the reapportionment criteria. Thus, absent a constitutional amendment that eliminates the Legislature's approval of the reapportionment plan, an independent reapportionment commission is probably not practical at this time, nor may it be advisable at any time.

On the other hand, computers are now an important feature of any reapportionment process. As such, the Legislature may be well-advised to carefully define the criteria to be used in generating computerized plans. Total exclusion of partisan and incumbency data, however, may produce the "politically mindless" and unintended bizarre results noted by the Supreme Court. Further, total exclusion of such data may never allow production of a plan acceptable to the Legislature. Therefore, although partisan data should not be among the primary factors on which reapportionment decisions are made, some consideration of partisan data may be advisable.

In any case, it is imperative to keep detailed and accurate records of the criteria and data used. Through the implementation of selected criteria and reliable records, the Legislature will have valuable proof that it considered compactness, contiguity, communities of interest, equal population standards, established political boundaries, and other neutral standards.

Thus, while total elimination of partisan intent is not necessarily practical or desirable, Florida's Legislature now has the capacity to institute procedures that will go a long way toward eliminating concerns of improper partisan influences.

## IV. How to Mount a Successful Partisan Gerrymandering Challenge in Florida

Despite legislative efforts to avoid partisan gerrymandering, challenges to the reapportionment plan can still be expected. The United States Supreme Court has effectively ensured this result by failing to adequately define what evidence will be sufficient to successfully challenge a reapportionment plan on partisan gerrymandering grounds. Potential criteria for proving both necessary elements of such a claim—discriminatory intent and discriminatory effects—are discussed below.

### *A. Discriminatory Intent*

If the Legislature initiates some of the procedures mentioned above to avoid the appearance of partisan manipulation of the reapportion-

ment process, there will probably be little independent evidence of the discriminatory intent necessary to succeed in a partisan gerrymandering claim. If not, such independent evidence will be abundant. It is likely that the actual steps taken by Florida's Legislature to reduce discriminatory intent will place it somewhere in between the two extremes and will result in a corresponding middle ground of independent evidence.

Regardless, absent total elimination of partisan participation in the reapportionment process, proving discriminatory intent will be by far the easier of the two necessary elements in a partisan gerrymandering challenge. The Court in *Bandemer* recognized this when it stated that any record that was sufficient to prove the second element of discriminatory effects should also be sufficient to support a finding of discriminatory intent.[143] The Court noted, however, that a plaintiff would still have the burden of presenting sufficient evidence to prove a claim of discriminatory intent.[144] Conceivably, the factors relevant to a showing of discriminatory intent are limitless. Factors suggested by the Court in *Bandemer* included a number of those previously outlined: partisan manipulation of the reapportionment process, multimember versus single-member districts, district shapes and compactness, district conformity with existing political boundaries, and respect for existing communities of interest.[145]

### *B. Discriminatory Effects*

The second, and by far the more difficult, prong to establish in a partisan gerrymandering challenge is that of discriminatory effects. In setting extremely high threshold criteria for proving these discriminatory effects, the Supreme Court attempted to reach a balance between remedying unconstitutional partisan gerrymandering and intruding in the legislative process.[146] Unfortunately, the Court did not provide clear standards for identifying sufficiently egregious discriminatory effects, and debate exists as to what a petitioner must actually prove to reach the *Bandemer* standard. Some argue that the threshold for proving discriminatory effects is so high that *no* evidence can ever meet the burden imposed by the Court.[147] Others disa-

143. Davis v. Bandemer, 478 U.S. 109, 128 (1986).

144. *Id.* at 130 n.11.

145. *Id.* at 141.

146. For example, see *Bandemer*, 478 U.S. at 134, where Justice White stated that it is "appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are sufficiently serious to require intervention by the federal courts in state reapportionment decisions."

147. Backstrom, *supra* note 10, at 307; Cain, *supra* note 87, at 117.

gree.[148] Without question, this area of the *Bandemer* decision will be the most litigated in an effort to define more precise standards for successful challenges.

### *1. Who May Bring a Challenge?*

In *Bandemer*, the plurality summarized its effects test by saying that "[t]he question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process."[149] Thus, before reviewing the effects criteria in detail, it is necessary to answer the threshold question of who is so situated as to constitute a "particular group" warranting constitutional protection. The precise issue is what constitutes an identifiable political group sufficient to challenge a reapportionment plan on the basis of partisan gerrymandering.[150]

The Court simply assumed that the Democrats who brought the suit in *Bandemer* were a sufficiently identifiable political group who therefore had standing to bring a partisan gerrymandering challenge. Throughout its opinion, the plurality discussed a plaintiff in a partisan gerrymandering context as "a particular group"[151] or as "an identifiable political group,"[152] but limited its discussion in terms of Democrats and Republicans. Of course, Democrats and Republicans should have no trouble satisfying the definition of a political group. These major parties exist "almost exclusively to promote candidates and issues and to influence government policy."[153] The question, then, is whether partisan gerrymandering challenges may be brought only by Democrats and Republicans, or whether other identifiable groups exist who would have standing to bring such claims.

