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BEYOND JUSTICIABILITY: POLITICAL GERRYMANDERING AFTER *DAVIS V. BANDEMER*

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"Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate."[1]

I. INTRODUCTION

In holding that political gerrymanders of state legislatures are properly justiciable under the equal protection clause, the Supreme Court finally severed one of the remaining thorns in the thicket of redistricting. There remain, however, numerous unanswered questions that will no doubt be the subject of litigation in

1. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 330 (Schocken ed. 1961), (cited by Chief Justice Burger in Davis v. Bandemer, 106 S. Ct. 2797, 2816 (1986) (Burger, C.J., dissenting)).

the future: Does the ruling apply to congressional districting as well as legislative? What are the standards for identifying and litigating a gerrymander? What is the level of discriminatory effect that must be proven by plaintiffs?

This article examines the decision in *Davis v. Bandemer*,[2] as well as the political circumstances that resulted in unusual legal alliances during the appeal. The article also attempts to dispel at least some of the confusion surrounding the decision. Because there was no majority opinion, and because there have been differing interpretations as to the meaning of the plurality opinion, the article will attempt to develop a workable application of *Bandemer* in light of existing redistricting and voting rights jurisprudence.

The major question remaining after the Court's decision concerns the applicable standards for identifying and adjudicating an illegal gerrymander. Rather than resorting to an "I know it when I see it" approach, this article suggests that a "totality of the circumstances test" could well serve both the courts and potential litigants.

It is clear that the *Bandemer* decision is but the first in a line of cases that will develop before and during the reapportionment of 1991. While the case was decided on a fourteenth amendment equal protection claim, there may be additional constitutional bases for litigating gerrymandering claims. Because there is not yet a clear majority on the Supreme Court for any particular theory of gerrymandering, and because a congressional gerrymandering case has not yet squarely faced the Court, a number of alternative constitutional theories are presented in this article.

The Court may, in its next term, be presented with a case which raises many of these claims and theories in a congressional gerrymander. This article discusses the background and implications of that case—arising in California—and suggests that it may be the next major step in the development of the law of gerrymandering. Finally, it considers the underlying propriety of judicial action on this subject.

II. THE QUESTION PRESENTED: IS PARTISAN GERRYMANDERING JUSTICIABLE?

A. *Background*

The *Bandemer* case involved a challenge to the 1981 redis-

2. 106 S. Ct. 2797 (1986).

tricting of the Indiana Legislature by seven Democrats, both black and white, from throughout the state. The challenged plan provided for fifty single-member senate districts and seven three-member, nine two-member, and sixty-one single-member house districts. The senate plan produced a population deviation between districts of 1.15 percent, while the house plan's deviation was 1.05 percent.[3] These deviations were well within the limits prescribed by the Supreme Court's "one person, one vote" cases. The multimember house districts were generally located in the state's metropolitan areas, with Marion County (Indianapolis) being combined with portions of neighboring counties to form five three-member districts.[4]

In their original form, the plans were introduced as vehicle bills, bills that had no substantive content. These bills were passed by both houses, and referred to a conference committee consisting of Republicans only. Democrats were excluded from the substantive deliberations on the plans, which were presented to the legislature a few days before the end of the legislature's 1981 session. The plans were passed by the Republican majorities of both houses, with voting along party lines, and signed by the Republican Governor.[5]

In early 1982, the plaintiffs filed an action in the United States District Court for the Southern District of Indiana alleging that the plans constituted a racial and political gerrymander in violation of the fourteenth amendment's equal protection clause, federal civil rights statutes, and state constitutional provisions.[6] In

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3. The principle issue in the Supreme Court's early "one person, one vote" cases was the disparity in the sizes of both congressional and legislative districts. The courts have not, however, always been consistent in the measures used to determine population equality and inequality. In this article, the term "deviation" is used in the manner most often used in court opinions. The measure assumes as a starting point an "ideal" district population, that is, total population divided by the number of districts to be created. In a hypothetical districting, assume an ideal district size of 100,000 voters, with the largest district having 102,000 and the smallest having 99,000. The largest district is two percent larger than the ideal and the smallest is one percent smaller than the ideal. The overall range between the largest and smallest districts, three percent, is designated as the plan's "deviation".

4. 106 S. Ct. at 2801.

5. *Id.* at 2801 n.2.

6. No. IP 82-56C (S.D. Ind. filed Feb. 8, 1982). Another case, Indiana NAACP State Conference of Branches v. Orr, No. IP 82-164-C (S.D. Ind. filed Feb. 8, 1982) was filed in the Southern District and was consolidated with

November 1982, before a trial on the merits, the first elections were held under the challenged plans. The full one hundred house seats and twenty-five senate seats were up for election. Statewide, Democratic house candidates received 51.9 percent of the vote, but were elected to only forty-three of the one hundred seats. Democratic senate candidates won thirteen of twenty-five seats with 53.1 percent of the statewide vote.[7]

After considerable delay, the district court issued a ruling on December 13, 1984, declaring by a two to one vote that the plan was an unconstitutional gerrymander. The court enjoined further elections under the plan, and ordered the legislature to prepare a new districting plan for 1984.[8] The district court concluded that the 1982 election results were the result of a Republican bias, warranting a further examination of the districting plans.[9] The court noted the unusual shapes of many of the districts, the inconsistent mix of single-member and multimember districts, and a lack of deference to political subdivision boundaries. The court determined that these factors were the result of an intentional effort to dilute Democratic voting strength.[10] The court concluded that the plaintiffs had made a prima facie showing of discriminatory political gerrymandering in violation of the equal protection clause, and that the state had been unable to support the districting by adequate neutral criteria.[11] The defendants immediately filed a direct appeal to the Supreme Court of the United States, where a peculiar alignment of parties and amici would take place.

B. *Strange Bedfellows*

Like the Indiana Democrats, Republicans in California cried "foul" over the 1982 redistricting of California's congressional districts.[12] An action instigated by California Republicans, *Badham v.*

Bandemer at the trial level. The NAACP alleged that the plans were unconstitutional dilutions of the black vote in Indiana in violation of the fourteenth and fifteenth amendments and the Voting Rights Act of 1965. The district court rejected the claims of racial vote dilution and the NAACP did not appeal.

7. Bandemer v. Davis, 603 F. Supp. 1479, 1486 (S.D. Ind. 1984).

8. *Id.* at 1496.

9. *Id.* at 1486.

10. *Id.* at 1493-95.

11. *Id.* at 1495.

12. In the 1980 general election, Democrats held twenty-two congressional seats to the Republicans' twenty-one, reflecting the relative parity of the two parties statewide. After the 1980 decennial census, two additional congressional dis-

Eu,[13] was pending in United States District Court in California when the *Bandemer* decision was announced. The district court in California abstained from hearing the federal gerrymandering claims in the case, and that order was affirmed by the Ninth Circuit.[14]

The plaintiffs in *Badham* realized that the Court's disposition of *Bandemer* was critical to the ultimate disposition of the California litigation. For this reason, a petition for certiorari was filed in the Supreme Court to attempt to obtain review of the Ninth Circuit's order sustaining continued abstention.[15] While the California Republicans understood that the possibility that the Supreme Court would grant certiorari on the procedural point at issue was small, they hoped the petition would serve the additional purpose of informing the Supreme Court that the question raised by the Indiana Democrats was not limited to Indiana. The *Badham* petition contained exhibits suggesting a gerrymander of historic proportions.[16] The Supreme Court considered the *Bandemer* appeal and the *Badham* petition in conference on the same day in early 1985, and while the *Badham* petition was denied,[17] the Court noted probable jurisdiction in *Bandemer*.[18]

The juxtaposition of parties and amici that then occurred prompted many commentators to note that Charles Dudley Warner's 1870 statement that "politics makes strange bedfellows"

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tricts were apportioned to the state. The Democratic legislature and Governor enacted a redistricting statute which, in 1982, gave Democrats twenty-eight seats to the Republicans' seventeen, even though the statewide vote was again roughly even between the two parties. The disparate treatment of the parties' incumbents, and the elimination of marginal districts, are detailed *infra* section VIII.

13. 568 F. Supp. 156 (N.D. Cal. 1983).

14. Badham v. United States District Court for the Northern District of California, 749 F.2d 36 (9th Cir. 1984). The Court concluded that the appeal did not meet the standards set down by its local Rule 21 for disposition by written opinion. As a result, disposition was by memorandum, forgoing publication in the *Federal Reporter*.

15. Badham v. Secretary of State of California, 749 F.2d 36 (9th Cir. 1984), *petition for cert. filed*, (U.S. Jan. 30, 1985) (No. 84-1226).

16. Plaintiffs' Petition for Certiorari at 46a-53a, Badham v. Secretary of State of California, 749 F.2d 36 (9th Cir. 1984).

17. Badham v. Secretary of State of California, 749 F.2d 36 (9th Cir. 1985), *cert. denied*, 470 U.S. 1084 (1985). *See infra* notes 180-209 and accompanying text.

18. Davis v. Bandemer, 603 F. Supp. 1479 (S.D. Ind. 1984), *prob. juris. noted*, 470 U.S. 1080 (1985).

still had vitality.[19] To the California Republicans, it was imperative that the Supreme Court affirm the Indiana district court's implicit holding that challenges to partisan gerrymandering are justiciable. The defendant-intervenors in the California case, the California Assembly and the California Democratic Congressional Delegation obviously had an interest in the opposite result.

Because the Republican National Committee (RNC) had concluded that a finding of justiciability could ultimately affect the control of the United States House of Representatives, the RNC undertook the unwelcome posture of aligning itself against the Indiana Republicans solely on the issue of justiciability. The reason was straightforward enough: if the Supreme Court determined that such claims were not justiciable, egregious gerrymanders such as those in California would become the rule, rather than the exception. Since Democrats control considerably more state legislative houses than do Republicans, the RNC reasoned that Republicans could get shut out of the process in many states in the next redistricting.[20]

C. *Oral Argument*

Oral argument in *Bandemer* occurred on October 7, 1985, the first day of the Court's 1985 term. William M. Evans appeared for the Indiana Republicans, the appellants, and Theodore R. Boehm appeared for the Democrats, the appellees. Both attorneys had been the principal trial attorneys in the case.

Mr. Evans argued that the issue of gerrymandering was not justiciable, but even if the Court should find against him on that point, the Indiana plan was not a gerrymander.[21] One of the most

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19. *See, e.g.*, The Washington Post, Oct. 5, 1985, at A4, col. 4; The Washington Times, Oct. 4, 1985, at D1, col. 2.

20. The RNC requested and obtained from all parties permission to file a brief amicus curiae in support of the Indiana Democrats on the justiciability question. Also adding their support were amicus briefs by Common Cause and the Mexican-American Legal Defense and Education Fund. The Indiana Republicans received amicus support from the California Democratic Congressional Delegation and the California Assembly (representing the Democrats in the assembly). The status of the NAACP was somewhat cloudy. While they had failed to file a notice of appeal to the Supreme Court, the NAACP filed a brief as appellees, not as amicus. This seemed to come as a surprise to the other parties in the case, and while the Court accepted the brief as filed, it was apparently treated as an amicus. Only the attorney for the Indiana Democrats took part in oral argument for the appellees.

