Journal of Legislation

Volume 15 | Issue 1 Article 1

1-1-1989

Fashioning a Test for Gerrymandering

Stephen E. Gottlieb

FASHIONING A TEST FOR GERRYMANDERING

*Stephen E. Gottlieb**

In *Davis v. Bandemer*,[1] the Supreme Court held that the shaping of electoral districts to the advantage of one political party presents a justiciable issue. The Court, however, had great difficulty identifying what constitutes gerrymandering.

The *Davis* case arose in Indiana after the Republican controlled legislature developed a gerrymandering plan and passed it without the input or opportunity for input by Democratic members. The oddly shaped districts showed little correspondence with the lines of political subdivisions of the state and produced a Republican majority in one house of the state legislature in the face of a statewide Democratic victory at the polls.[2] Despite this result, the Court found no right to relief in that case.

On the issues of what constitutes gerrymandering and whether the plaintiffs had proven gerrymandering in Indiana, Justice White wrote for a four member plurality including Justices Brennan, Marshall and Blackmun. The dissenters, Justices Powell and Stevens, joined them on the justiciability issue. The concurring justices joined the plurality in finding no right to relief in the Indiana case.

Although the plurality was prepared to find partisan gerrymandering unconstitutional, it voted to deny relief in Indiana because the showing of injury was insufficient. A clear majority of the Court, however, found the plurality's test for gerrymandering vague and undefined. Thus the *Davis* decision invites further clarification of what constitutes gerrymandering.

ORIGINS OF GERRYMANDERING

Gerrymandering is a long-standing problem. Patrick Henry attempted to gerrymander James Madison out of a seat in the first Congress[3] long before Elbridge Gerry gave his name to the process in Massachusetts.[4] In addition, the delegates to the Philadelphia Convention expressed concern with the districting

---

* Professor of Law, Albany Law School of Union University. B.A., Princeton University, 1962; LL.B., Yale Law School, 1965. This article is based on a paper presented at the Annual Meeting of the American Political Science Association, Sept. 3, 1987, and draws on a presentation made at a panel of the New York State Political Science Association, April 5, 1986. The author wishes to express his thanks to his colleagues on both panels as well as to Dean Martin Belsky and Professor Daniel H. Lowenstein for reading the manuscript and making some very helpful suggestions.

1. 106 S. Ct. 2797 (1986). A six member majority of the Court held that a claim of partisan gerrymandering is justifiable. *See* the opinions of Justices White, 106 S. Ct. at 2803-07 and Powell, 106 S. Ct. at 2825.
2. *Id.* at 2801-02.
3. 3 I. BRANT, JAMES MADISON 238 (1950). Henry claimed that he was trying to ensure the election of someone devoted to the passage of amendments to the new costitution.
4. 3 J. BARRY, HISTORY OF MASSACHUSETTS 369 (4th ed. 1857). Elbridge Gerry, in districting the state of Massachusetts, sought to bolster the power of the Republican party.

process[5] and numerous statutory and constitutional provisions attest to continued concern with the shaping of district lines.[6]

Nevertheless, gerrymandering appears to have become a much more salient problem since 1962 when *Baker v. Carr*[7] was decided. Prior to *Baker*, district lines were seldom altered and often followed county or municipal lines.[8] Partisan advantage resulted largely from malapportionment. The safety or competitiveness of each district depended upon internal traditions. *Baker*, however, required states to redistrict.[9] In doing so, the dominant parties were forced to surrender the advantages of malapportionment but they quickly learned how to use district shape to accomplish their partisan ends.[10]

THE PROBLEM

Control over districting has enormous consequences. Popular majorities can, by the way that lines are drawn, be transmuted into anything from a clean sweep to a minority of elected positions.[11] Control over state government therefore has meant the opportunity to perpetuate party dominance of the state legislature, and to extend its influence in Congress. Moreover, control over districting allows the in-party to decide how many legislators will have safe seats and whose seats will be safe, thus maintaining leadership influence over representatives that is largely hidden from voters.

The impact of gerrymandering is underscored by some unusual alliances. In *Davis v. Bandemer* the Indiana Democratic Party challenged the shape of district lines drawn by the Republican Party. The National Republican Party filed an amicus brief on behalf of the state Democratic party.[12] California Democrats filed a brief on behalf of the Indiana Republican Party.[13]

---

5. M. FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION 240-41 (1937) (Madison, interpreting the draft of Article I, section 4 to include the power to restrict malapportionment of congressional districts within states); *see also* Wesberry v. Sanders, 376 U.S. 1, 14-16 (1964) (describing the historical concern with districting).
6. *See* U.S. CONST., art. I, sec. 2, cl. 3 (proportioned by census); art I, sec. 4, cl. 1 (congressional control over place and manner); 2 U.S.C.A. § 3 (expired 1929) (compact and contiguous). *See also* Wood v. Broom, 287 U.S. 1 (1932).
7. 369 U.S. 186 (1962).
8. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 79-80, 86-88 (1985).
9. Although most state constitutions have provisions for periodic reapportionment, some state legislatures ignored these provisions. *Id.* at 79 n. 11. Thus, following the Supreme Court's ruling in Baker that a failure to periodically reapportion districts violated due process protections, many states were forced to reapportion their voting districts.
10. W. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY, 213-36, 266 (1974).
11. *See* Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 6-7 (1985); Excerpts from First Declaration of Bernard Grofman in Badham v. Eu, PS 544, 546 (Summer 1985); Brief Amicus Curiae of the Republican National Committee in Support of Appellees at 5-8 in Davis v. Bandemer [hereinafter Republican National Brief]. Justice O'Connor, Davis, 106 S. Ct. at 2820-21, argues correctly that there are limits. Specifically, Justice O'Connor focuses on the "self-limiting enterprise" of gerrymandering in which a legislative majority must weaken "safe seats" in order to carry more seats by narrower margins of votes. *Id.* at 2321. She is incorrect, however, in concluding that the existence of limits makes the practice insignificant.
12. *See* Republican National Brief, *supra* note 11 at 2-3.
13. *See* D. Wells, "A Crucial Test on Gerrymandering," N.Y. Times, Oct. 29, 1985, at A27, col. 1 (describing the political stakes); *see also* Brief Amicus Curiae of the Members of the California Democratic Congressional Delegation, Davis v. Bandemer.