In addressing racial vote dilution, the Supreme Court itself in *City of Mobile v. Bolden*[154] foresaw a similar problem. Writing for the majority, Justice Stewart noted:

> It is difficult to perceive how the implications of the . . . theory of [political] group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a

148. *See, e.g.*, Grofman, *Toward a Coherent Theory of Gerrymandering:* Bandemer *and* Thornburg, in POLITICAL GERRYMANDERING AND THE COURTS 29 (B. Grofman ed. 1990).
149. Davis v. Bandemer, 478 U.S. 109, 133-34 (1986).
150. *See id.* at 124.
151. *See, e.g., id.* at 133.
152. *Id.* at 127.
153. Comment, *supra* note 50, at 470.
154. 446 U.S. 55 (1980).

> particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (*e.g.*, Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? . . . The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory [that political groups themselves have an independent constitutional claim to representation].[155]

By failing to adequately address these questions in *Bandemer*, the Court may have opened the door to any group that has a definable membership and that can identify its members as persons who have consistently been denied the opportunity to effectively influence the political process as a whole.[156] In *Bandemer* itself, groups other than the Democratic party, such as the NAACP, joined the challenge to Indiana's districting scheme. However, all of the plaintiffs stipulated that they were members of the Democratic party. It is unclear what effect there would have been if such a group had challenged a plan on its own behalf, rather than under the auspices of one of the major parties.

Political groups such as those who identify themselves as Independents could try to show discriminatory effects by establishing that they have been excluded from the process given that they have no representatives in the Legislature and that they are effectively "shut out" of the political process. This would hold equally true for such other groups as the Nazi party or the Ku Klux Klan. As the Court suggested, however, these smaller groups would encounter the greatest difficulty in proving discriminatory intent because their exclusion from the political process is more likely to be caused by the sheer lack of numbers they enjoy or lack of unified political power, rather than by any sort of intent to discriminate against them by either or both of the major parties. Thus, while only eventual litigation brought by nontraditional political groups will provide the answer to just which political groups have standing to challenge a reapportionment plan,

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155. *Id.* at 79 n.26.

156. The Court in *Bandemer* summarily addressed this issue by simply stating that "[i]t is not clear . . . that other groups will have any great incentive to bring gerrymandering claims, given the requirement of a showing of discriminatory intent." Davis v. Bandemer, 478 U.S. 109, 127 (1986).

claims by those outside the traditional Republican/Democrat structure may lack the necessary causal connection between the required intent and effects to actually succeed.

*2. How Can a Challenger Show Sufficient Discriminatory Effects?*

As previously indicated, exact standards and measurements necessary to satisfy the discriminatory effects threshold requirement have yet to be established. Because no court has sufficiently addressed those requirements since the Court's decision in *Bandemer*, and because no plaintiff has been successful in a partisan gerrymandering challenge, only prospective decisions will clarify what evidence actually will be sufficient to win such a claim. Hopefully, those same cases will identify workable and practical criteria for use by the courts in evaluating such challenges. Because of the lack of any clearly articulated standards, any specific "test" for determining discriminatory effects under *Bandemer* is speculative. Nevertheless, the Court has provided some broad guidelines as to the evidence necessary to surmount the partisan gerrymandering discriminatory effects threshold.

In *Bandemer*, the Court stated:

> [U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole . . . .
>
> [S]uch 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.[157]

Essentially, the Court's requirements can be broken into two parts. First, a plaintiff must establish a history of actual or projected disproportionate statewide election results.[158] Second, evidence must be presented to establish that a plaintiff has been denied the opportunity to participate in the political process as a whole or has been denied fair representation.[159]

In *Bandemer*, the Court found the evidence presented by the plaintiffs to be insufficient. The district court primarily relied on the discrepancies in the election results and the seats obtained by the

157. *Id.* at 133-34.
158. *Id.* at 140.
159. *Id.* at 132-40.

Democrats in striking down the plan.[160] The Supreme Court, however, held that the results from a single election were insufficient to establish the first prong's history of actual or projected disproportionate election results.[161] The Court further found no evidence in the record showing that the election results were the consequence of the reapportionment plan.[162] Likewise, the Court found no evidence that the Democrats would be consigned to a statewide minority status throughout the decade.[163] Thus, from *Bandemer* it is clear that plaintiffs must establish disproportionate election results through more than one election, must establish that those results are the consequence of the reapportionment plan, and must establish that the plan will confine them to a minority status throughout the decade.