21. Official Transcript at 9, Davis v. Bandemer, 106 S. Ct. 2797 (1986).

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telling questions from the bench summarized the dilemma facing the Court: "But if you say it's not justiciable, [doesn't] that mean[] that even the most extreme example of gerrymandering would not be subject to any judicial review?"[22] The Court commented that if that were the case, "by gerrymandering, one party could put the other party entirely out of business, entirely, if you were using the computer, without discriminating against the voters in the other party . . . ."[23] Evans had to concede that his argument logically led to that conclusion, but he attempted to shift the Court's attention to the Indiana plan itself. He argued that the notwithstanding the election results, there were rational justifications for the plan.[24]

The Court then engaged Mr. Boehm in questioning relating to proportional representation and the necessity of proof of discriminatory intent, before returning to the threshold question of justiciability. Boehm raised a key issue, which was not fully resolved by the Supreme Court's opinion:

> We contend that you judge a map not by hindsight, and in this respect we respectfully disagree with the district court that the primary test is not how many seats were in fact elected, but what does the map look like on the basis of the data that is available as of the time this map was drawn . . . .[25]

This comment is significant in light of the plurality's dicta concerning the use of election projections instead of actual results.[26]

Boehm further maintained that regardless of how the map is analyzed, it is not necessary to push the doctrine of *Baker v. Carr*[27] beyond its current application to find the issue to be justiciable. He maintained that *Baker* already provided the doctrinal framework that leads inevitably to a conclusion of justiciability.[28] The Court's questioning of Mr. Evans on rebuttal indicated some con-

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22. *Id.* at 10.
23. *Id.* at 14.
24. *Id.* at 18-19.
25. *Id.* at 33.
26. *See infra* section VI.
27. 369 U.S. 186 (1962). In *Baker*, the Court determined that none of the identifying characteristics of a nonjusticiable political question were present: "We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home . . . . Nor [must the Court] enter upon policy determinations for which judicially manageable standards are lacking." *Id.* at 226.
28. Official Transcript at 40, Davis v. Bandemer, 106 S. Ct. 2797 (1986).

cern on the use of multimember districts and some observers of the argument felt the Court might focus on that issue in its opinion. Mr. Evans responded that the districts in question were justified by history and other nondiscriminatory factors.[29]

In concluding, Mr. Evans pointed out what he perceived to be a fatal flaw in the Democrats' case. He noted that the record contained no other plan to compare with the challenged plan. Before the Court got into the political thicket, he argued, at least it should be presented with an alternative plan, to determine if there was some other way to redistrict with less damage to the Democrats.[30] With that, the Court took the case under advisement, and did not issue its opinion in the case until the end of its term, nearly nine months later.

III. An Opinion for Justiciability

In an opinion by Justice White, on June 30, 1986 the Supreme Court ruled (6-3) that political gerrymandering is properly justiciable under the equal protection clause of the fourteenth amendment.[31] At the same time, the Court determined (7-2) that the redistricting plan in question—the Indiana legislature—did not meet the Court's standard for proof of a gerrymander.[32] The key issue in the decision was whether federal courts could hear claims of egregious gerrymandering, or whether the courts are prevented from adjudicating such claims because they are political questions.

Justice White, joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens, held that such claims are justiciable, that is, subject to judicial review and relief. The Court pointed out that it had long considered as justiciable "claims going to the adequacy of representation in state legislatures."[33] The Court likened the question to that considered in two other lines of cases—those based on "one person, one vote," and those involving racial discrimination.[34]

The Court determined that in order to succeed, plaintiffs in gerrymandering cases are "required to prove both intentional discrimination against an identifiable political group and an actual

29. *Id.* at 48-52.
30. *Id.* at 56.
31. Davis v. Bandemer, 106 S. Ct. 2797, 2816 (1986).
32. *Id.*
33. *Id.* at 2806.
34. *Id.* at 2803.

discriminatory effect on that group."[35] The Court recognized that in legislative districting, discriminatory intent will not be hard to prove: "As 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."[36] Contrary to expectations raised at oral argument, the opinion reconfirmed the Court's long-held view that multimember districts are not unconstitutional per se. Justice White stated for the majority, "Only where there is evidence that excluded groups have 'less opportunity to participate in the political processes and to elect candidates of their choice' have we refused to approve the use of multi-member districts."[37]

While finding gerrymandering to be justiciable, the Court reversed that part of the district court's ruling that held Indiana's legislative plan unconstitutional: "[A] group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause."[38] The Court further indicated that a cause of action against a gerrymander would exist where an "electoral system has been 'arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[39]

The majority found that this evidence did not exist in the record before it, and that the district court had not satisfied this threshold showing. Instead, the district court relied on a single election to demonstrate unconstitutional discrimination. The majority found this to be unsatisfactory in this case.[40] The Court did not, however, preclude the use of projected election results based on district boundaries and past voting patterns, "even where *no* election has yet been held under the challenged districting."[41]

While the majority did not detail explicit guidelines for analyzing a gerrymander, a plurality summarized the requirements in making an equal protection challenge to a gerrymander:

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35. *Id.* at 2808.
36. *Id.* at 2809.
37. *Id.* at 2809-10.
38. *Id.* at 2810.
39. *Id.*
40. *Id.* at 2814.
41. *Id.* at 2814 n.17 (emphasis in original).

> If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings. Thus, evidence of exclusive legislative process and deliberate drawing of districts in accordance with accepted gerrymandering principles would be relevant to intent, and evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests.[42]

Justices Powell and Stevens, while joining in the Court's finding of justiciability, argued that the Court had failed to provide more explicit guidance to legislatures and courts in analyzing future gerrymanders.[43] To provide this guidance, they suggested a variety of "neutral factors" for judging gerrymanders.[44] Justice White's plurality opinion explicitly recognized that the factors suggested by Justice Powell—including district configurations, vote projections, and legislative process—may be relevant to the proof of an equal protection claim. The plurality cautioned, however, that the various factors must be differentiated in proving the various elements of a constitutional claim. At least in this case, each factor standing alone would not be enough to prove the claim itself.[45]

Justice O'Connor, in an opinion joined by Chief Justice Burger and Justice Rehnquist, argued that gerrymandering was a political question that the Court should avoid. She argued that no judicially manageable standards exist to litigate gerrymandering cases, and that even if such standards do exist, gerrymandering, in most cases, is a "self-limiting enterprise."[46]

IV. JUSTICIABILITY, BUT FEW STANDARDS

Justiciability is an evolving concept. The arguments raised in *Bandemer* against the justiciability of egregious political gerrymandering harkened back to those voices raised in opposition to the Supreme Court's decision in *Baker v. Carr*.[47] In *Baker*, the

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42. *Id.* at 2815.

43. *Id.* at 2826 (Powell, J., concurring).

44. *Id.* at 2825-38 (Powell, J., concurring). Of particular interest is Justice Powell's statement that "the merits of a gerrymandering claim must be determined by reference to the configurations of the districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of redistricting." *Id.* at 2827.

45. *Id.* at 2815.

46. *Id.* at 2820 (O'Connor, J., concurring).

47. 369 U.S. 186 (1962).

Court observed that "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry . . . ."[48] The history of the United States "has seen a continuing expansion of the scope of the right of suffrage."[49] The political system and the Court have, for the most part, accommodated this expansion. Justiciability, like suffrage itself, is an evolving concept as reflected in the history of the judicial review of claims of diluted voting rights. In concluding that "[c]ourts ought not to enter [the] political thicket" of redistricting in *Colegrove v. Green*,[50] the Court suggested that the "remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[51] Recourse to the legislatures was futile, however, since the condition of inequality complained of benefited the very officials asked to change it.

Increasingly malapportioned legislative and congressional districts, together with legislative intransigence, provided a different remedy in the 1960's. In *Baker*, the Supreme Court insisted on "the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging."[52] Rejecting arguments of judicial incapacity, the Court found that there were judicially manageable standards by which an allegedly unconstitutional redistricting could be identified and remedied: "Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."[53] The *Baker* Court concluded that the federal district courts are fully equipped to resolve redistricting cases in a manageable and thoughtful manner, consistent with the facts presented by each case. In *Baker*, the question of relief was left to

48. *Id.* at 210-11.

49. Reynolds v. Sims, 377 U.S. 533, 555 (1964). As the Court suggested in *Reynolds*, the fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth amendments to the Federal Constitution, the civil rights legislation of 1957, 1960, and 1964 (as subsequently amended), and the Court's consistent line of decisions on voting rights all involved expansion of the right of suffrage. 377 U.S. at 554-56 & n.28.

50. 328 U.S. 549, 556 (1946).

51. *Id.*

52. *Baker*, 369 U.S. at 217.

53. *Id.* at 226 (emphasis in original).

the district court, because the Court had "no cause . . . to doubt the District Court will be able to fashion relief if violations of constitutional rights are found . . . ."[54]

There is no reason to believe that the district courts—or state courts for that matter—are any less equipped in gerrymandering cases than in other redistricting cases to draw and implement legislative or congressional plans applying objective criteria. As Justice Douglas noted in his concurrence in *Baker*, "The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity."[55]

The *Bandemer* Court applied the same analysis to the facts that were presented. The Court stated that it was "not persuaded that there are no judicially . . . manageable standards by which political gerrymander cases are to be decided."[56] The Court noted that it was not in *Baker* but in subsequent cases that the Court formulated the one person, one vote rule, and commented:

> The mere fact . . . that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented here are non-justiciable. The one person, one vote principle had not yet been developed when *Baker* was decided. At that time, the Court did not rely on the potential for such a rule in finding justiciability. Instead . . . the Court contemplated simply that legislative line-drawing in the districting context would be susceptible of adjudication under the applicable constitutional criteria.[57]

Bandemer thus leaves unanswered a perplexing question: What are the applicable criteria for measuring and adjudicating a political gerrymander?

V. STANDARDS: A TOTALITY OF THE CIRCUMSTANCES APPROACH

In redistricting litigation, justiciability is a function of manageability. While the *Bandemer* Court expressed supreme confidence in the ability of federal district courts to determine manageable standards for gerrymandering cases, the Court gave little guidance to the lower courts on where to look for such standards. The one thing that the decision makes clear is that the Supreme Court will not accept Justice Stewart's classic definition of obscen-

54. *Id.* at 198. *See also* Reynolds v. Sims, 377 U.S. at 556.
55. *Baker*, 369 U.S. at 250 (Douglas, J., concurring).
56. 106 S. Ct. at 2805.
57. *Id.*

ity—"I know it when I see it"[58]—as the determinative standard in judging the constitutionality of a gerrymander.