The amicus briefs on both sides were premised on the fact that the Democratic Party controls the majority of state legislatures that draw district lines. The National Republican Party therefore sees the possibility of a national political revolution if standards can be introduced.[14]

THE *DAVIS V. BANDEMER* DECISION

The *Bandemer* plurality concluded that a finding that a districting plan violates the equal protection clause solely because of the shapes of the district lines must be premised on both an intent to disadvantage the opposing political party and substantial predictable success.[15] The plurality concluded that intent is virtually always present in districting cases—it would be hard for a political body to close its eyes to the political implications.[16] Thus, the significant issue was to define sufficiently damaging effects of partisan districting.

In defining a sufficient effect to violate equal protection, the plurality refused to rely on a mere disparity between the number of seats won and the party's percentage share of the total vote.[17] The plurality explained that if a large number of the districts are competitive, *i.e.*, the parties are relatively evenly balanced, "even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature."[18] The plurality would neither require nor prohibit districting that yields such results. Nevertheless, the plurality also decided that "parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status, is hardly an illegitimate extrapolation from our general majoritarian ethic. . . ."[19] This prompted Justice O'Connor to conclude that the plurality approach inevitably embraced proportional representation despite its explicit rejection.[20]

The plurality decided that a sufficiently severe impact of partisan districting requires proof that a party is "denied its chance to effectively influence [sic] the political process."[21] The plurality directed consideration to the "influence on the elections of the state legislature as a whole" and "evidence of continued frustration of the will of a majority . . . or effective denial . . . of a fair chance to influence the political process."[22] To exemplify the very high threshold the plurality was attempting to set, it concluded that there could be no remedy for gerrymandering without findings as serious as the consignment of the majority party to minority status for a decade or the absence of hope that it would be able to correct its minority status after the next census.[23] One commentator concluded that the plurality was willing to remedy gerrymandering that disadvantages a majority party only in the event of a virtually total and permanent

---

14. *See* Republican National Brief, *supra* note 11, at 2-3.
15. Davis, 106 S. Ct. at 2808, 2810.
16. *Id.* at 2808-09.
17. *Id.* at 2809.
18. *Id.*
19. *Id.* at 2807 n. 9.
20. *Id.* at 2822-24 (O'Connor, J., concurring).
21. *Id.* at 2810.
22. *Id.* at 2811.
23. *Id.* at 2812.

consignment of that party to minority status.[24] The plurality offered no justification for such a high threshold other than the unsatisfactoriness of proportional representation and the availability of the total exclusion standard.[25]

Justices O'Connor and Rehnquist and Chief Justice Burger, who concurred in holding that no violation of the equal protection clause had been shown, argued that the Court should treat gerrymandering claims as nonjusticiable.[26] Their conclusion was based partly on the view that the plurality had proposed a "nebulous standard"[27] which would prove "unmanageable and arbitrary or else evolve towards some loose form of proportionality."[28] Justice Powell, joined by Justice Stevens, supported the plurality on the issue of justiciability but agreed with Justice O'Connor's evaluation of the plurality's test.[29] They concur that the way the districting affected the relative strength of the parties is a relevant consideration, but their opinion is no clearer than the plurality's on this issue. They deny the need for a "heightened effect"[30] where there is direct evidence of intent to disadvantage the opposing party, but they appear to require disproportionate election results which are "serious enough"[31] to justify an independent finding of "vote dilution."[32]

The major alternative to the standard offered by the plurality was offered by Justices Powell and Stevens. They found a denial of equal protection because the evidence showed that the Republican members of the legislature who drafted the plan intended to minimize Democratic voting strength. For Powell and Stevens, motive is the more likely form of evidence.[33] Under these conditions, they would not demand proof of severe injury. The focus on a motivational theory is whether a statute or other public act was done for an illicit purpose.

---

24. Lowenstein, "*Bandemer's* Gap: Gerrymandering and Equal Protection," paper prepared for delivery at the annual meeting of the American Political Science Association, September 4, 1987, at 22-24.
25. Davis, 106 S. Ct. at 2809-10.
26. *Id.* at 2816.
27. *Id.* at 2817.
28. *Id.* at 2822. Note, however, the tolerance of the same trio of justices for vague standards as part of the majority in Brown v. Thompson, 462 U.S. 835 (1985) (89% deviation permissible) and in joining Justice White, dissenting in Karcher v. Daggett, 462 U.S. 725, 766 (1983) (no precise formula appropriate in state apportionment cases).
29. In Davis, 106 S. Ct. at 2831, Powell wrote the plurality "fail[ed] to enunciate any standard."
30. *Id.* at 2831 n. 10.
31. *Id.* See also *id.* at 2827.
32. *Id.* at 2832.
33. In Karcher v. Daggett, 462 U.S. 725, 753-54 (1983) Justice Stevens attacked motive as worthless in the context of districting cases because the legislators cannot escape partisanship. Nevertheless, Stevens returned to "a procedural standard" that is similar to motive. *Id.* at 759.