It is unclear how the evidence necessary to prove discriminatory effects may be different if the state in question is not a swing state as was Indiana. In *Bandemer*, the plurality held that the district court's reliance on the results of a single election was insufficient to satisfy the discriminatory effects standard.[164] The reason for this was that the district court "declined to hold that the [single] election results were the predictable consequences of the [reapportionment plan] and expressly refused to hold that those results were a reliable prediction of future ones."[165] The single election results did not allow for such findings because Indiana was a swing state in which the success of each party varied from election to election,[166] and the plurality said that without such predictive capacity, a plan could not be found to violate the Equal Protection Clause of the Constitution based on a single election's results.[167]

This holding may still leave open the possibility of one election's results being sufficient to support a finding of unconstitutional partisan gerrymandering. For example, in a state that is not a swing state, if sufficient evidence was presented, a trial court could make specific findings that the results of the single election were "predictable consequences" of the reapportionment plan. Further, the court could find that the single election results were a "reliable prediction of future ones." Under this scenario, the language used by the plurality

160. *Id.* at 117. As previously indicated, the Democrats in the *Bandemer* challenge received 51.9% of the statewide vote for the House, but won only 43 of the House seats. *Id.*

161. Davis v. Bandemer, 478 U.S. 109, 136 (1986).

162. *Id.*

163. *Id.*

164. *Id.* at 134-36.

165. *Id.* at 135.

166. *Id.* at 135 (1986).

167. *Id.*

seems to indicate that a court may rely on a single election's results in finding unconstitutional gerrymandering. Of course, the arguably insurmountable barrier of exclusion from the political process would still have to be overcome.

As noted, the *Bandemer* plaintiffs also failed the second prong of discriminatory effects—exclusion from the political process. The Court indicated that more was needed than a showing that an apportionment scheme had made winning elections more difficult.[168] Instead, plaintiffs would have to prove that they had been effectively denied the opportunity to participate in the election process. Further, a showing of more than a mere *de minimis* effect on that denial would be necessary.[169] Allegations and proof would have to be sufficiently serious to require federal judicial intervention.[170] None of the evidence presented by the *Bandemer* plaintiffs was adequate to warrant such intervention.

At least one group in post-*Bandemer* litigation may have established the necessary criteria to meet the first part of the effects test, a history of actual or projected disproportionate statewide election results. In *Badham v. Eu*,[171] a district court reviewed a Republican challenge to California's 1982 redistricting scheme.[172] The district court determined that the facts of the complaint, if true, were possibly sufficient to meet the "throughout the decade" requirement of *Bandemer*.[173] In *Badham* the plaintiffs alleged that the plan locked in grossly disproportionate election results throughout the decade by allocating "a substantial and permanent majority of seats to Democratic party candidates in percentages far superior to the statewide voting strength of Democratic voters."[174] The Republicans produced results from two elections. In the first, the Republicans received 50.1% of the vote statewide, but received only 40% of the congressional seats (eighteen of forty-five). In the next election, the Republicans received 46.9% of the vote, and kept the same eighteen seats.[175]

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168. *Id.* at 133.

169. *Id.* at 133-35.

170. *Id.* at 135.

171. 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989).

172. The California reapportionment plans of 1981 and 1982 have been cited as examples of the most numerous and egregious gerrymanders of the 1980s. Baker, *The "Totality of Circumstances" Approach*, in POLITICAL GERRYMANDERING AND THE COURTS 203, 205-06 (B. Grofman ed. 1990). In fact, the plans were so egregious that California won the Elbridge Gerry Memorial Award for Creative Cartography. *Id.*

173. *Badham*, 694 F. Supp. at 671. This standard was applied because the opinion addressed a motion to dismiss.

174. *Id.* at 670.

175. *Id.*

Nevertheless, because the Republicans failed the second part of the effects test—total exclusion from the process—the district court declined to specifically find that this evidence was sufficient to meet the first component.[176]

The *Badham* decision reflects the extreme difficulty any plaintiff would meet in attempting to establish the second prong of exclusion from the political process. In finding that the Republicans had not satisfied the second prong of the effects test, the district court stated:

> There are no allegations that California Republicans have been 'shut out' of the political process, nor are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning. Republicans remain free to speak out on issues of public concern; plaintiffs do not allege that there are, or have ever been, any impediments to their full participation in the 'uninhibited, robust, and wide-open' public debate on which our political system relies.
>
> Particularly conspicuous by its absence is any allegation that plaintiffs' interests are being 'entirely ignored' by their congressional representatives.[177]

As the *Badham* decision indicates, Democrats and Republicans may never be able to satisfy this test. As noted by the Supreme Court in *Bandemer*, it would be difficult for either party to ever prove that its members had been "excluded from participating in the affairs of their own party or from the processes by which candidates are nominated and elected."[178] Nevertheless, given the uncertainty of future court rulings in this area, legislatures must presume that an eventual partisan gerrymandering challenge may succeed and should govern themselves accordingly.

## V. WHAT TO EXPECT IN FLORIDA

The above discussions about how to avoid the appearance of partisan gerrymandering, how to challenge suspected abuses, and how to determine whether those challenges have merit, can only be appreciated in light of Florida's changing political and population climates. Therefore, it is necessary to examine the following questions: 1) How will Florida's increasing and shifting population affect partisan reapportionment? 2) To what extent is it possible to make the voting

176. *Id.*
177. *Id.* (citations omitted).
178. Davis v. Bandemer, 478 U.S. 109, 137 (1986).

predictions necessary for those who wish to reapportion on partisan grounds, given the pattern in Florida of voting contrary to one's party registration? 3) Will the current partisan alignments in the Legislature allow for openly partisan reapportionment? and 4) How will Florida's open government provisions affect the process?