A major source of assistance to the courts in gerrymandering litigation after *Bandemer* can be found in the literature of political and social scientists. The role of these individuals, in fact, will probably expand in gerrymandering litigation well beyond that in other districting litigation, including Voting Rights Act litigation. One leading political scientist, Bernard Grofman, recently suggested that for perhaps the first time, political scientists are leading the law, rather than the other way around.[59] While that may not yet be true, it is clear that in the next major gerrymandering litigation—most likely to be *Badham v. Eu*—expert political science testimony will play a critical role. Writing before the *Bandemer* decision was announced, Grofman correctly identified the flaw in the preparation of the case that resulted in many key questions remaining unanswered by the opinion:

> Because *Bandemer* fails to provide definitive legal standards for defining and measuring gerrymandering, if political gerrymandering is held justiciable by the Supreme Court, then *Badham* will probably be the next of many cases to be heard and, unlike *Bandemer*, it is likely to be a case in which political science testimony will play a critical role—and one which I believe will be helpful in clarifying both the factual and the methodological issues with which federal district courts must cope if intelligent judgments about allegations of political gerrymandering are to be reached.[60]

The political science literature has already devoted substantial attention to various measures to identify gerrymanders and litigate claims of discriminatory districting. Two different, but complementary approaches to this problem have arisen in the literature, and are worthy of particular attention. One approach uses some objective measure to weigh the impact of a plan before an election is conducted. That approach is the subject of the next section of this article.[61] The second approach, while theoretically applicable before an election, often relies, at least in part, on election results for its analysis. This second approach is addressed in this section.

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58. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

59. Grofman, *Gerrymandering: Political Science Goes to Court*, 18 POL. SCI. 538 (1985).

60. *Id.* at 543.

61. *See infra* Section VI.

In his classic work on the law of reapportionment, Robert Dixon suggested: "Gerrymandering is discriminatory districting. It equally covers squiggles, multi-member districting, or simple non-action, when the result is racial or political malrepresentation."[62] In other words, gerrymandering exists when votes are not accorded the same weight on the basis of party affiliation. To determine the relative weight of the votes of a political group, the cumulative effect of a number of factors provides a proper framework for analysis on a case-by-case basis.

Several commentators have identified a variety of factors that may be used to identify a discriminatory gerrymander. The most comprehensive treatment of this subject yet conducted is by Professor Grofman in his article on objective criteria for identifying gerrymanders.[63] He identifies twelve prima facie indicators of gerrymandering along with three "flags" that "suggest the possibility of intentional partisan gerrymandering."[64]

In its brief amicus curiae in *Bandemer*, the Republican National Committee ("RNC") suggested that this analysis was analogous to the "totality of the circumstances" test of claims of racial vote dilution under amended section 2 of the Voting Rights Act of 1965.[65] If such a test can be effectively used by plaintiffs, courts,

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62. R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 460 (1968).

63. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77 (1985).

64. *Id.* at 117-18.

65. Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973(b) (1982). These factors were derived from the analytical framework of White v. Regester, 412 U.S. 755 (1973), as expanded in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). In approving the 1982 amendments to the Voting Rights Act, the Senate Judiciary Committee explicitly adopted the "result standard" articulated in *White*, concluding that it was unnecessary for purposes of section 2 of the Act to make a finding or require "proof as to the motivation or purpose behind the practice or structure in question." SENATE COMM. ON THE JUDICIARY, REPORT ON THE VOTING RIGHTS ACT EXTENSION, S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177.

The resulting statutory language provides a possible framework for an analysis of the "effects" portion of the *Bandemer* standard, or a complete analysis under the first amendment, where proof of intent would be unnecessary:

> A violation . . . is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other

and the Department of Justice in statutory and constitutional Voting Rights Act cases, can it not be similarly adapted to the partisan gerrymandering context? In fact, this approach is the logical outgrowth of the concurring opinion of Justice Stevens in *Karcher v. Daggett*.[66] In *Karcher*, Justice Stevens, together with Justice Powell, indicated a willingness to allow the adjudication of gerrymandering claims. Stevens suggested an approach to the proof of a prima facie case which was related to the Voting Rights Act approach.

The RNC's brief identified seven nonexclusive indicia of gerrymandering which, along with intent and other factors, could be included in a "totality" test. The following is a brief comparison of those factors with the *Bandemer* opinion. Each of these factors was based on one or more of Professor Grofman's twelve indicators of gerrymandering or three warning flags of possible intentional partisan gerrymandering.

A. Unnecessarily Disregarding Compactness Standards in Drawing District Lines

Meaningful measures of compactness do exist. Depending on the configuration of the district, compactness can be measured by summing the length of aggregate boundaries,[67] computing the absolute value of the difference between the length and width of the district,[68] calculating the ratio of the area of a district to the area of the smallest possible circumscribing circle,[69] or by a combination of these or other methods.[70] In *Karcher*, Justice Stevens noted that

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members of the electorate to participate in the political process and elect representatives of their choice.

Voting Rights Act Amendments of 1982, Subchapter IA, § 1973(b). Congress suggested a variety of factors which, when viewed in totality, would be indicative of vote dilution. S. REP. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 177. *See also* Hunter, *Racial Gerrymandering and the Voting Rights Act in North Carolina*, 9 CAMPBELL L. REV. 255, 273-77 (1987).

66. 462 U.S. 725 (1983) (Stevens, J., concurring). *See, e.g.*, Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J.L. & POL. 357, 374 (1984).

67. Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation,"* 14 HARV. J. ON LEGIS. 825 (1977).

68. IOWA CODE § 42.4(b) (1983).

69. Reock, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDWEST J. OF POL. SCI. 70 (1971).

70. Many state constitutions contain compactness standards, at least with respect to legislative redistricting, and the courts of several of these states have

Professor Dixon warns "against *defining* gerrymandering in terms of odd shapes."[71] But, he said, "dramatic departures from compactness are a signal that something may be amiss."[72]

The *Bandemer* plurality gave relatively little attention to the configurations of the districts in question. The Court simply noted that it did not reject "the District Court's findings as to . . . the contours of particular districts."[73] Rather, the Court determined that "none of the facts found by the District Court were relevant to the question of discriminatory effects."[74] Consequently, the Court concluded that "the valid or invalid configuration of the districts was an issue we did not need to consider."[75]

However, these statements by the plurality do not make the shape of the districts irrelevant to the issue of discriminatory effect. If a plaintiff were to produce evidence that the shape of the district limited a candidate's access to parts of the district or had some similar effect on representation of part of the district, the plurality's objections might be overcome. At the very least, the plurality's language recognizes evidence of invalid configuration as relevant "to whether the districting plan met legitimate state interests."[76]

B. Unnecessarily Disregarding City, Town, County and Geographic Boundaries in Drawing District Lines

As the Supreme Court indicated in *Reynolds v. Sims*, and Justice Stevens noted again in *Karcher*, "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to par-

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reviewed districting plans on this basis. *See* Schrage v. State Bd. of Elections, 88 Ill.2d 87, 430 N.E.2d 483 (1981); *In re* Legislative Districting of General Assembly, 193 N.W.2d 784, 791 (Iowa 1972); Acker v. Love, 178 Colo. 175, 178, 496 P.2d 75, 76 (1972); Preisler v. Doherty, 365 Mo. 460, 284 S.W.2d 427 (1955); *In re* Livingston, 96 Misc. 341, 160 N.Y.S. 462 (N.Y. Sup. Ct. 1916); *In re* Sherill, 188 N.Y. 185, 81 N.E. 124 (1907); State *ex rel.* Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40 (1912).

71. 462 U.S. at 755 n.15 (Stevens, J., concurring) (emphasis added).

72. *Id.* at 758.

73. 106 S. Ct. at 2815 n.20.

74. *Id.*

75. *Id.* at 2815.

76. *Id.* Presumably, evidence relating to political subdivision splits or disregard of communities of interest, or similar "configurational criteria" (see following discussion) would be equally relevant in determining whether a state interest proffered as a justification is legitimate.

tisan gerrymandering."[77] The *Bandemer* plurality treated the evidence of political subdivision splits in the same manner as lack of compactness, concluding that in this case, it was relevant only to the proof of intent.

Again, it is submitted that were a plaintiff to introduce evidence that the division of political subdivisions has a truly deleterious effect, this hurdle could be overcome. After all, city and county boundaries were recognized by the Court in *Brown v. Thomson*,[78] as playing an important role in state government administration. Presumably, an adverse effect on such administration would satisfy the Court's demand for proof of effect.

C. Unnecessarily Disregarding Communities of Interest in Drawing District Lines

While less explicit than local government jurisdictional boundaries, "historical" boundaries or those dividing "communities of interest" are often discernible, and in some states, have very explicit, determinable boundaries that have been used by state and federal courts in the redistricting process.[79] The disregard of communities of interest would seem to fall into the same category as the two previous criteria in light of the *Bandemer* decision. It may, therefore, be necessary to identify a discriminatory or dilutive effect of such districts. There may be, of course, a relationship to a lack of compactness and disruption of communities of interest. Thus, evidence concerning the impact on representation may be relevant here as well. Furthermore, where community of interest can be defined in terms of orientation to a particular political subdivision, proof of impact on the particular subdivision may overlap with this criteria.

D. Packing, Fragmenting, or Submerging the Voting Strength of Political Parties

Packing the voting strength of a party into particular districts insures that much of its voting strength is wasted in districts that are won by lopsided margins. Conversely, fragmenting or submerging the voting strength of a party among several districts helps

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77. *Karcher*, 462 U.S. at 758 (quoting Reynolds v. Sims, 377 U.S. at 578-79).

78. 462 U.S. 835 (1983).

79. California: Legislature v. Reinecke, 10 Cal. 3d 396, 110 Cal. Rptr. 718, 516 P.2d 6 (1973); Colorado: Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982); New York: Flateau v. Anderson, 537 F. Supp. 257 (S.D.N.Y. 1982).

turn that party into a near certain minority. The *Bandemer* opinion recognized "[t]hese are familiar techniques of political gerrymandering,"[80] but concluded, that while this produced an adverse effect in the 1982 elections, additional proof was necessary to sustain the plaintiffs' claim.[81]

E. Differential Treatment of the Majority Party's and the Minority Party's Incumbents

A redistricting plan can impact on the reelection likelihood of a redistricting party's representatives by altering district boundaries to put two or more representatives from the same party into the same district, or by reducing the reelection likelihood of a party's representatives by cutting up old districts, or otherwise altering district boundaries so as to make it impossible for those representatives to continue to represent the bulk of their former constituents.[82] The differential treatment of incumbents may be one of the most visible indicia of a gerrymander, especially where two or more incumbents are combined in the same district. No one could deny the adverse impact of such an action, but the issue was not presented to the Court in *Bandemer*.