    There is warrant for a focus on the intent of the legislature in some understandings of the eighteenth century theories of protections against abuse of the democratic process. Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH. J. 521 described the primacy of the effort to control abuse of official power. That potential for abuse certainly included the risk of temptation to misuse power. Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?* 33 UCLA L. REV. 257, 261-64, 271 (1985) described a historic theory of representation which required that the legislators mirror the feelings and interests of their constituents. This focus on identity of feelings and interests is equivalent to a focus on motive. *See also* FARRAND, *supra* note 5, at 240-41 (Madison, describing abuses); Shapiro, *Gerrymandering, Unfairness and the Supreme Court*, 33 UCLA L. REV. 227, 237-241 (1985) (officials may misuse their power).

The dissenters treated partisan advantage in the electoral process as an illicit purpose.

Nevertheless, motive is not a simple concept.[34] Motive can mean several different things.[35] For every different meaning of motive, there is a set of evidence necessary to prove gerrymandering which is also sufficient to prove gerrymandering without reference to motivation.[36] The particular considerations suggested

---

34. *See* Gottlieb, *Reformulating the Motive/Effects Debate*, 33 WAYNE L. REV. 97 (1986); Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 504-505 (1985) (favors inquiry into motive); Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena For Your Thoughts?*, 63 N.C. L. REV. 879 (1985) (privilege bars inquiry into motive); Harper and Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1212, 1241-43 (1985) (motive and effects differ); Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust and Deconstruction*, 73 GEO. L.J. 89, 119 (1984) (motive and effects differ but author suggests they should be equivalent because of contextual variables acting on legislators); Note, *Liberal Theory as Constitutional Doctrine: A Critical Approach to Equal Protection*, 73 GEO. L.J. 153 (1984) (effects should replace motive); Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1333-47 (1984) (distinguishes motive from effects); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 98-103, 155-156 (1977) (motive differs from effects); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 586 (1977) (Court rejected disproportionate impact); Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 979 (1983) (intent and motive differ); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 126-28 (1983) (motive differs from intent) and Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982) (motive and effects differ).

35. In a case brought under the Voting Rights Act, the Court considered restricting the proof of motive to actual expressions of intent. City of Mobile v. Bolden, 446 U.S. at 67-68 (1979). *But see* Davis, 106 S. Ct. at 2808 (Opinion of White, J.); Karcher, 462 U.S. at 2671-72 (Opinion of Stevens, J.). It discarded that approach in Rogers v. Lodge, 458 U.S. 613 (1982). For earlier efforts to prove motive in the districting context see Gottlieb, *Identifying Gerrymanders*, 15 ST. LOUIS U. L. REV. 540, 542-44 (1971). (Thus motive can rest either on direct evidence or inferential proof.

36. Barring successful inferences from legislative history or shape, motivational analysis becomes virtually indistinguishable from examination of the partisan consequences of districting. Both present the same major choices.

    Assuming that a districting plan appears to favor one of the parties or a racial or other group, the issue in a motivational analysis is whether this was the purpose. The analysis, however, proceeds as if one merely registered effects under a rational basis. *See* Palmer v. Thompson, 403 U.S. 217 (1971); United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (strict scrutiny test). *See also* Minneapolis Star Tribune Co., 460 U.S. 575, 585 n.7 (1983); Shelton v. Tucker, 364 U.S. 479 (1960). The courts will infer that the purpose was racial or partisan if the districting cannot be satisfactorily explained in another way. The issue then becomes the delineation of a satisfactory explanation. *See* Davis, 106 S. Ct. at 2837-38 (Powell, J., dissenting). Logically the courts could accept any reason, insist on very strong reasons or any level of requirement in between. If the courts accept any reason, it is essentially employing rational basis analysis. If the courts accept only strong reasons they are essentially employing a strict scrutiny analysis. Both levels of analysis are characteristic of nonmotivational analysis. *See, e.g.*, Perry, *supra* note 34, at 544 (comparing motive analysis to rational basis analysis); J. ELY, DEMOCRACY AND DISTRUST 145-46 (1980) (comparing motive with strict scrutiny). On some of the difficulties with this form of analysis, see P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 553-63 (2d ed. 1983).

    The motive approach taken by Justices Powell and Stevens requires this type of analysis at an appropriate level of scrutiny. After checking to see whether the districting had favored an identifiable group they ask whether the district lines can be justified. Davis, 106 S. Ct. at 2837-38 (Powell, J., dissenting) and Karcher, 462 U.S. at 759-61 (Stevens, J. concurring). Justification, however, is always possible. A districting plan that treats Democratic strongholds differently can be described simply as beginning at particular locales, recognizing the boundaries

by Powell and Stevens do not alter that conclusion.[37] As a result, with or without motivational analysis, the crucial question is whether or not it will be possible

---

of those locales and eventually incorporating in some unfortunately oddly shaped districts the area that simply did not fit. *See* Lowenstein & Steinberg, *supra* note 11, at 21-27 (stated policies might include compactness or community lines).