### A. *How Will Florida's Increasing and Shifting Population Affect Partisan Reapportionment?*

Florida's population grew by nearly one-third between the 1980 and 1990 censuses to 12,937,926 people.[179] This increase, relative to the rest of the nation, allows Florida four additional congressional seats that must be incorporated in the 1992 redistricting.[180] Thus, even if Florida's population growth were evenly distributed throughout the state, there would have to be a significant redrawing of congressional districts to accommodate these new seats. However, because the state's population growth has not been evenly distributed, there will have to be a significant redrawing of state legislative districts as well. This, combined with the partisan positioning that will be inevitable in allocating each of the four new congressional seats between the parties, raises several interesting issues.

#### 1. *The State Legislature*

That the areas of Florida's greatest population growth are the most heavily Republican in the state may make it more difficult for the Democrats to retain the same high level of control of the Legislature that they have in the past—especially if a partisan-neutral districting scheme is used.[181] Thus, there may be an even greater incentive for the Democratic majority to attempt to engage in partisan gerrymandering to minimize the Republican population growth.

To analyze and demonstrate the effects of Florida's population shift,[182] we divided the state into five geographic regions that we iden-

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179. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION AND HOUSING (July 1991) (preliminary report) [hereinafter 1990 CENSUS]. The 1980 census reported 9,746,324 people, an increase of 32.75% over the 1970-80 period. BUREAU OF ECON. AND BUS. RES., UNIV. OF FLA., 1980 CENSUS HANDBOOK: FLORIDA COUNTIES [hereinafter 1980 CENSUS].

180. APPORTIONMENT POPULATION, *supra* note 14, at 3.

181. We define a partisan-neutral districting scheme as one in which lines are drawn without consideration given to partisan concentrations and distributions.

182. We choose to identify this phenomenon as "population shift" even though that may technically be a misnomer because there is not the commonly ascribed trend of people moving from one region to another. In fact, each of Florida's five regions, identified *infra* note 183, has experienced increased population over the past ten years, with even the region of least gain, the northwest, experiencing a significant increase of 21.40%.

tify as the northwest, northeast, central, southwest, and southeast.[183] Population is greater from region to region as one moves from the northwest to the southeast,[184] as was the case following the 1980 census.[185] Of more significance for state legislative reapportionment, however, is not which regions have the greatest population, but which regions have experienced the greatest population growth relative to the rest of the state.[186]

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183. The regions are defined the same as Florida's Market Regions, identified in BUREAU OF ECON. AND BUS. RES., UNIV. OF FLA., FLA. STAT. ABSTRACT 27 (1987). It is not contended that these regions have any independent political or social significance other than their usefulness in providing manageable geographic subdivisions.

The northwest region includes the following counties: Bay, Calhoun, Escambia, Franklin, Gadsden, Gulf, Holmes, Jackson, Jefferson, Leon, Liberty, Madison, Okaloosa, Santa Rosa, Taylor, Wakulla, Walton, and Washington.

The northeast region includes: Alachua, Baker, Bradford, Clay, Columbia, Dixie, Duval, Gilchrist, Hamilton, Lafayette, Levy, Marion, Nassau, Putnam, St. Johns, Suwannee, and Union counties.

The central region includes: Brevard, Flagler, Lake, Orange, Osceola, Seminole, Sumter, and Volusia counties.

The southwest region includes: Charlotte, Citrus, Collier, De Soto, Hardee, Hernando, Highlands, Hillsborough, Lee, Manatee, Pasco, Pinellas, Polk, and Sarasota counties.

The southeast region includes: Broward, Dade, Glades, Hendry, Indian River, Martin, Monroe, Okeechobee, Palm Beach, and St. Lucie counties.

184. Population figures by region following the 1990 census are: northwest—1,046,835; northeast—1,531,555; central—2,054,820; southwest—3,766,322; and southeast—4,538,394. 1990 CENSUS, *supra* note 179.

185. The 1980 populations were: northwest—862,336; northeast—1,196,006; central—1,371,831; southwest—2,776,313; and southeast—3,539,928. 1980 CENSUS, *supra* note 179.