F. Creating Partisan Advantage in Open Seats

A political majority, especially where the number of seats increases in a reapportionment, may take advantage of open seats by creating "safe" seats for candidates of their own party. Once the seat is captured, the benefits of incumbency are also gained. The first post-redistricting congressional election sets in place almost all the incumbents, and thereafter defeat of those incumbents who run for reelection is increasingly difficult.[83] A consistent pattern of using new or open seats to favor the majority party's candidates is a valid indicium of partisan gerrymandering. Like the impact on incumbents, this factor would be a significant and quantifiable ef-

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80. 106 S. Ct. at 2802 n.6.

81. *Id.* at 2811.

82. Grofman, *supra* note 63, at 117, 119 (1985).

83. *See, e.g.*, Erickson, *The Advantage of Incumbency in Congressional Elections*, 3 POLITY 395 (1971); Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 POLITY 295 (1974); M. FIORINA, CONGRESS: THE KEYSTONE OF THE WASHINGTON ESTABLISHMENT 1 (1977); Ferejohn, *On the Decline of Competition on Congressional Elections*, 71 AMER. POL. SCI. REV. 166 (1977); B. CAIN, ASSESSING THE PARTISAN EFFECTS OF REDISTRICTING 1 (1983).

fect in support of a gerrymandering claim. However, the Supreme Court in *Bandemer* found no such evidence before it, and it remains for the next case to determine the relative weight of such a factor.

G. *Abusing the Process*

Finally, just as a truncated or irregular process has been found to require explanation in other vote dilution cases, so too is a procedural standard useful in partisan gerrymandering cases. The *Bandemer* Court considered just such evidence of a truncated process in which Democrats were excluded from any substantive involvement.[84] The Court agreed that this evidence was relevant, but again, could go only to the question of intent. It may be that this is the limit of the use of such evidence in a case rooted solely in the equal protection clause. If however, a claim is also made under state due process provisions, evidence of an abusive process could have more relevance. Furthermore, such evidence might have relevance to a claim brought under the guarantee clause.[85]

H. *The* Bandemer *Court's View of the Totality Approach*

In response to arguments by Justice Powell, the *Bandemer* plurality commented that it "seems inappropriate, however, to view these separate components of an equal protection analysis as 'factors' to be considered together without regard for their separate functions or meaning."[86] It might be argued that such a view leaves little room for the "totality" argument outlined above, but when viewed in context, there remains room for further development of the concept.

To begin with, the totality argument was never made to the *Bandemer* Court by the litigants, so it cannot be said to have rejected what it did not review. The Court simply felt that "an undifferentiated consideration of the various factors [cited by Justice Powell] confuses the import of each factor and disguises the essential conclusion of Justice Powell's opinion: that disproportionate election results alone are a sufficient effect to support a finding of a constitutional violation."[87] The Court did not reject the various to-

84. 106 S. Ct. at 2800-01.
85. *See infra* Section VII(C).
86. 106 S. Ct. at 2815.
87. *Id.*

tality factors, it simply contended that each factor standing by itself was inadequately related to a discriminatory effect. The Court did not say that the factors could *never* be relevant to discriminatory effect. The Court simply concluded that the *Bandemer* plaintiffs failed to sufficiently tie these factors to an actual adverse effect.[88] Therefore, the most they could be used for was to prove intent, which the Court concluded was an easy task anyway. Thus, the Court determined that the only remaining factor was disproportionality, which by itself was insufficient to demonstrate effect.[89] The Court did suggest, however that such factors could also be relevant to a determination of whether a state interest offered as a justification was legitimate.[90] The clear message of this result is that future plaintiffs must tie these factors to specific effects, a more difficult but necessary task. Furthermore, these factors may have relevance in the context of other constitutional claims (such as the first amendment or due process).

Finally, the opinion made clear that in the case before it, no one factor was sufficient to demonstrate discriminatory effect. "Although there are judicially recognizable standards for identifying boundary manipulation, some standards may be flawed if applied in isolation."[91] The result in *Bandemer* demonstrates the perils of taking too narrow an approach in gerrymandering litigation.

VI. Is an Election Necessary to Prove a Claim?

One of the persistent misconceptions about the *Bandemer* opinion is that more than one election must be conducted under a challenged plan in order to wage a successful gerrymander attack.[92] While the Court did determine that reliance on "a single election to prove unconstitutional discrimination is unsatisfactory,"[93] that determination seemed to be more a factor of the evidence before the Court than a hard and fast rule.

In simplest terms, the plaintiffs in Indiana offered little more than evidence that, statewide, Democrats received 51.9 percent of

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88. *Id.* at 2815 n.20.

89. *Id.* at 2815.

90. *Id.*

91. Baker, *Judicial Determination of Political Gerrymandering: A "Totality of Circumstances" Approach*, 3 J.L. & Pol. 1, 19 (1986).

92. This and other misstatements of the case may have originated in early wire service reports on the decision on the morning of June 30, 1986. One such story reported that the Supreme Court had, in fact, endorsed gerrymandering.

93. 106 S. Ct. 2812.

the votes for state house, but received only forty-three of one-hundred house seats.[94] The district court also found that Democrats received 46.6 percent of the vote in multimember districts in Marion and Allen counties, but won only three of the twenty-one available seats.[95] The Supreme Court's plurality concluded that this seats-votes disparity, without more, was not sufficient to constitute a violation of the equal protection clause.[96]

The meaning of this holding can be found in a "battle of the footnotes" between Justice Powell and Justice White. In his dissent, Justice Powell characterized this result as meaning that "[p]laintiffs apparently can meet the plurality's 'threshold' only after a number of elections have been held under the challenged plan."[97] In his own footnote, Justice White responded that "Justice Powell incorrectly asserts that more than one election must pass before a successful racial or political gerrymandering claim may be brought."[98] Instead, "*[p]rojected* election results based on district boundaries and past voting patterns may certainly support this type of claim, even where *no* election has yet been held under the challenged districting."[99]

Is it possible to determine whether a given redistricting plan is in fact an egregious gerrymander before an actual election? This question was anticipated in 1978 by Backstrom, Robins and Eller in their article concerning the measure of gerrymandering.[100] The authors argue that to be of any practical use a measure of partisan gerrymandering must be made before the next election. The implication is that the use of subsequent legislative election results involves Monday-morning quarterbacking, resulting in justice delayed, and therefore denied.[101]

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94. 603 F. Supp. at 1485.

95. *Id.* at 1489.

96. 106 S. Ct. at 2811-12.

97. *Id.* at 2797 n.10.

98. *Id.* at 2814 n.17 (emphasis in original). The exchange in these two footnotes demonstrates Justice White's attempts to forge a majority for his reasoning, and gives some clue as to why this opinion was released so long after oral argument. The issue was a legal and political hot potato, which was probably tossed back and forth among the Justices for months before it became apparent they would have to settle for a somewhat fragmented opinion.

99. *Id.* (emphasis in original).

100. Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121 (1978). An updated version of this article is being prepared by these authors.

101. *Id.* at 1128-29.

The authors argued that reliance on "post hoc" measures of gerrymandering risks contamination or neutralization of the gerrymander by "ad hominum" factors such as candidate quality and campaign expenditures. Instead, they propose using a base race to determine party strength in each district, and then using that measure, along with some straightforward computations and indexing, to determine whether the majority party is dominant in more districts than their base race strength would suggest. If so, the plan is a partisan gerrymander, unless irremediable under population and other structural standards.[102] The measure proposed by Backstrom and his co-authors can meet the Supreme Court's requirement of discriminatory effect, even though no election need take place under their proposal. Theirs is indeed a measure of *effects*, rather than *results*.

The Backstrom measure has yet to be tested in actual litigation, but the use of a base race as an indicator of political strength has become an increasingly accepted procedure in redistricting litigation. The concept was relied upon by both sides in *Bandemer*. While the district court majority used an aggregate of "all those voters who voted for Democratic Assembly candidates in 1982,"[103] dissenting Judge Pell argued in favor of

> those voters who could be counted on to vote Democratic from election to election . . . [counting] the true believers by averaging the Democratic votes cast in two different elections for those statewide offices for which party-line voting is thought to be the rule and personality and issue-oriented factors are relatively unimportant.[104]

The Supreme Court declined to resolve this dispute on appeal.

If Justice White's footnote is to have any meaning, the Backstrom measure, or something akin to it, may be a possible resource for potential litigants. It should be noted, in addition, that a "totality of the circumstances" analysis may be also useful even before an election has taken place. Professor Grofman maintains that his "twelve elements of districting plans all can be identified in advance of any election, if data on party registration or previous party voting strength is available."[105] The two approaches are therefore consistent, and the approach chosen will depend on the

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102. *Id.* at 1131-39.
103. *Bandemer*, 106 S. Ct. at 2811-12 n.15.
104. *Id.*
105. Grofman, *supra* note 63, at 117 (1985).

data available to potential litigants, and the timing of a challenge to a gerrymander.

VII. ALTERNATIVE CONSTITUTIONAL THEORIES

In this bicentennial year of the Constitution of the United States, it is especially appropriate to remind ourselves that there was a federal constitution long before there was a fourteenth amendment, and that constitutional rights do not begin and end with the equal protection clause. Until the applicability of *Bandemer* to congressional districting is adjudicated and appealed, and until political gerrymandering jurisprudence has been fully developed, plaintiffs should consider alternative legal theories. The following discussion addresses some of those theories, but does not venture an analysis of the various claims that may be rooted in state constitutional law, none of which should be overlooked either.

A. Congressional Challenges Under Article I, Section 2

Since *Baker v. Carr*, challenges to legislative districting have generally been based on the fourteenth amendment's equal protection clause. However, the first post-*Baker* decision by the Supreme Court involving a challenge to a congressional districting was brought under article I, section 2 of the Constitution. In *Wesberry v. Sanders*,[106] the Court held that "the command of Art. I, [section] 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practical one man's vote in a congressional election is to be worth as much as another's."[107]

Until the Supreme Court states otherwise, it is prudent to assume that *Wesberry* continues to govern congressional districting challenges, including those alleging partisan gerrymandering. While the decision involved numerical equality, the language of the opinion is certainly applicable in a partisan context:

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[108]

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106. 376 U.S. 1 (1963).
107. *Id.* at 7-8.
108. *Id.* at 14.

The language of *Wesberry* clearly suggests that it was vote dilution that was the issue, and there is nothing in the Court's opinion that suggests that the decision should be limited only to numerical dilution. After reviewing the original constitutional debates, the Court concluded that, "[o]ne principle was uppermost in the minds of many delegates: that no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."[109] It would seem an easy jump from this language to a prohibition of congressional gerrymandering.

It does a plaintiff little practical good, however, if as was the case in *Bandemer*, the plaintiff succeeds on the justiciability issue, but fails to prove a challenged plan is, in fact, a gerrymander. There may be other constitutional bases for attacking gerrymanders which would allow different, perhaps even easier, standards of proof than the equal protection clause. As long as the jurisprudence in this area is in an evolutionary stage, it would seem prudent for potential litigants to base their challenge on as many constitutional bases as are applicable.