Thus in New York State one might begin in the west by protecting upstate Democratic cities and begin in the east at the tip of Long Island. That would permit real recognition of municipal and other political lines. It would also concentrate upstate Democrats in major cities instead of leaving them divided among upstate rural Republicans. Then, however, the districting commission would have had to pick up the remaining territory around "marginal" areas, making or breaking large numbers of Republican or Democratic seats. Districts might look odd, but the explanation is excellent. *See* Schneider v. Rockefeller, 328 N.Y.S.2d 996, 1001 (Sup. Ct.) *aff'd* 331 N.Y.S.2d 220 (App. Div.) *aff'd* 340 N.Y.S.2d 889 (1972), *see also* Bay Ridge Council v. Carey, 115 Misc.2d 433, 437-38 (N.Y. Sup. Ct., 1982) (quoting Schneider), *aff'd* 103 A.D.2d 280 (1984), *aff'd* 66 N.Y.2d 657 (1985), *appeal dismissed sub nom* Rappleyea v. Carey, 106 S. Ct. 3323 (1986).

The result of this analysis is that a pragmatic and realistic analysis of motive is likely to force the Court to a position quite close to a strict scrutiny test—only motives that are important enough so that it is reasonable to believe that people not motivated by partisanship would pursue them, and only means closely tailored to achieve those goals so that those goals in fact explain the plan, could explain the partisan results of a districting plan.

Little is gained by calling that a motive test. The inquiry is in fact a comparison of various ends to ascertain their legitimacy and their importance and a comparison of ends with means. Ultimately the issue is what the legislature may do and what it may not do in drawing district lines.

37. Justice Powell, trying to develop a motivational analysis, referred to the procedures used in enacting districting legislation and the legislative history of the districting statute as sources from which to glean intent. Davis, 106 S. Ct. at 2832 (Powell, J., dissenting).

The Republicans, however, need not have been so secretive. They could have made the same proposals in the open, gone through the charade of hearings, and decided that they liked the plan well enough to pass it. The motivation would be no different though the outward forms were more fair. Unless Powell intends not to refer to "actual" intent but to appearances, the absence of the procedural and historical irregularities that he described do not suggest purity of motive but only sophistication of means. Recognizing the difficulties, Justice White downplayed the utility of examining legislative intent, arguing that partisan motives are virtually inherent and unavoidable in this area. *Id.* at 2808-09.

But see City of Mobile v. Bolden, 446 U.S. 55 (1980), and Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket*, 1 J. L. AND POL. 357, 374-75 (1984) (arguing that direct evidence of intent is the best test for gerrymandering)), it seems reasonable that Justices Powell and Stevens will be forced to define further their views on shape and adherence to boundaries, the remaining criteria they identified apparently as tests of intent. Davis, 106 S. Ct. at 2831-32.

Shapes and boundaries are of limited utility as tests for gerrymandering, however, for several reasons. As proposed, shape appears subjective. *See id.* at 2832. That subjectivity could be cured by a wealth of proposed definitions of compact shapes. *See* Karcher v. Daggett, 462 U.S. at 756 (Stevens, J., concurring) (describing measures of compactness). But regularity of shape conflicts with honoring existing political boundaries and both conflict with requirements of equality of population. *See* Brown v. Thompson, 462 U.S. 835 (1983). Choosing among the three criteria create infinite possibilities for partisan considerations: since some existing political boundaries must be pierced, the choice of which to pierce has enormous consequences. *See* Lowenstein & Steinberg, *supra* note 11, at 35; Declaration of Nelson W. Polsby in Badham v. Eu, in PS 568, 570 (Summer 1985). Regularity of shape, moreover, is quite consistent with substantial partisan tilting of the district lines. Lowenstein & Steinberg, *supra* note ll, at 21-27. Formal qualities like shape will prove satisfactory if the fairness is either defined by the shapes themselves or is undefinable. But regular geometric shapes that can expand or reverse popular statewide majorities are not self-justifying. Hence one can reasonably look behind shape—good shape—and still seek to identify motive or ascertain whether the package is justifiable. In effect, shape works if the plurality is wrong about the possibility of testing the validity of districting by examining the severity of its consequences on the relative strength of the two parties. If, however, the plurality is correct, a shape test will not answer the fundamental question of fairness.

to look at a map and some set of demographic data and conclude that a state has or has not been gerrymandered.

In summary, the Court has told us what gerrymandering is not: it is not proportional representation; it is not minor disadvantage.[38] The high threshold announced by the plurality requires a justification. Its inability to find any measure of gerrymandering short of a very high threshold, and the measurement of that threshold itself—frustration and denial of a fair chance—require a yardstick. If Justice O'Connor is correct,[39] the Court will become involved in an endless morass with highly political overtones. Gerrymandering must be defined so that the cases involving district shape can emerge with the clarity of the cases involving district population.

DEFINING GERRYMANDERING

Although a wealth of materials describing techniques for and possible measures of gerrymandering exists,[40] the significance of that material depends on normative standards.[41] For example, imagine a community divided on a north-south line.[42] East of the line the community is made up of blacks, Democrats, poor people and a liberal middle class. West of the line are whites, Republican and the more affluent. The simple question posed by all arguments about gerrymandering is whether to create homogeneous or heterogeneous districts.[43]

Homogeneous districts will be quite safe for the representative parties. The number of seats won by representatives of each race and party will also probably be roughly proportional to their proportion among the voters.