186. The reason for this can be demonstrated through a simplified example. Assume that a state has 100 legislative seats and five regions for which the initial populations and accompanying legislative representation are as follows:

| District | Population | # of Legislators |
|---|---|---|
| one | 10 | 10 |
| two | 15 | 15 |
| three | 20 | 20 |
| four | 25 | 25 |
| five | 30 | 30 |
| TOTALS | 100 | 100 |

Next assume that the state experiences significant population growth over the following ten-year period and that the new census reveals the following populations and resulting legislative representation:

| District | Population | # of Legislators |
|---|---|---|
| one | 14 | 7 |
| two | 28 | 14 |
| three | 48 | 24 |
| four | 52 | 26 |
| five | 58 | 29 |
| TOTALS | 200 | 100 |

The two regions that experienced the greatest population growth during the past ten years were the central and the southwest. The population in the central region increased by nearly 50%,[187] and the southwest region grew by nearly 36%.[188] Although each of the other three regions experienced significant growth, none was as great as that of the central and southwest.[189]

On its face, this growth pattern is significant because it indicates that any reapportionment plan based on equipopulous districts[190] and a constant number of legislative seats will result in seats flowing into the central and southwest regions of the state, with those seats coming from losses in the other three regions. What is more significant in the context of partisan gerrymandering is that the two regions that will gain seats are the state's most heavily Republican. In both regions, a majority of the voters who are registered with one of the two major parties are registered as Republicans.[191] On the other hand, the three regions that will not gain seats are the state's most heavily Democratic, with each of those regions having a majority of its voters who are registered with one of the two major parties being registered Democrats.[192]

What this means, essentially, is that when the new districts are created, they will be located in areas in which the concentration of Republican voters is much greater than in those areas from which the seats will be lost. Of course, this trend runs contrary to the desires of much of the legislative leadership and the Democratic majority who

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As is seen, each district experienced significant population growth and each retained its population rank relative to the other districts, but three of the districts lost at least one legislative seat, while the other two gained at least one seat. This result is because of unequal population growth throughout the state and the constant maximum number of legislative seats to be apportioned. This simplified example demonstrates what has happened in Florida and how it will affect reapportionment of the state legislative seats.

187. The 1990 population increased 49.79% to 2,054,820 from 1,371,831. 1990 CENSUS, *supra* note 179; 1980 CENSUS, *supra* note 179.

188. The 1990 population increased 35.66% to 3,766,322 from 2,776,313. 1990 CENSUS, *supra* note 179; 1980 CENSUS, *supra* note 179.

189. Across the 1980-90 decade, the northwest population increased by 21.40%; the northeast by 28.06%; and the southeast by 28.21%. *See supra* notes 184 & 185.

190. Equipopulous districts are required by the one person, one vote standard set forth by the United States Supreme Court. *See supra* notes 19-25 and accompanying text.

191. In the central region, 50.65% of those registered with one of the major parties are registered Republicans, and in the southwest region, 50.44% of those registered with one of the major parties are registered Republicans. 1990 CENSUS, *supra* note 179.

192. In the northwest region, of those registered with one of the major parties, 72.23% are registered Democrats, in the northeast region, 68.45% are registered Democrats, and in the southeast region, 57.22% are registered Democrats. *Id.*

will actually draft the new reapportionment plans.[193] Their emphasis, then, will likely be to attempt to minimize the effects of this population shift into Republican areas by drawing district lines in such a way that the new districts in these more Republican areas will allow for Democratic majorities to be preserved in at least some of the new districts. Also, by redrawing certain districts that currently have Republican majorities to make them more competitive for the Democrats, it may be possible to partially offset some of the gains that mathematics indicate the Republicans should enjoy.[194]

Perhaps the best way to do this is seen when one recognizes that partisan concentrations within a particular region are not constant. Although there is a greater percentage of Republican voters in the regions that have experienced the greatest growth, there will still be concentrations of Democratic voters within those regions. Strategically drawing the new district lines to use these concentrations of Democratic voters may give the Democrat-controlled Legislature its best opportunity to counter the Republican trend.

### 2. *Congress*

The congressional reapportionment in Florida may present the most interesting issues. There are two main reasons for this. First, because Florida's congressional seats will increase from nineteen to twenty-three,[195] there will be significant competition between the major parties to draw the new district lines in order to capture as many of those new seats as possible. Second, congressional lines are drawn by the state Legislature. Thus, less attention may be paid to protecting sitting incumbents because there is not the concern of protecting one's self or one's fellow legislators, so that they will in turn protect you.[196]

Unlike the reapportionment for the state Legislature, no congressional region must lose seats because of the increase in the number of

193. Of the 120 House members, 73 are Democrats and 47 are Republicans. Of the 40 senators, 23 are Democrats and 17 are Republicans. *Id.*

194. Methods that the majority may use in this partisan gerrymandering include cracking, packing, and stacking discussed in ESKRIDGE & FRICKEY, *supra* note 13.