B. The First Amendment

1. Relation to the Fourteenth Amendment

Justice O'Connor's dissent suggests that the fourteenth amendment offers no protection to the rights of political groups:

> [T]he individual's right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength. Treating the vote dilution claims of political groups as cognizable would effectively collapse the "fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community."[110]

While the *Bandemer* case did not raise the issue, perhaps an answer can be found to Justice O'Connor's objection by considering political gerrymandering in light of first amendment jurisprudence.

Egregious political gerrymandering can be fairly seen as infringing directly on the right of political association without the mediation of equal protection. A first amendment analysis provides

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109. *Id.* at 10.

110. *Bandemer*, 106 S. Ct. at 2820 (quoting City of Mobile v. Bolden, 446 U.S. 55, 83 (1979)).

an effective means of balancing the constitutional interests of political parties and their members, in light of the legitimate interests of the state. Such an analysis also may eliminate the need for proof of legislative intent, and the resulting inquiry into legislator's motives. As early as 1968, Robert Dixon suggested the relationship of the first amendment to redistricting cases:

> [A]pportionment and districting arrangements have a more than casual impact on effective competition in the marketplace of political ideas. For without a fair opportunity to elect representatives, freedom of political association yields no policy fruits. Thus, First Amendment freedoms of speech and of association as well as Fourteenth Amendment interests may be thwarted by discriminatory districting systems.[111]

2. Judicial Recognition of the Special Role of Political Parties

The first amendment is especially appropriate as the basis for a claim in gerrymandering litigation brought by a political party. There is "no America without democracy, no democracy without politics, and no politics without parties . . . ."[112] Political parties and the candidate choices they offer voters, provide the single most important mechanism for incorporating voter preferences into decisions on public policy. As a result, the Supreme Court has recognized that political parties and their adherents enjoy a constitutionally protected right of free political association.[113] This first amendment freedom to gather for the purpose of advancing shared beliefs is protected from infringement by any state by the fourteenth amendment.[114] The constitutional protection accorded to political speech is at the core of the first amendment political activity. It "is more than self-expression; it is the essence of self-government."[115] Just as "[a]ny interference with the freedom of a

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111. R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 499 (1968).

112. C. ROSSITER, PARTIES AND POLITICS IN AMERICA 1 (1960).

113. Cousins v. Wigoda, 419 U.S. 477, 487 (1975). *See* Scalia, *The Legal Framework for Reform*, 4 COMMONSENSE 40, 44-45 (1981); Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 SO. CAL. L. REV. 213 (1984).

114. Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 121 (1981).

115. Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18 (1965).

party is simultaneously an interference with the freedom of its adherents,"[116] any interference with the freedom of party adherents on the basis of the party affiliation or electoral tendencies interferes with the freedom of the party itself. That is why partisan gerrymandering is "a major concern . . . only in a political system dominated by party politics."[117]

The Supreme Court has long recognized that the right to elect legislators freely and unimpaired is a bedrock of our political system.[118] Competition in the marketplace of ideas is the center of the electoral process and of the first amendment freedoms.[119] Once these freedoms are implicated, the state must demonstrate a compelling interest if the restriction is to survive judicial scrutiny.[120] In *Anderson v. Celebrezze*,[121] the Supreme Court rejected a judicial "litmus-paper test" to determine valid and invalid restrictions. Rather, the Court recognized the need to identify and weigh the legitimacy and strength of all relevant interests and to consider the necessity of burdening the plaintiff's first amendment rights.[122] A court must then determine whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.[123]

3. *Identifying the Protected Class*

In *City of Mobile v. Bolden*,[124] Justice Marshall emphasized that any political minority seeking to invoke the protection of the fourteenth amendment must be sufficiently cognizable to be afforded relief.[125] Such a standard would likely have relevance in a first amendment context. Justice Stevens, in his concurring opinion in *Karcher v. Daggett*,[126] delineated the showing necessary to satisfy such a standard. In demonstrating that there are members of an identifiable political group whose voting strength has been diluted, "plaintiffs must show that they belong to a politically sali-

116. Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).
117. Backstrom, Robins & Eller, *supra* note 100, at 1122 n.9 (1978).
118. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
119. Williams v. Rhodes, 393 U.S. 23, 32 (1968).
120. NAACP v. Button, 371 U.S. 415, 438 (1963).
121. 460 U.S. 780, 789 (1983).
122. *Id.*
123. Lubin v. Parish, 415 U.S. 709, 716 (1974).
124. 446 U.S. 55 (1980).
125. *Id.* at 122 (Marshall, J., dissenting).
126. 462 U.S. 725 (1983).

ent class . . . one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing districts."[127]

The most readily identifiable voting group is one based on political affiliation and voting patterns.[128] The courts readily recognize the identifiability of racial voting groups, even though the basis for the identification—the United States Census—is updated only once per decade. Voting patterns, on the other hand, are identifiable at least every two years. Voters who tend to vote for a party's candidates are reasonably identifiable and quantifiable.[129] Politicians and political scientists alike use concepts like "base race" to determine the partisan vote in a given election,[130] and the Supreme Court has recognized that political groups are cognizable.[131]

The *Bandemer* plurality did not squarely address this issue. While the Court refused to accept the argument that "there are no judicially discernible and manageable standards by which political gerrymanders are to be decided,"[132] the plurality did not suggest an appropriate means by which to identify a political group. However, implicit in the Court's recognition that "the question is whether a *particular group* has been unconstitutionally denied its chance to effectively influence the political process,"[133] must be an understanding that such groups are readily cognizable.[134]

Legislators take political data into account when designing districts. This data, including voter registration, election results and demographic information enables the legislators to determine with reasonable accuracy the likely electoral outcomes in a new redesigned district. If political groups are cognizable for the purposes of redistricting, they certainly are cognizable for the purpose of re-

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127. *Id.* at 754 (Stevens, J., concurring).

128. *See* Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 IOWA L. REV. 1, 38 (1973) (cognizable group with coherent and identifiable legislative policy); Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. CHI. L. REV. 398, 407-08 (1974) (clearly identifiable and stable group).

129. *See, e.g.*, Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 U.C.L.A. L. REV. 185, 204-05 (1985).

130. *See, e.g.*, Backstrom, Robins & Eller, *supra* note 100.

131. Gaffney v. Cummings, 412 U.S. 735 (1973).

132. *Bandemer*, 106 S. Ct. at 2797.

133. *Id.* at 2810 (emphasis added).

134. *Id.* at 2810 n.12.

lief from overreaching redistricting.[135]

4. Impairment of Free Association

Partisan gerrymandering seriously restricts first amendment rights by placing burdens on the freedoms of expression and association. An unrestrained legislature can manipulate district lines to such a degree as to provide one party a virtual monopoly in the marketplace of ideas. In *Williams v. Rhodes*,[136] the Court held that Ohio's ballot access laws were repugnant to the first amendment because the electoral process gave a decided advantage to some political parties over others. The state laws burdened "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of their political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[137] The complete, partisan monopoly in Ohio offended the first amendment by placing unequal burdens on *both* the right to vote and the right to associate.

Partisan gerrymandering is even more starkly offensive to the first amendment because district lines are drawn specifically to negate the effect of the votes of members of certain parties. Although there is no right to the *most* effective speech possible,[138] the right to cast effective votes ranks "among our most precious freedoms."[139] When voters are identified on the basis of party affiliation and are relegated to a district designed to eliminate their ability to affect the outcome of an election, the denial is not one of the "most effective" speech, but an elimination or dilution of the right to participate in the electoral process.

In *Anderson v. Celebrezze*,[140] the Court found unconstitutional Ohio's early campaign filing deadline because it threatened "to reduce diversity and competition in the marketplace of

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135. Writing for the plurality, Justice White recognized this explicitly:
> [We] think it most likely that whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that either candidate might win.

Id. at 2808.

136. 393 U.S. 23 (1968).

137. *Id.* at 30.

138. San Antonio School District v. Rodriguez, 411 U.S. 1, 36 (1972).

139. *Williams*, 393 U.S. at 30.

140. 460 U.S. 780 (1983).

ideas."[141] The deadline discriminated against voters with a particular political orientation and thereby contravened the associational freedoms of the first amendment. As the Court noted, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference . . . ."[142] However, it is precisely for the purpose of imposing such restrictions on political parties that gerrymandered districts are drawn.

Gerrymandering infringes on first amendment associational rights because it dilutes the impact of voters with a particular partisan association or view. It is "a fundamental tenet of American democracy that a representative government be responsive to the changing will of the electorate."[143] Drawing districts that are largely insensitive to electoral changes because they lock in "a particular partisan imbalance . . . through the use of dispersal and concentration techniques of gerrymandering,"[144] thwarts the very purpose of political association. Partisan gerrymanders "are designed to limit the effectiveness of organized political activity, and for that reason strike at the rights of free speech and free association guaranteed by the First Amendment."[145] By impairing the ability of the voters to change their representatives on election day, the gerrymander "limits use of political processes that the First Amendment is intended to protect."[146]

5. *Competition in the Political Process*

Partisan gerrymandering, because it destroys the competitive nature of our political process, eliminates any serious discussion of political issues in many congressional and legislative districts across our country. Individual voters, simply because of their party affiliation are assigned to electoral districts where their votes are, by design, rendered without effect. Naturally, the activity of individuals in the political process is severely discouraged by grossly gerrymandered districts, which make the advocacy of particular candidates, or parties, a meaningless civic exercise. Rotten bor-

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141. *Id.* at 1572-73.

142. *Id.* at 1572 (footnote omitted).

143. Grofman, *supra* note 63, at 112.

144. *Id.*

145. Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket*, 1 J.L. & POL. 357, 373 (1984).

146. *Id.*

oughs, the diseased fruit of the partisan gerrymander,[147] simply demand no discussion of issues by their representatives. Many gerrymandered districts go uncontested or are not seriously contested, so speech is not just diluted, it is eliminated.[148] Since the electoral process is, through clever computer-assisted cartography, foreordained, the marketplace of ideas is foreclosed to those whose party did not control the redistricting process.

The House of Representatives, the institution of our national government designed to be most responsive to the changing will of the electorate, has been substantially isolated from partisan change through increasingly sophisticated gerrymandering. A transient political majority now can effectively limit the ability of the electorate to change its representatives in any legislative body without extraordinary majorities. This insulation of legislators from the will of the electorate violates fundamental notions of our democracy: "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people."[149]

A Congress, or legislature, elected in districts cleverly gerrymandered, is neither immediately dependent upon nor in intimate sympathy with the voters, for the ability of voters to change control of the legislatures is severely attenuated by gerrymandering. Recent electoral patterns show that the United States Senate has a more volatile membership than the House of Representatives.[150] The House of Representatives is now, in the opinion of many observers, increasingly immutable to the changes in the political views of the people. A substantial reason for this phenomenon is gross partisan gerrymandering.