Heterogeneous districts are less likely to be safe districts. The number of seats won by members of each race and party will not tend to be roughly proportional. Instead, the dominant party in any given election will tend to win a disproportionate number of seats. If the public sentiment changes between elections, the other party is likely to win a disproportionate number of seats. A relatively small number of voters may hold the balance of power. Voter influ-

---

38. Davis, 106 S. Ct. at 2809-11.
39. Shapiro, *supra* note 33, at 252-56.
40. Lowenstein & Steinberg, *supra* note 11, at 7-8 (describing the technique for gerrymandering); Grofman, *supra* note 8, at 77, 117-18 (techniques for and commensurate measures of gerrymandering); Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185, 191-201 (measures of gerrymandering). *See also* Neimi, "The Effects of Districting on Trade-offs Among Party Competition, Electoral Responsiveness, and Seats-Votes Relationships," in B. GROFMAN, A. LIJPHART, R. MCKAY & H. SCARROW, REPRESENTATION AND REDISTRICTING ISSUES 35 (1982) (describing a larger set of measures for different aspects of partisan gerrymandering).
41. Commentators have focused on active, structural and historic considerations. Lowenstein & Steinberg, *supra* note 11, at 27-35 (techniques are normatively neutral); Shapiro, *supra* note 33, at 237-41 (comparing active and structural criteria); Levinson, *supra* note 33, at 257, 261-64, 271 (describing two historic theories of representation and finding republican values antithetical to proportional representation).
42. Beer v. United States, 425 U.S. 130 (1976) describes a pattern of that type in New Orleans.
43. If the lines are drawn north-south, then each district will tend to be homogeneous. Some districts will lie wholly within the black and Democratic district. Others will lie wholly within the white Republican district. There may be a competitive district on the border with elements of both sides of the division of the community. If the lines are drawn east-west, each district will tend to be heterogeneous—each district will contain some people from both sections of town.

encing factors not confined to single legislative districts are likely, therefore, to have strong generalized consequences.

Proportional representation requires homogeneous districts. Each group, with relatively safe seats, is assured of representation. Proportionality is relatively attainable because results are relatively predictable.

All of the members of the Court specifically declined to find that proportionality is required or even desirable, but none of the members of the Court found that proportionality is forbidden either. Notions of proportionality have already played a large part in judicial and scholarly thinking in this area. Many proposals assume that we should choose homogeneous districting.[44] Since the Court has employed a "motive" test for discrimination in districting[45] and since in some circumstances the Voting Rights Act only requires that current districting do no more damage to minority rights than past districting,[46] the Court has not always required homogeneous districting.[47] It has been assumed, however, that heterogeneous districting would dilute the voting power of blacks. This conclusion rests on the concept of polarized voting.[48] If whites and blacks refuse to vote for each others' candidates, then the defeated group loses completely. The winning candidate will not be the least conciliatory and the defeated group cannot expect by its pressure to change the district's politics in the short run. It is simply excluded from power.[49]

The assumption that homogeneous lines are appropriate dates back to the concerns of incumbent black officeholders in such cases as *Wright v. Rockefeller*.[50] However, that which is good for incumbent black officeholders is not necessarily good for the black community. In nonpolarized communities, it can be argued that assuring the black community of large majorities in some districts wastes their votes and influence.[51] It might be better for the black community to have the ear of a large number of elected officials who are caught in the middle and

---

44. Niemi, *supra* note 40, at 41, advocates a compromise between a wide range of vote shares in which seats will turn over, thus requiring relatively homogeneous districts, and an effort to provide a substantial number of competitive districts. Grofman, *supra* note 8, at 93-99, 126-49, measures racial proportionality and Grofman, "For Single-Member Districts, Random is Not Equal," in GROFMAN *et al.*, *supra* note 40, at 55-58, criticizes random methods of generating districts because they depart from proportionality. *But see* Grofman, *supra* note 8, at 171 (objecting that the Supreme Court placed too much emphasis on proportionality).

    The court's consistent position in the racial districting cases under the Voting Rights Act has been that heterogeneous districting dilutes black votes. *See* Rogers v. Lodge, 458 U.S. 613 (1982) (evaluating vote dilution under the Voting Rights Act); Karcher v. Daggett, 462 U.S. at 725, 754 n.13 (1983) (Stevens, J., concurring) (familiarity with vote dilution under the Voting Rights Act); Whitcomb v. Chavis, 403 U.S. 124, 157-60, (1971) (multimember districts dilute voting power).

45. *See* City of Mobile v. Bolden, 446 U.S. at 67-68; Rogers, 458 U.S. at 621. Note that a showing of intentional discrimination is a necessary element in equal protection racial vote dilution claims.

46. *See* Beer v. United States, 425 U.S. at 134-36.

47. *Id.*

48. *See* Grofman, *supra* note 8, at 135-45.

49. Justice O'Connor's view that only suspect classes should be protected against gerrymandering can be supported by analysis of polarized voting. *See* Davis, 106 S. Ct. at 2820 (O'Connor, J., concurring).

50. For a discussion of Wright v. Rockefeller, 376 U.S. 52 (1964) and related districting cases, *see* Gottlieb, *supra* note 35, at 540, 548-49 (1971).

51. Lowenstein & Steinberg, *supra* note 11, at 7-8, 29.

forced to temporize than a small number of wholly committed delegates who wield fewer votes in the legislature and can more easily be discounted.