195. APPORTIONMENT POPULATION, *supra* note 14, at 3.

196. There are often, however, concerns about drawing a district so that it will be particularly well-suited for a particular legislator to capture that seat following reapportionment. For example, some believe that when what is now Florida's sixth congressional district was first added following the 1980 reapportionment—when Florida also received four new seats—the district was drawn specifically to help elect then-state Senator Kenneth H. "Buddy" MacKay. M. BARONE & G. UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1988, 252 (1987). If that, in fact, was the intent, it proved successful.

seats to which Florida is entitled. In fact, based on the authors' rough data, it appears that the two northwestern districts should experience no change in the number of seats to which they have been entitled; the southwest should gain two seats, and each of the other two regions should gain one seat.[197]

The new seat in the central region will be in the Orlando area and will almost certainly be a Republican district. One of the new seats in the southwest region will probably be drawn in the area to the north and east of the Tampa/St. Petersburg area, and the voters there are likely to elect either a Republican or a conservative Democrat. The other southwest seat will probably be drawn in the southern part of that region. Because five of the counties in that area are among the state's eight most Republican, it is likely that the seat will go to the Republicans.[198] The final seat will be drawn in the southeast, probably between Ft. Lauderdale and West Palm Beach. This district can be expected to elect a Democratic representative.[199]

Of course, Florida's shifting population and the carving out of new districts from existing ones will force the redrawing of virtually all of the existing congressional districts. This could create potential problems for some of Florida's more junior Republican congressional representatives. Two who have been cited as being in jeopardy during the upcoming reapportionment are Representatives Craig James (Republican, 4th District) and Cliff Stearns (Republican, 6th District).[200]

At least three major tactics may be used by the Legislature to attack the seats of individual representatives. The first approach is to place two incumbents in the same district, forcing them to run against each other for reelection and ensuring the elimination of at least one of them.[201] The second approach is to redraw an incumbent's district in such a way that major areas of partisan support are removed from the district and are replaced by areas of partisan opposition.[202] The third approach is to redraw the district to the greatest extent possible so that the representative's old constituency is replaced almost entirely by a new, unfamiliar constituency. This helps eliminate many

197. It is important to note that because some congressional districts cross region lines, an addition or redrawing of a district is likely to affect more than one region.

198. Collier County is the state's most Republican with 70.62% of the county's voters being registered Republicans; Sarasota County is third with 65.10%; Charlotte County is sixth with 58.76%; Lee is seventh with 58.18%; and Manatee is eighth with 55.29%. 1990 CENSUS, *supra* note 179. *See infra* note 207.

199. Beiler, *supra* note 2, at 18-19; St. Petersburg Times, July 2, 1991, at 4B, col. 1.

200. Beiler, *supra* note 2, at 18.

201. *See* Grofman, *supra* note 3, at 105.

202. *See* Lowenstein & Steinberg, *supra* note 49, at 8.

of the advantages of incumbency, such as name recognition and pre-existing campaign organizations, that would otherwise exist for the representative in a race for reelection.[203]

### B. *Can the Vote of Floridians Be Predicted?*

Given that the population shifts and the new seats will result in opportunities for partisan gerrymandering, it is important to remember that an essential component in meaningful partisan gerrymandering will be the ability to predict for which party a proposed district is more likely to vote. This prediction usually consists entirely of assuming that most voters will vote for the party with which they are registered.[204] While such an assumption is, of course, never perfectly reliable, its validity is even more suspect in parts of Florida.

Although many factors usually influence a district to elect a particular legislator, aggregate partisan registration may be the most readily measurable, accessible, and usable data for purposes of partisan gerrymandering.[205] In Florida legislative and congressional elections, however, such data are often inaccurate predictors. This is particularly true in districts where the Democratic party has a majority of registered voters. For example, in Florida's House of Representatives, fifteen Republican representatives[206] are from Democratic districts.[207] By contrast, only four Democratic representatives are from Republican districts.[208]

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203. *See* H. SMITH, THE POWER GAME 122-25 (1988).

204. *See* Lowenstein & Steinberg, *supra* note 49, at 6-9.

205. This data may be easily obtained from the Secretary of State's Division of Elections.

206. Those Republican representatives, their districts, and the percentage of voters from that district who are registered Republican are: Tom Banjanin (3), 40.43%; Robert T. Harden (5), 48.01%; Stephen R. Wise (14), 37.90%; James E. "Jim" King, Jr. (18), 42.73%; Joseph "Joe" Arnall (19), 46.09%; Frances L. "Chance" Irvine (21), 45.47%; George Albright (25), 40.24%; Paul M. Hawkes (26), 43.57%; Richard S. "Dick" Graham (28), 44.71%; John Laurent (43), 35.42%; "Buddy" Johnson (61), 37.16%; J.J. "Toby" Holland, Jr. (67), 48.93%; Marian V. Lewis (81), 48.30%; Alberto "Al" Gutman (105), 48.93%; and Bruce Hoffman (114), 47.81%. DIV. OF ELECTIONS, FLA. DEP'T OF STATE, OFFICIAL GENERAL ELECTION RETURNS 18-29 (Nov. 1990) [hereinafter 1990 TABULATION]; THE CLERK'S MANUAL 1990-1992, 8-266 (compiled by J. Phelps, Clerk, Fla. H.R., Feb. 1991) [hereinafter CLERK'S MANUAL].

207. We have used the term "Democratic district" to describe a district in which more than 51% of the voters registered with one of the major parties are registered Democrats. Likewise, we have used the term "Republican district" to describe a district in which more than 51% of the voters registered with one of the major parties are registered Republicans. We assume a 51% majority to be the beginning point with any predictive value because the number of registered voters separating the parties in those districts in which the majority party has less than a 51% majority is often too small to be meaningful.