6. *No Intent Requirement*

The Supreme Court and the other federal courts have been understandably reluctant to undertake a subjective analysis of legislators' motives in redistricting litigation. Even Justice Stevens,

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147. Brown v. Thomson, 462 U.S. 835, 856 (1983) (Brennan, J., dissenting).

148. *See* Baker, *Representation and Apportionment*, in III ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 1118, 1128 (J. Greene ed. 1984).

149. THE FEDERALIST No. 51, at 329 (J. Madison or A. Hamilton) (Henry Cabot Lodge ed. 1892).

150. Price, *Bringing Back the Parties*, CONG. Q. PRESS 59 (1984).

who has led the charge of the Court against unconstitutional gerrymanders, admits:

> [I]t is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting. In the long run, constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment.[151]

In the *Bandemer* plurality, Justice White concluded that "As 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."[152] He noted, however, that even though "discriminatory intent may not be difficult to prove in this context," it does not mean "that it need not be proved at all to succeed on such a claim."[153]

Such proof of intent might be obtained by reference to the series of constitutional intent-effect cases that prompted the 1982 amendments to the Voting Rights Act. For example, the Supreme Court noted in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[154] that it is the rare case where direct evidence of discriminatory purpose is available.[155] The Court then outlined a number of factors that could be used to develop circumstantial evidence of intent:

> The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.[156] In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.[157]

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151. Karcher v. Daggett, 462 U.S. 725, 753-54 (1983) (Stevens, J., concurring).

152. *Bandemer*, 106 S. Ct. at 2809.

153. *Id.*

154. 429 U.S. 252 (1977).

155. *Id.* at 266.

156. Consider the letter of New Jersey Speaker Jackman in *Karcher* or the testimony of Indiana Speaker Dailey or Senator Bosma in *Bandemer*, 106 S. Ct. at 2802.

157. *Arlington Heights*, 429 U.S. at 267-68 (citations omitted).

Surely once legislators become aware that their statements concerning the political effect of a plan may be used against the plan, those legislators will become curiously silent on the issue. Furthermore, even if a valid claim of privilege does not protect legislators from inquiry into their motives at trial, many judges may limit such inquiry for policy reasons or out of deference to the legislative process. Inquiry into legislative motive is one of the reasons the gerrymandering issue has been labeled a "thicket." A first amendment analysis, however, limits or avoids the need for inquiry into, or proof of, intent.

Where, as in an egregious gerrymander, an enactment affects fundamental rights of speech and association, it is subject to the "closest scrutiny."[158] Whenever limitations are placed upon first amendment rights, particularly those involving speech and associational rights, the state may prevail only upon a convincing demonstration of a compelling governmental interest.[159] Furthermore, the burden is on the government to show the existence of such an interest.[160] In the absence of a substantial and compelling state interest, the impairment of those first amendment rights should be struck down. Intent, in such a context, is irrelevant.

C. *The Guarantee Clause*

Article IV, section 4 of the Constitution of the United States, the guarantee clause, provides that the United States shall guarantee to every state in the union a republican form of government. Not since *Baker v. Carr* has a reported redistricting case involved the assertion of rights under the clause. It has been suggested, however, that the clause may have a limited contemporary role, authorizing judicial action where individual rights authorized in other provisions of the constitution are threatened by structural defects in state government.[161]

If a legislature becomes immutable to changing voting patterns—and therefore no longer republican—that legislature has become structurally defective, while concurrently diluting the rights

158. Buckley v. Valeo, 424 U.S. 1, 25 (1975); *accord*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Federal Election Comm'n v. Nat'l Conservative Political Action Comm., 105 S. Ct. 1459 (1985).

159. NAACP v. Button, 371 U.S. 415, 438-39 (1963).

160. Elrod v. Burns, 427 U.S. 347, 362 (1976).

161. Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 682 (1981).

of individuals and the candidates they support.[162] It may be easier to identify such a structural defect in challenged legislative districting, but congressional districting plans, as creatures of state legislation, may also be subject to such an analysis. At the very least, a gerrymandered congressional plan creates and results in a defective electoral structure for congressional districts within the state—a structure which is implemented and enforced by the state government.

It might be argued that the Supreme Court disposed of claims under the guarantee clause as nonjusticiable in *Baker v. Carr*.[163] However, the Supreme Court qualified that approach in both *Baker* and *Reynolds v. Sims*,[164] noting that *Baker* only held that "*some* questions raised under the Guarantee Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards."[165] The *Baker* opinion detailed the history of the Court's guarantee clause jurisprudence, with particular emphasis on Justice Taney's opinion in *Luther* v. *Borden*.[166] This case arose out of an armed conflict in 1841 and 1842 between two rival political groups in Rhode Island, both of which claimed to be the lawful government of the state. In weighing whether the acts of the defendant government were lawful, the Supreme Court agreed that the court decisions of the state demanded deference unless there was a federal constitutional ground for overturning them.[167] No federal constitutional provision had been invoked by the plaintiffs except the guarantee clause, and the Court concluded that, by itself, the clause failed to yield any standards by which a court could make a choice between competing governments. Thus, the *Baker* Court concluded that

> the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a state's lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the

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162. *See generally* Rosenblum, *Justiciability and Justice: Elements of Restraint and Indifference*, 15 CATH. U.L. REV. 141 (1966); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

163. 369 U.S. 186 (1962).

164. 377 U.S. 533 (1964).

165. *Id.* at 582 (emphasis added).

166. 48 U.S. (7 How.) 1 (1849).

167. 48 U.S. at 40.

source of a constitutional standard for invalidating state action.[168]

This suggests that the clause may have continued vitality in cases where plaintiffs allege violations not only of the guarantee clause, but also independent constitutional violations of article I, section 2 and the first and fourteenth amendments. Plaintiffs would also need to allege that manageable standards for review of unconstitutional gerrymanders exist. Plaintiffs in a gerrymandering case would not be demanding, as did the *Luther* plaintiffs, that the court choose between competing governments. Rather, the objection would be to an unconstitutional statute of a state legislature, and to its implementation by the state at the expense of republican government.

Justice Brennan's majority opinion in *Baker* noted that the *Luther* court "plainly implied that the political question barrier was no absolute."[169] While he did maintain that "it does not necessarily follow that if Congress did not act, the Court would,"[170] his projection of what might occur in a proper case was cast in very qualified terms:

> For while the judiciary might be able to decide the limits of the meaning of "republican form," and thus the factor of lack of criteria might fall away, there would remain other *possible* barriers to decision because of primary commitment to another branch, *which would have to be considered in the particular fact setting presented . . . . [L]ack of criteria does not obliterate the Guaranty's extreme limits.*[171]

Because of the role of Congress in the federal government, it might be argued that the issue of "primary commitment to another branch" insulates congressional districting from such a constitutional attack. This argument is belied by the Court's statement in *Reynolds* that the mere recognition and acceptance by Congress of a state's redistricting does not mean that Congress assumes "to pass on all constitutional questions relating to the character of state governmental organization . . . . Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights."[172] The

168. *Baker*, 369 U.S. at 223.
169. *Id.* at 222 n.48.
170. *Id.*
171. 377 U.S. at 582 (emphasis added).
172. For example, in White v. Hart, 80 U.S. (13 Wall.) 646 (1871), the Court found the contract clause violated by a provision of Georgia's reconstruction con-

clear implication of this language is that even in the exercise of its guarantee powers Congress is not immune to all judicial scrutiny.[173] This seems to have been the court's assumption in a variety of cases which challenged statutes as being repugnant to the standards of republican government.[174] While the Court generally upheld these statutes, there is no doubt that the guarantee clause imposed some substantive limitations on state action, and that the Court is capable of identifying and applying these standards.

The guarantee clause has additional relevance insofar as it suggests which interests may be worthy of heightened equal protection scrutiny. The right to vote, for example, can be understood as a fundamental interest under the equal protection clause only by reference to the guarantee clause.[175] There can be no doubt that if a state statute made legislative or congressional membership hereditary, or granted life tenure to legislators or congressmen, the foundations of republican government would be threatened. It was this very threat that the drafters of the Constitution sought to disarm in the adoption of the guarantee clause.[176] Surely legislation that effectively grants legislators ten-year terms remains subject to judicial review as a threat to the republican principles that guided the authors of the Constitution.

D. Privileges and Immunities Clause

Another rarely considered constitutional provision is article IV, section 2, which was further extended in section 1 of the four-

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stitution, the adoption of which had been required by Congress as a condition for recognizing the state's government as lawful and republican. In a later case, Coyle v. Smith, 221 U.S. 559, 566-67 (1911), the Court invalidated a provision in the Oklahoma Enabling Act which provided for a certain time a change of the state capital. The Court indicated that under its guarantee power Congress could not admit a new state under restrictions which would deprive it of equality with other members of the Union.

173. *See, e.g.*, Kies v. Lowry, 199 U.S. 233 (1905) (republican government not violated by statute creating and altering school districts); Forsyth v. City of Hammond, 166 U.S. 506 (1897) (republican government is violated by delegation of power to a court to determine municipal boundaries); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (republican government does not require female suffrage); *See also* The Collector v. Day, 78 U.S. (11 Wall.) 113 (1870); *In re* Duncan, 139 U.S. 449, 461-62 (1891).

174. *See* Note, *A Niche for the Guarantee Clause*, 94 HARV. L. REV. 681, 695-97; J. ELY, DEMOCRACY AND DISTRUST 118 n.*, 122 (1980).

175. *See* THE FEDERALIST Nos. 39 and 43 (J. Madison).

176. 376 U.S. 1 (1964).

teenth amendment, the privileges and immunities clause. A claim under this provision was raised by the appellants in *Wesberry v. Sanders*,[177] but the issue was not reached by the Supreme Court, which found a sufficient basis in article I, section 2 of the Constitution. Whether the privileges and immunities clause could serve as a basis for a challenge to a congressional gerrymander therefore remains an open question.

The *Wesberry* appellants argued that their right as electors qualified under the laws of the State of Georgia to full and equal representation in the United States House of Representatives, was a privilege and immunity of national citizenship secured against invasion by the State. The appellants cited *Twining v. New Jersey*,[178] as the controlling definition of the rights they asserted:

> Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution . . . . Thus, among the rights and privileges of National citizenship recognized by this court [is] . . . the right to vote for national officers . . . .

Since it is the Constitution which creates the right to vote for members of Congress, they argued, it is a right that is to be free from abridgment by the states:

> The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the states entitled to exercise the right . . . . While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the sense that the states are authorized by the Constitution to legislate on the subject as provided by [section] 2 of Art. I . . . .[179]

This argument became unnecessary in light of the Court's reliance on article I, section 2, and probably will continue to be unnecessary if the Court finds that article to be the basis for the justiciability of claims of congressional gerrymandering. It remains, however, an available option should the Court analyze gerrymandering cases differently than population-based cases.