Where polarized voting is not the case, the losers exert a good deal of influence on district politics because a coalition with a group of the former majority might tip the balance. That defines the political center in the district. The plurality's rejection of proportional representation is partly related to this fact.

In a community that is not polarized, therefore, there can be a distinct advantage in participating in elections in several districts instead of being segregated into a homogeneous district. The opportunity to exert influence on several representatives exists. It is not correct, therefore, to assume that homogeneous districting is advantageous for all groups.[52] Even for blacks in currently polarized districts it is not clear that the best route toward long-run influence is through homogeneous districting. Whether or not analogies to integration among school children or military servicemen are apt, there is little reason to expect barriers to be broken by segregation.

There is even less reason to believe that homogeneous districting serves any important function for others. Where homogeneous districting serves no important function, there is little reason to treat it as constitutionally mandated. Indeed the plurality found much gerrymandering only marginally significant since other channels of influence may be pursued. Because the plurality believed that gerrymandering often does not make much difference, it insisted on proof of severe injury.[53]

Political scientists have been chronicling the decline of party identification at the polls.[54] It is not clear whether that decline is continuing, permanent or temporary.[55] If the decline continues it may become inappropriate to talk about politically polarized voting.

Nevertheless, districting does affect political decisions. In government, as Justice Powell pointed out,[56] the parties continue to dominate legislative and governmental processes. Voting in the legislature is polarized on the issue of legislative leadership. Legislative agendas, committee assignments and other forms of significant patronage are affected by party victories. Party voting, therefore, should continue to be treated as special if party identification continues to have

---

52. *See generally* Lowenstein & Steinberg, *supra* note 11, at 29 (making this argument in the context of municipalities). Compare the discussions of geographic criteria in Karcher, 462 U.S. at 754-60, (Stevens, J., concurring), 787 (Powell, J., dissenting), 776 (White, J., dissenting) (suggesting that geographic and "political boundaries" are more resistant to political manipulation).

53. *See e.g.*, Davis, 106 S. Ct. at 2810 (White, J.) ("losers" may exert influence) and 2820-21, (O'Connor, J., concurring) (heterogeneous districts create risks of opposition victories).

54. *See, e.g.*, N. NIE, S. VERBA & J. PETROCIK, THE CHANGING AMERICAN VOTER 47-73 (1979) (tying the rise and fall of party identification to the rise and fall of ideological voting); Asher, *Voting Behavior Research in the 1980s: An Examination of Some Old and New Problem Areas,* in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 339, 355 (1983) (showing significance of party affiliation in congressional elections); *id.* at 375 (showing evaluation of candidate-dominated presidential and congressional elections); Kinder, *Diversity and Complexity in American Public Opinion, id.* at 389, 392-96 (1983) (showing that the role of ideology does not appear to be increasing).

55. *See supra* note 54.

56. Davis, 106 S. Ct. at 2830.

major influence on voting or in the legislature. Under these conditions, homogeneous districting can protect the influence of members of the state party not in power.

Unfortunately, homogeneous districts divide and may help to polarize. Campaigns in homogeneous districts may additionally exacerbate disputes. Most important, homogeneous districts tend to be safe districts, offering the public little opportunity to reject and replace officeholders.[57]

Since the public can achieve representation through heterogeneous districts, homogeneous districts are not essential. Because of the disadvantages of homogeneous districts, they may not be wise.

Reading the Constitution to require homogeneous districting is wrong for a second reason. The Constitutional Convention recognized it as one of two valid competing types of politics, but not the only or most necessary system.[58] Expressed as a desire for local representation, homogeneous districting lost crucial battles. Madison expressed the contrary tradition succinctly in *The Federalist No. 10*. He sought a plan which would juxtapose different groups in such a way that elections would "refine and enlarge" the public views by taking into account more than the parochial views of discrete factions.[59] Thus Madison advocated a more regional approach to democracy than the more local approach advocated by some of his colleagues.

There is no particular reason to treat the Constitution as excluding either theory. The Convention clearly recognized the legitimacy of both and compromised between them. The constituencies of the House and Senate differ. The House itself reflects a compromise between a greater and a lesser localism. Larger districts would prove more heterogeneous. On the other hand, smaller ones would be more homogeneous. The Convention chose a minimum figure higher than some sought and lower than some proposed.[60] Given that conflicting history, it is therefore unclear on what basis we now claim that Madison's plan was unconstitutional.

Neither the First nor Fourteenth Amendment abandoned that compromise for the states. Neither regional nor local theories of democracy forms an exclusive theory of representative democracy which the Fourteenth Amendment can incorporate. And there is nothing in the history of the Amendment to suggest that the Thirty-ninth Congress focused on either the gerrymandering problem in particular or regional- or community-oriented democratic theories in general.[61]

---

57. *See* Reynolds v. Sims, 377 U.S. 533, 580-81 (1964); Gottlieb, *supra* note 35, at 547.
58. Support for homogeneous districting was evident in the 1787 Convention's emphasis on local representation. *See* Levinson, *supra* note 33, 261-64; 1 FARRAND, *supra* note 5, at 48-49, 56 (George Mason) (representatives should know and sympathize with their constituents); *id.* at 185, 191 (James Wilson) (members should speak the language of their constituents); *id.* at 568 (Madison) "to bring . . . all the local information" needed); 2 FARRAND *supra* note 5, at 644 (George Washington) (more representatives needed to protect the rights and interests of the people). *See also* Gottlieb *supra* note 35, at 546-550 (developing the legitimacy of the competing theories of districting).
59. Madison's was a balanced view—the House also had to be large enough to represent local interests accurately. *See* 1 FARRAND, *supra* note 5, at 568. Nevertheless, he explained the new Constitution as transcending those interests.
60. *Id.* at 559-560.
61. This raises two questions: whether the First Amendment and/or Fourteenth Amendment

Nothing in either amendment pertains to the choice between these specific theories of democracy.