208. Those Democratic representatives, their districts, and the percentage of voters from that district who are registered Democrats are: Harry C. Goode, Jr. (33), 47.99%; Robert B. "Bob" Sindler (39), 48.97%; Everett A. Kelly (46), 48.61%; and Lars A. Hafner (54), 47.13%. 1990 TABULATION, *supra* note 206, at 18-29; CLERK'S MANUAL, *supra* note 206, at 8-266.

Similar results are seen in the Senate and in Florida's congressional delegation.[209]

Obviously, many of these party-seat inconsistencies may be explained by extrinsic factors and may not indicate any sort of long-term propensity to vote contrary to partisanship. Nevertheless, they do seem to indicate that mere registration is an insufficient predictor of electoral behavior in Democratic districts in Florida. Therefore, if the Legislature will be engaging in partisan gerrymandering in the creation of new districts, additional data—such as past election returns—must be included in its consideration to accurately predict future voter behavior.

### C. *Will the Current Legislative Environment Allow for Openly Partisan Reapportionment?*

As previously indicated, reapportionment in Florida is solely a legislative function.[210] The Legislature prepares its new districting plans and then approves them by joint resolution, which requires only a simple majority vote.[211] Because of this simple majority requirement, and because the Democrats hold a majority of the seats in each chamber of the Legislature, they could likely choose to adopt an openly partisan plan if they so desired. This assumption, however, is premised upon the Democrats being able to hold together a majority on such a partisan issue—a questionable premise, particularly in the Senate, where the Democrats' majority is thin.[212]

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209. In the Florida Senate, six Republican senators are from Democratic districts, but only two Democratic senators are from Republican districts. The Republican senators, their districts, and the percentage of voters from that district who are registered Republicans are: Ander Crenshaw (8), 41.74%; William G. "Bill" Bankhead (9), 43.23%; Richard T. "Rich" Crotty (14), 48.78%; John A. Grant, Jr. (21), 46.60%; Malcolm E. Beard (22), 44.43%; and James A. "Jim" Scott (31), 43.91%. The Democratic senators, their districts, and the percentage of voters from that district who are registered Democrats are: Patsy Ann Kurth (16), 46.68%; and Winston W. "Bud" Gardner, Jr. (17), 48.42%. 1990 TABULATION, *supra* note 206, at 13-17; CLERK'S MANUAL, *supra* note 206, at 285-403.

In Florida's congressional delegation, six Republican congressional representatives were elected from Democratic districts, but only one Democratic congressman was elected from a Republican district. Those Republican congressional representatives, their districts, and the percentage of voters from that district who are registered Republicans are: Andy Ireland (10), 44.03%; Craig T. James (4), 43.41%; Tom Lewis (12), 49.01%; Ileana Ros-Lehtinen (18), 43.74%; E. Clay Shaw, Jr. (15), 42.60%; and Clifford B. Stearns (6), 42.80%. The Democratic congressional representative elected from a Republican district is Jim Bacchus from District 11, where 46.66% of voters are registered Democrats. 1990 TABULATION, *supra* note 206, at 10-12; DIV. OF ELECTIONS, FLA. DEP'T OF STATE, U.S. CONGRESSMEN (April 1991).

210. *See 1972 Apportionment Case*, *surpa* note 60, at 800 (Fla. 1972).

211. FLA. CONST. art. III, § 7.

212. Even in the absence of these considerations, a majority is sometimes difficult to main-

For the Democrats to be able to hold such a majority together in the Senate, every member of the majority would have to entertain a certain amount of "partisan lust,"[213] a trait noticeably absent from some Florida Senate Democrats. A recent example of this was seen in Gwen Margolis's[214] campaign and election for Senate President before the 1990 session. In that case, a group of conservative Panhandle Democrats defected from their party's candidate and joined with Republicans to support W.D. Childers.[215] This deprived the Democrats' intended candidate of her automatic majority. Not until Senator Margolis was able to attract several Republican senators to her side was she able to recapture her majority and assume the presidency.

It is unclear whether some of those same conservative Democrats would abandon an effort of the Democratic leadership to inappropriately strengthen the party through the reapportionment process. Nonetheless, it does not seem entirely unlikely. This is especially true considering that each senator's primary concern is to protect his or her own incumbency and interests. Recognizing that new Republican seats are inevitable given population shifts and increases, conservative Democrats may find themselves aligning with Republicans now to ensure retention of or award of valued committee chairs later. If such a defection did occur, it does not seem likely that the Democrats could count on any Republicans to vote for a plan that would openly and substantially harm their own party. Thus, it may be that the only plan that would be capable of winning Senate approval would be one that is not openly partisan.

### *D. How Will Florida's Open Government Provisions Affect the Reapportionment Process?*

Theoretically, regardless of what course the Legislature chooses in reapportioning itself and the congressional seats, the entire process will be open to public scrutiny. Florida's strong Government in the

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tain. "Party discipline among legislators is not strong enough in the United States to assure automatic support for a party plan from all legislative members of the party, especially on what is a political life-or-death issue for those members." Lowenstein & Steinberg, *supra* note 49, at 8.