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177. 211 U.S. 78 (1908).
178. *Id.* at 97.
179. United States v. Classic, 313 U.S. 299, 314-15 (1941).

VIII. *BADHAM v. EU*

Bandemer left many questions unanswered, and it remains for additional cases to flesh out the jurisprudence of gerrymandering. The most likely candidate to next present the issue to the Supreme Court is *Badham v. Eu*,[180] a challenge to California's congressional districting now pending before the United States District Court for the Northern District of California. This case has had a long, arduous procedural history to date, but now is poised to become the major redistricting case of the 1980's.

Following the 1980 decennial census and reapportionment, the State of California received two additional congressional seats, raising its total to forty-five.[181] Democrats controlled both houses of the state legislature along with the governorship, and together, without Republican input, they passed a congressional districting plan that was both reviled and hailed as a masterpiece of redistricting. The late Congressman Phillip Burton claimed and deserved much of the credit for what he called his "contribution to modern art."[182]

California voters collected over 800,000 signatures to subject the plan to a referendum. In June 1982, the voters disapproved the plan by more than 60 percent of the vote, thereby invalidating it.[183] Notwithstanding the referendum, the California Supreme Court ordered that the plan remain in effect for the November 1982 elections.[184] The use of the rejected districts resulted in the election of twenty-eight Democrats and only seventeen Republicans, in contrast to the 1980 election where Democrats won twenty-two seats and Republicans won twenty-one seats.[185] The legislature still retained the task of drawing new lines for the 1984 elections, but took no formal action on the issue until, in the November election, a Republican was elected Governor.

The outgoing Democrat Governor Edmund G. Brown, Jr., called the legislature into special session beginning on December 6, 1982, at which time, a skeletal or "vehicle" congressional district-

180. No. C-83-1126 RHS (N.D. Cal. filed Dec. 12, 1983).

181. *State Politics and Redistricting*, CONG. Q. 146 (L. McNeil ed. 1982).

182. Malan, *Boss*, CAL. MAG., Nov. 1981, at 89.

183. Plaintiffs' Third Amended Complaint at ¶ 11, Badham v. Eu, No. C-83-1126 (N.D. Cal. filed Oct. 1, 1986).

184. Assembly of State of California v. Deukmejian, 30 Cal. 3d 638, Cal. Rptr. 382, 639 P.2d 974 (1982).

185. Plaintiffs' Third Amended Complaint at ¶ 11, Badham v. Eu, No. C-83-1126 (N.D. Cal. filed Oct. 1, 1986).

ing bill was introduced. Once again, Republicans were shut out of the drafting process. No hearings were held on the bill, no maps were made public, and district lines were not incorporated into the bill until December 27, 1982. The next day, the assembly passed the bill on a strict party-line vote.[186]

The bill could not be passed by the state senate because of a California constitutional requirement that a bill be read on three separate days. To circumvent this requirement (so that the senate could adjourn on December 29), the senate Democratic leadership ordered the removal from the Governor's desk of another bill which had already been passed, and then amended into this bill the redistricting plan passed by the assembly. The final bill was then passed by a strict party-line vote of both houses. On January 2, 1983, hours before leaving office, Governor Brown signed the bill into law.[187]

Angered Republicans, arguing that the new bill was virtually identical in effect to the bill the voters had rejected in the referendum, filed a challenge in federal district court in early March 1983. The complaint stated a variety of federal and state claims based on the fourteenth amendment, article I, section 2, the first amendment and state constitutional provisions.[188] The most obvious claim, based on the statute's excessive population deviations, was eliminated by "technical" changes which reduced the deviations significantly after the complaint was filed.[189]

The plaintiffs then amended their complaint, placing more emphasis on first amendment freedom of association and gerrymandering claims, and on the illegality of the "technical corrections" process.[190] Meanwhile, California's Democratic congressional delegation, and the California Assembly (supported by only the Democratic caucus) sought and were granted leave to intervene.[191] The intervening congressional delegation moved for a stay of the

186. *Id.* at ¶¶ 12-15.

187. *Id.*

188. Plaintiffs' Complaint, Badham v. Eu, No. C-83-1126 (N.D. Cal. filed Mar. 8, 1983).

189. Congressional Intervenors' Memorandum in Opposition to Partial Summary Judgment Motion, Badham v. Eu, No. C-83-1126 (N.D. Cal. filed May 21, 1983).

190. Plaintiffs' First Amended Complaint, Badham v. Eu, No. C-83-1126 (N.D. Cal. filed Mar. 31, 1983).

191. Stipulation for Intervention, Badham v. Eu, No. C-83-1126 (N.D. Cal. filed Apr. 26, 1983).

federal court proceedings, arguing that the court should abstain from hearing the case pending resolution of the complaint's state law issues in a state court. At the same time, the delegation filed what can only be described as backfire litigation in the state's most congested trial court, the Superior Court of the County of Los Angeles, asking for a declaration that the redistricting plan was legal and constitutional.[192] On June 20, 1983, the federal district court issued an order abstaining from deciding the federal issues in the case, "until the state law issues are settled by the state court" and to "retain jurisdiction to resolve whatever federal issues remain."[193]

Two days later, the Supreme Court of the United States issued its decision in *Karcher v. Daggett*,[194] suggesting the possibility that a gerrymandering claim could indeed be viable. The plaintiffs immediately requested the district court to reconsider its decision in light of *Karcher*, but the court denied the petition.[195] This denial was appealed to the Court of Appeals for the Ninth Circuit, and on September 26, the Ninth Circuit affirmed the abstention order but indicated that the plaintiffs could return to that court if the state courts did not act with reasonable speed.[196] Four days later, the plaintiffs filed a petition for writ of mandate in the Supreme Court of California asking for an expedited hearing and decision of all state law issues in view of the fast-approaching 1984 elections.[197] Although this is a common procedure by which virtually all other California redistricting cases have been resolved in the past,[198] the California Supreme Court denied the petition on October 27, 1983 without a hearing.[199]

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192. California Democratic Congressional Delegation v. Eu, No. C-450-827 (Cal. Super. Ct. filed Apr. 26, 1983).

193. Badham v. Eu, 568 F. Supp. 156 (N.D. Cal. 1983).

194. 462 U.S. 725 (1983).

195. *Badham*, 568 F. Supp. 156 (N.D. Cal. 1983) (order denying motion to reconsider).

196. Badham v. United States District Court for the Northern District of California, 721 F.2d 1170 (9th Cir. 1983).

197. Badham v. Eu, No. C-450-827 (Cal. Super. Ct. 1983), *petition for writ of mandamus filed*, No. S.F. 24638 (Cal. Sup. Ct. Sept. 3, 1983).

198. *See, e.g.*, Assembly of State of California v. Deukmejian, 30 Cal. 3d 638, 180 Cal. Rptr. 332, 639 P.2d 974 (1982); Legislature of State of California v. Reinecke, 10 Cal. 3d 396, 110 Cal. Rptr. 718, 516 P.2d 6 (1973); Legislature v. Reinecke, 6 Cal. 3d 595, 99 Cal. Rptr. 481, 492 P.2d 385 (1972).

199. Badham v. Eu, No. C-450-827 (Cal. Super. Ct. 1983), *petition denied*, No. S.F. 24638 (Cal. Sup. Ct. Sept. 3, 1983).

In light of the California Supreme Court's refusal to act, and the failure of the congressional delegation to pursue its action in Superior Court in Los Angeles, the plaintiffs asked the district court to lift its abstention order and reassert jurisdiction, so that the case could be resolved in time for the 1984 elections. At the same time, they moved for leave to file a second amended complaint, deleting all state law claims.[200]

District Judge Schnacke granted the motion, and answers were filed. The full three-judge court thereafter scheduled a hearing on all pending motions, and on April 13, 1984, again denied the plaintiffs' motion to lift the abstention.[201] The opinion was written by Circuit Judge Poole, and joined by District Judge Zirpoli, with District Judge Schnacke dissenting. A second appeal was filed with the Ninth Circuit, which again affirmed the abstention order on November 1, 1984.[202] Six weeks later, while the plaintiffs were proceeding to attempt resolution in state court, the district court's opinion in *Bandemer* was issued. Because it was clear that *Bandemer* was being appealed to the Supreme Court, the *Badham* plaintiffs decided to file a petition for certiorari for review of the Ninth Circuit's order.[203]

All parties then proceeded to obtain a disposition of the Los Angeles Superior Court case, and a May 1985 trial date was set. Shortly before that time, however, negotiations between the parties led to an agreement to delete all state law claims in the case, leaving for all practical purposes only the federal gerrymandering claim, rooted in the first and fourteenth amendments and article I, section 2. By order of the district court,[204] an expedited discovery schedule was undertaken which proceeded until, in September 1985, the district court ordered a stay of discovery pending the Supreme Court's ruling in *Bandemer*.[205] That order was affirmed by the Court of Appeals for the Ninth Circuit.[206]

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200. Plaintiffs' Second Amended Complaint and Supporting Motions, Badham v. Eu, No. C-83-1126 (N.D. Cal. filed Dec. 12, 1983).

201. Badham v. Eu, No. C-83-1126 (N.D. Cal. filed Apr. 13, 1984).

202. Badham v. United States District Court for the Northern District of California, 749 F.2d 36 (9th Cir. 1984). *See supra* note 14.

203. Badham v. Secretary of State of California, 749 F.2d 36 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

204. Discovery Order, Badham v. Eu, No. C-83-1126 RHS (N.D. Cal. Aug. 21, 1985).

205. Badham v. Eu, No. C-83-1126 RHS (N.D. Cal. 1985).

206. Badham v. United States District Court for the Northern District of

The case remained dormant until July 1, 1986, the day after the *Bandemer* decision, when the plaintiffs petitioned the court for a status conference in light of the Supreme Court's decision. On August 14, the Court asked for briefs concerning the applicability of the Supreme Court's action, and at a status conference on September 15, requested the plaintiffs to file another amended complaint conforming to the *Bandemer* decision. That complaint was filed on October 1.[207]

On November 7, 1986, the defendant-intervenors made motions to dismiss on two grounds. First, they argued that notwithstanding the *Bandemer* decision, claims of partisan gerrymandering of *congressional* districts are not justiciable. Second, they maintained that even if such claims are justiciable, the *Badham* plaintiffs fail to state a claim under the plurality opinion in *Bandemer.*[208]

A hearing on these motions occurred on December 5, 1986. If the plaintiffs' complaint could survive the motions to dismiss, the court had previously indicated its willingness to have a trial on the merits in the first half of 1987. At the hearing, all three judges expressed reservations, if not hostility, to the plaintiffs' position, but when offered an opportunity to further amend the complaint, plaintiffs' counsel stood on the complaint as alleged.[209] Whatever the outcome, it is likely that this case will ultimately reach the Supreme Court, and it is that probability that makes the *Badham* case so significant. The trial of the case is likely to involve the top political scientists in the country, along with a considerable amount of legal resources. For these reasons, an appeal in *Badham v. Eu* has the potential to answer many of the questions left unanswered by *Bandemer.*

IX. JUDICIAL ACTIVISM OR FEDERALISM REVISITED?

The position taken by the Republican National Committee and others promoting justiciability of gerrymandering in the *Bandemer* case has been criticized by commentators as advocating

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California, 785 F.2d 314 (9th Cir. 1986) (per curiam).