Therefore, all of the measures of districting that take as their basis a choice between these two types of districts are fundamentally in error.[62] Proportional representation can neither be required nor prohibited. As the next section makes clear, however, combinations of the two may be thoroughly unacceptable.

An Alternative

Neutrality, the unbiased and equal treatment of voters, partisans, and districts, is the essential constitutional standard with respect to district lines.[63] Neutrality can best be defined by symmetry, whether each party has the same number of districts with the same difference from its statewide average support as the other party.[64] Symmetry gives each party the same advantages and disadvantages. If one party receives disproportionate support in a district, so must the other, and in the same degree and number.[65]

Effective gerrymandering is precisely the opposite of symmetry. It represents the inconsistent use of both districting policies to "waste" opposition votes by concentrating as many opposing voters as possible in a few safe districts. By doing so, gerrymandering leaves a larger number of districts to be controlled by smaller but quite secure friendly majorities.[66] Thus symmetry attacks the core of

---

interdict voting discrimination and/or gerrymandering and whether they or either of them set up standards and what they are. That the Congress did not focus on gerrymandering does not settle the issue of whether control of the practice is a necessary part of the concepts written into the tests of the amendments or the goals of the Congress in developing the amendments.

62. This includes considerations of competitiveness, *see* Polsby, *supra* note 37, at 571, range of responsiveness, and the swing ratio. Niemi, *supra* note 41, at 36; Grofman, *supra* note 9, at 149-50.

A competitive district is one in which competing parties are evenly balanced. It necessarily assumes and depends on heterogeneous districting. The range of responsiveness is the range of different statewide vote percentages at which one party will gain or lose seats. The swing ratio measures the rate at which a party wins or loses seats for each percent change in its statewide vote. Some commentators urge a broad range of responsiveness and a swing ratio which permits a continuous change of seats as a party wins or loses votes. These are sophisticated descriptions for largely, but not completely homogeneous, districting.

63. *See* Police Department v. Mosely, 408 U.S. 92 (1972), Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975), Stone, *Content Regualtion and the First Amendment*, 25 WILLIAM AND MARY L. REV. 189 (1983). The author has been critical of the Court's reliance on neutrality theory, *see* Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. (forthcoming) and in particular its failure to examine the restrictive consequences of the preconditions of the theory and the division between public and private rights in the light of first amendment interests. Neutrality in this context is consistent with and protective of the purposes of the first amendment. Indeed failure to employ neutrality analysis in this context allows governmental bodies to trench on private rights.

64. It should be based on voting rather than registration statistics. Lowenstein & Steinberg, *supra* note 11, at 57, treat this as an effort to identify precisely what proportion of the public will actually cast their vote for each party and point out that it is impossible to ascertain that proportion in advance. Niemi responds that we should not want to identify such phenomena. Niemi, *supra* note 40, at 195-96. The data set chosen should reflect predisposition reflected in past, not future, voting behavior.

65. Shapiro, *supra* note 33, worries that this will prove too complex and that the Court will ultimately be impelled to move toward proportional representation. *Id.* at 252-56. He acknowledges that this would be doctrinal disaster and historically as incorrect as it would be unwise. But he thinks it will triumph because it is easier to understand than the complex mathematics involved in other votes-seats districting standards.

66. *See* Davis, 106 S. Ct. at 2802; Gottlieb, *supra* note 35, at 550; Lowenstein & Steinberg, *supra* note 11, at 6-8.

the problem—the inconsistent use of policies for political gain. Asymmetrical districting is discriminatory. In doctrinal terms it is not neutral.

In ordinary parlance, symmetry provides an equivalent opportunity for both parties to win elections. It is not a formula with respect to results. It is not therefore proportional representation. The public, rather than either legislature or courts, has the right to determine who wins.

However, even if it can be assumed that the Convention meant to authorize Congress to deal with gerrymandering or that the Fourteenth Amendment permits the Court to deal with it, should it not also be assumed that the Convention and the First and Thirty-Ninth Congresses never considered neutrality in general or symmetry as a special consequence of the neutrality standard?

The problem with that conclusion is that there were some principles on which the founders agreed as well as those which they compromised. Among the principles agreed upon were the representative character of all government institutions, the fundamental equality of all mankind and the emerging consensus that structured class representation had to give way to equal representation of all voters.[67] Whether we should encompass symmetry analysis in this context depends in part on the implications for gerrymandering of the principles agreed on by the founders and incorporated in the document they wrote. This may be another instance in which the progress of understanding allows us more fully to realize their purposes than they themselves could.

It was no part of their jurisprudence that future courts should be restricted to the limitations of their own understanding. The founders expected constitutional purposes to be followed and fulfilled where provisions were vague.[68] Failure to employ the progress of understanding in interpreting provisions of the Constitution will result in failure to achieve their purposes as well as they currently could be. That conclusion would require justification both with respect to the founders' jurisprudence and with respect to any intentionalist theory.