213. Mayhew, *Congressional Reapportionment: Theory and Practice in Drawing Districts*, in REAPPORTIONMENT IN THE 1970s, at 249 (N. Polsby ed. 1982).

214. Dem., N. Miami Beach.

215. Dem., Pensacola. Senators Sherry Walker, Dem., Waukeenah; and Vince Bruner, Dem., Ft. Walton Beach initially declined to support Senator Margolis and instead supported Childers for the Senate presidency. Senator Margolis then successfully solicited the backing of Senators Roberto Casas, Repub., Hialeah; Lincoln Diaz-Balart, Repub., Miami; and Javier Souto, Repub., Miami to regain the majority and win the presidency. Tallahassee Democrat, Nov. 13, 1990, at 1A, col. 4.

Sunshine Act and Public Records Act require that all public meetings and records, respectively, be open to public inspection.[216] Additionally, Florida's constitution was amended in 1990 to require that all legislative meetings be open and noticed to the public.[217] The amendment provides, however, that the provision shall be implemented and defined by the rules of each house.[218] Moreover, the judiciary has determined that separation of power principles prohibit its interference in the enforcement of self-governing legislative rules.[219] Therefore, enforcement of the requirements will be left to the Legislature itself,[220] and the Legislature may be reluctant to closely and effectively monitor its own members in enforcing these requirements. Additionally, imaginative legislators can always find methods to avoid the rules.[221] Seemingly, legislators could simply direct members of their staff to talk to other staff members to avoid the constitutional and statutory open meetings requirements.[222] Thus, many important reapportionment decisions may still be reached "behind closed doors."

## VI. CONCLUSION

The justiciability of partisan politics in the reapportionment process has added more tension to the dilemma of redistricting. On one hand, legislators must guarantee the one person, one vote equal protection standard through population equalities and adequate minority representation. On the other hand, those same legislators seek to protect their own incumbencies and party interests. *Bandemer* purports to ensure that this second concern does not act to dilute the guarantees of the first.

As always, there will be intense pressure for partisan manipulation in the upcoming reapportionment process. On a national level, it has been predicted that the Democratic National Committee will spend $5 million to increase its representation in state legislatures through the

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216. *See* Government in the Sunshine Act, FLA. STAT. § 286.011 (1989); Public Records Act, FLA. STAT. § 119.01 (1989). *But see* Locke v. Hawkes, No. 76,090, slip op. (Fla., filed Nov. 7, 1991) (holding that the Public Records Act is not applicable to members of the Legislature) (petition for rehearing filed).

217. FLA. CONST. art. III, § 4(e). As amended, section four further requires that any prearranged gathering between more than two legislators, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, in which formal legislative action is taken, or will be taken later, shall be reasonably open to the public. For a further discussion of this topic, please see McSwain, *The Sun Rises on the Florida Legislature: The Constitutional Amendment on Open Legislative Meetings*, 19 FLA. ST. U.L. REV. 307 (1991).

218. FLA. CONST. art. III, § 4(e).

219. *See* Moffitt v. Willis, 459 So. 2d 1018 (Fla. 1984).

220. *Id.* at 1021.

221. Comment, *When Open-Meeting Laws Confront State Legislatures: How Privacy Survives in the Capitol*, 10 NOVA L.J. 107, 108 (1985).

222. *Id.* at 114.

1992 reapportionment,[223] and it is likely that the Republicans will surpass that.[224] Thus, it would be naive to believe that legislators will strive to implement a truly neutral reapportionment scheme. If neutrality is the outcome, it will likely be the accidental equipoise that occasionally, and temporarily, results from vigorous political competition.

Nevertheless, legislators may be well advised to proceed carefully until the Supreme Court's holding in *Bandemer* is clarified. Despite the arguably vague standards set by the Court, *Bandemer* has undoubtedly supplied new ammunition for challenges to reapportionment plans. As political groups attempt to decipher what standards are sufficient to succeed in such a claim, litigation is sure to ensue.

Florida in particular, with its shifting demographics, will substantially alter its current districts, and accordingly will be subject to intense scrutiny. Consequently, the Legislature should consider carefully its procedures for drawing the new district lines and its standards for the data that will be used in determining the representational plan for the next decade. A plan that is developed through the use of neutral criteria and standards will almost certainly survive any subsequent partisan gerrymandering challenges in light of the relatively high thresholds established by the Supreme Court in *Bandemer*. However, given the Court's recognition of the inherently political nature of the reapportionment process, it is probable that *Bandemer* will find its greatest impact in litigation and legal fees generated, rather than in fundamental rights protected.

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223. Peck, *Project 500 and the 1991 Initiative*, CAMPAIGNS & ELECTIONS, Jan.-Feb. 1989, at 15.

224. *Id.* Republican National Committee representatives were reluctant to place dollar figures on their efforts to influence redistricting outcomes, but acknowledged that reapportionment is their top priority. *Id.*