207. Plaintiffs' Third Amended Complaint, Badham v. Eu, No. C-83-1126 RHS (N.D. Cal. filed Oct. 1, 1986).

208. Motions of Defendant-Intervenors Assembly and Congressional Delegation to Dismiss, Badham v. Eu, No. C-83-1126 RHS (N.D. Cal. filed Nov. 7, 1986).

209. Official Transcript of Proceedings at 67, Badham v. Eu, No. C-83-1126 RHS (N.D. Cal. December 5, 1986).

judicial activism. Some individuals assert that the advocacy of the justiciability of gerrymandering was contrary to the 1984 Republican National Convention Platform's commitment to judicial restraint.[210] The arguments in support of justiciability were motivated by a belief that the jurisprudence since *Baker v. Carr*,[211] had carried our legislative redistricting system far from its constitutional roots. In fact, one observer recently commented that "placing constitutional limits on political gerrymandering is far more faithful to the districting goals of the Founding Fathers than would obtain with legally unrestrained gerrymandering."[212]

To understand the logic behind this position, it helps to examine *Baker v. Carr* in its historical perspective. A few months after obtaining a successful ruling in *Baker*, Charles S. Rhyne, counsel for the appellants, made the following predictions as likely outcomes of the decision:

> Reapportioned state governments will become more effective parts of our governmental machinery. The oft-repeated words "state rights" will now assume real meaning as states begin again to exercise their governmental powers. Unshackling of long-dormant state powers will enable urban problems to be dealt with at state capitols with lessened reliance on Washington . . . . The extensive nation-wide dialogue on the fundamentals of our system of government provides an opportunity to restudy and reallocate public powers and functions to those levels of government best able to perform them under twentieth century conditions.[213]

Contrary to those early hopes for a strengthening of federalism, *Baker*'s progeny have superceded legitimate state interests—as embodied in state constitutions—and replaced them with the federally-mandated requirement of one person, one vote.

Prior to *Baker*, many states had constitutional or statutory schemes that, if enforced, served as limitations on gerrymandering.

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210. *Our Constitutional System*, Official Report of the Proceedings of the Thirty-Third Republican National Convention 306 (1984) (from the 1984 Republican Platform).

211. 369 U.S. 186 (1962).

212. Fein, *Constitutional Restraints on Political Gerrymandering: A Partial Corrective of One Person, One Vote*, 7 COMMONSENSE [3] (forthcoming; citations to manuscript).

213. *National Civic Review*, 1962 (quoted in Baker, *Whatever Happened to the Reapportionment Revolution in the United States?*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 257, 260-61 (B. Grofman & A. Lijphart eds. 1986)).

These provisions recognized certain historical state interests which sometimes run counter to the requirements of equipopulous districting: nondivision of city, county, or town boundaries; construction of relatively compact districts; recognition of social, economic, and geographic communities of interest; guaranteeing at least a minimal amount of direct representation for every county; protection of incumbent candidates; and even the protection of political minorities within the state. These state constitutional provisions are, in some cases, as old or older than the federal constitution itself.[214]

After *Baker v. Carr*, many of these state constitutional provisions were superceded by the Court's mandate of equipopulous districting, resulting in a system under which the state legislatures could no longer constitutionally construct a redistricting plan which gives consideration to the legitimate and historical interests particular to that state.[215] Recognition of these interests provides some limits on the ability to gerrymander. A singular emphasis on population equality alone is an invitation to gerrymander.

This emphasis on equipopulous districting reached its apex in *Karcher v. Daggett*,[216] which invalidated a congressional deviation plan with a .6984 percent population deviation because the deviation was not unavoidable despite a good faith effort to achieve absolute equality. However, even the *Karcher* Court recognized that "beyond requiring States to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, *Kirkpatrick* [*v. Preisler*[217]] does little to prevent what is known as gerrymandering."[218] In fact, "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort."[219]

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214. For example, see the recognition given towns in Chapter I, section III of John Adams' Massachusetts Constitution of 1780, seven years older than the Constitution of the United States.

215. *See, e.g.*, Wells v. White, 274 Ark. 197, 623 S.W.2d 187, *cert. denied*, 456 U.S. 906 (1981) (Arkansas — One representative per county and no division of county lines); Miller v. Schaffer, 164 Conn. 8, 320 A.2d 1 (1972) (Connecticut — Division of county lines); Swann v. Adams, 385 U.S. 440 (1966) (Florida — Provisions for geographical representation); Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982) (Hawaii — Basic Island Units).

216. 462 U.S. 725 (1983).

217. 394 U.S. 526 (1969) (requiring a good faith effort to achieve absolute equality in congressional districting).

218. *Id.* at 725, 734 n.6 (1983).

219. *Id.* at 752 (Stevens, J., concurring).

One commentator has lamented the Court's increasing emphasis on equipopulous districting as contrary to the intentions of the authors of our government. He argues that a "one-person, one vote norm for electoral apportionment seeks an equality of political rights that aggravates the threat of pure majoritarian dominance of legislative bodies."[220] A " 'perfect equality in political rights' encourages the mischiefs and formation of majoritarian factions."[221]

The Court's considerable emphasis on the *quantitative* nature of redistricting has elevated the interests of the individual voter over the interests of broader elements of society. Are there not *qualitative* aspects of democratic representation as well, aspects that provide a balance between the simple aggregation of votes to achieve a majority and the development of the many coalitions necessary for effective representation? If each individual has a right to an effective vote, that right cannot be fully exercised independent of some political group.

> It can be phrased as an issue between majoritarian democracy and consensus democracy. In other words, shall 51 percent rule, subject only to the occasional check of judicial review? Or shall there be attempts to work a compromise between the power of majorities and the power of minorities, denying to the former the full sweep of sovereignty and denying to the latter a plenary vote?[222]

In an earlier era, John C. Calhoun noted that "[t]he right of suffrage, *of itself* can do no more than give *complete control* to those who elect, over the conduct of those they have elected."[223] If all citizens had identical interests, suffrage by itself would assure that those interests were respected and protected. However, the American electorate is composed of numerous conflicting interests which may not be adequately represented if one portion of society attains complete political ascendancy. Said Calhoun, "The dominant majority, for the time, would have the same tendency to oppression and abuse of power, which, without the right of suffrage,

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220. Fein, *Constitutional Restraints on Political Gerrymandering: A Partial Corrective of One Person, One Vote*, 7 COMMONSENSE [4] (forthcoming, citations to manuscript).

221. *Id.* (citing THE FEDERALIST No. 48 at 81 (J. Madison) (New American Library 1961)).

222. R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 10 (1968).

223. J. CALHOUN, A DISQUISITION ON GOVERNMENT 13 (R. Cralle ed. 1851) (emphasis added).

irresponsible rulers would have."[224]

It was Calhoun's reasoning that in order to protect all groups within an electoral system, the right of suffrage must be coupled with other provisions or elements. These other qualitative elements would have to "be of a character calculated to prevent any one interest, or combination of interests, from using the powers of government to aggrandize itself at the expense of the others."[225] Our scheme of governance calls for majoritarian government, but through reflective representation, whereby our legislatures "reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices . . . were brought to bear on the decision-making process."[226] As a result, ours is a democracy in which groups, including political parties, as well as individuals, are represented.

Quoting John C. Calhoun to defend a judicial challenge to gerrymandering may seem an anachronism, but several recent Supreme Court cases suggest that his approach to governance may provide a framework for future redistricting litigation. In *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*,[227] the Court recognized the constitutionality of a statute which required separate majorities of voters within city limits and those without for county charter referenda approval.

While the Court has thus given its implicit approval of a system of concurrent majorities designed to accommodate competing interests, it has also recognized that such interests are worthy of protection. In *Hunter v. Erickson*,[228] the Court noted that the "State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."[229] This recognition that citizens have distinct interests not just as individuals but as part of a group was clearly recognized in *Rogers v. Lodge*.[230] In that case, the population of Burke County, Georgia was roughly equally split between blacks and whites, with a slight majority of whites. However, a

224. *Id.* at 22.
225. *Id.* at 24.
226. Bickel, *The Great American Apportionment Case*, NEW REPUBLIC, Apr. 9, 1962, at 13-14.
227. 430 U.S. 259 (1977).
228. 393 U.S. 385 (1969).
229. *Id.* at 393.
230. 458 U.S. 613 (1982).

black had never been elected to the at-large board of county commissioners. The Court found that "voting along racial lines allows those elected to ignore black interests without fear of political consequences."[231] If the Court can apply such an approach to racial gerrymandering cases, it could consistently do so in partisan gerrymandering litigation.

The RNC's position, then, is defensible in its goals: first, to obtain a balance between individual political rights and group political rights; second, to effect a shift from a strictly quantitative approach to vote dilution litigation to an analysis that considers the qualitative nature of representation; and finally, to generate a recognition that there may be other legitimate interests that are not readily protected by a requirement of equipopulous districting, and that the recognition of those interests will improve the quality of representation in America. If the Court continues the balancing of these rights and interests in future districting litigation, we may yet see an enhancement of federalism so optimistically predicted by Charles Rhyne in *Baker's* wake.

X. CONCLUSION

After the Supreme Court opened the door to claims of malapportionment in *Baker v. Carr* in the early 1960s, it took over a decade for the Court to flesh out the limits of "one person, one vote." Twenty years later, in *Davis v. Bandemer*, the Court finally agreed to address one of *Baker's* lingering legacies—the issue of egregious partisan gerrymandering. Some were disappointed by the lack of guidance provided by the Court's decision in *Bandemer*. However, it is important to remember, that like *Baker*, *Bandemer* is but the first of a line of cases that could profoundly affect the manner in which legislative and congressional districts lines are drawn.

Like the *Baker* Court, the plurality in *Bandemer* expressed great confidence in the ability of the federal district courts to apply equitable principles in this new area of jurisprudence. The courts can only do so, of course, if the cases they hear are presented in as clear a fashion as possible. The litigant's challenge, then, is to approach gerrymandering litigation both creatively and exhaustively, while attempting to clarify a still nebulous field of the law.

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231. *Id.* at 623.

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The Court has made it known that frivolous claims of gerrymandering will not be met with favor. The very difficulty of making a winning gerrymandering claim should help allay the concerns of those who feared a flood of litigation following the decision in *Bandemer*. What the Court may have done is ensure that competitiveness in electoral districts will be the rule, rather than the exception, in the reapportionment of the 1990's.