Neutrality stands on a strong footing under an intentionalist jurisprudence. Violation of neutrality in district line drawing defeats all relevant constitutional purposes. No theory of democracy abides favoritism—treating one party differently than another.

Nothing in a *local theory* supports variation in the degree to which different districts are accorded the privilege of a close and effective representation of the people. In the terms of that theory, some districts would have been favored and some disfavored by a non-neutral districting system.

In addition, there is nothing in a *regional theory* which supports variation in the degree to which different districts combined different interests. Instead,

---

67. *See generally* D. LUTZ, POPULAR CONSENT AND POPULAR CONTROL (1980) and G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

68. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888-913 (1985) (competing traditions stressed language or purpose; neither tradition treated the specific meaning of the framers as significant); W. CROSSKEY, 1 POLITICS AND THE CONSTITUTION 364-69 (1953) (common law tradition stressed objective purpose); Dewey, *James Madison Helps Clio Interpret the Constitution*, 15 AM. J. LEGAL HIST. 38, 38-43 (1971) (Madison stressed public over private purposes, downgrading the importance of the Philadelphia debates and argued, parallel to common law traditions, that the Constitution should be understood in light of the problems which gave rise to it). *See* 1 W. BLACKSTONE, COMMENTARIES 59-62, 87 (1803).

those districts which were more homogeneous would appear to receive less enlightened representation, prove more susceptible to mob fashions and sacrifice legitimate and enduring minority interests.

Systems of districting that discriminate among the parties in the terms of both regional and local theories of democracy, which can be justified by neither theory of democracy accepted by the framers of the Constitution and the First and Fourteenth Amendments, should not prove acceptable to us.

If one looks at elections as popular protection against official abuse of power,[69] incumbents ought not have the power to exclude change by protecting a party. If one looks at districting through self-government theory,[70] the public should have either the right to local representation (through a community oriented districting) or the right to electoral choice (through cross-community or regional districting). Favoritism gives them neither. It excludes choice via safe districts. It excludes local representation for some groups that it gives others. It denies equal treatment in all respects.

Neutrality has played a major part in First Amendment jurisprudence.[71] It captures the instinct which makes proportional representation so alluring but does so more accurately by defining equal treatment as the issue rather than the type of politics.

The neutrality model and its symmetrical derivative are not without difficulties. The problem is whether it is possible to district neutrally or symmetrically for two or more variables. If districting is done symmetrically with respect to Republicans and Democrats, can it also be done symmetrically for blacks and whites? Since blacks tend to be Democrats but a large proportion of Democrats are not black, merely scrutinizing for party allegiance would permit considerable black/white variations among districts. The fact that the overwhelming proportion of blacks are Democrats also simplifies the task of symmetrical racial districting. It is necessary only to allocate among Democrats and need not confound inter-party symmetry.

Groups that cut more evenly across party lines may present more difficulties. Assume, for example, that environmentalists or peace groups or abortion groups are not as highly correlated with party lines as is race. Does one then have to treat Republican anti-abortionists within the Republican Party in a consistent way and do the same within the Democratic Party? If one works out symmetrical solutions within each party there is no necessary reason to expect that the groups will be ranged symmetrically among the districts. If the districts are ranged symmetrically according to sentiment on the abortion issue, can party allegiance similarly be ranged symmetrically among the districts?

Plainly, the more groups which we choose to account for symmetrically, the more difficult—or perhaps impossible—the task becomes. That in turn raises the question whether the key variable in the entire process is polarization. Earlier we noted that districting was crucial to blacks because they could not exert influence in heterogeneous districts. Thus, it makes a tremendous difference to blacks

---

69. *See generally* Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).
70. *See generally* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).
71. *See supra* note 63.

whether they are united in black districts or divided among several heterogeneous districts. By contrast, to the extent that voters are not polarized they can and will exert influence in both contexts—albeit the influence will assume a different garb. In a more homogeneous districting plan they control a proportion of the seats. In a more heterogeneous districting plan they will change the overall complexion of each district, altering the crucial location on the political continuum of the swing voters in their districts.

Parties, however, reflect discrete choices rather than fungible lines of influence.[72] Thus it seems necessary to take the trouble to protect the fairness of the districting process among the parties.

PRAYER FOR RELIEF?

Gerrymandering perverts the American political system. In place of both local and regional representation it substitutes an amalgam which leaves the political system noncompetitive at both local and statewide levels. It is noncompetitive locally because of homogeneous districting. It is noncompetitive at the statewide level because concentrations of partisans have been manipulated for political advantage. The result is a caricature of democracy.

Neutrality goes to the heart of that amalgam. It forbids neither local nor regional representation. Each state can arrange whichever kind of political system seems most congenial. What neutrality does forbid is rigging the system.

Each of the opinions in *Davis* posed as a challenge the definition of serious partisan effects of election line drawing. The plurality stated a general standard and asked the future to respond as it had to *Baker v. Carr*, with precise and manageable standards. The concurrence doubted the possibility that such a standard could be formulated. The dissent found the majority's approach much too vague. If the challenge is to be met, it ought not be met with a choice of politics which would fundamentally alter American democracy, limiting strengths the founding generation intended us to enjoy. Of the potential standards, neutrality alone offers the possibility that the challenge can be met.

---

72. *See supra* notes 54-56, and accompanying text.