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# How To Limit Gerrymandering

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# HOW TO LIMIT GERRYMANDERING

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## I. INTRODUCTION

In *Davis v. Bandemer*,<sup>1</sup> the Supreme Court held that partisan gerrymandering could, under certain circumstances, violate the Equal Protection Clause of the Fourteenth Amendment.<sup>2</sup> However, the Court did not make it clear when such gerrymandering is unconstitutional, except insofar as it rejected proportional representation (a system under which political parties must be represented in a legislature in proportion to their statewide vote totals) as a constitutional requirement.<sup>3</sup> There was no majority opinion, and the plurality opinion stated only that an unconstitutional gerrymander existed when the minority party's strength was "consistently degrade[d]"<sup>4</sup>—hardly a clear standard. The purpose of this article is to ascertain whether any possible standard for determining the constitutionality of redistricting plans is both workable and consistent with *Bandemer*.<sup>5</sup> The article concludes that the courts should uphold a redistricting plan if it (1) is the result of a bipartisan compromise or (2) yields results similar to those which a bipartisan compromise would have created.

## II. BACKGROUND

### A. What Is Gerrymandering and Why Is It So Bad?

#### 1. What Is Gerrymandering and How Did It Come to Exist?

A gerrymander is a "distortion of district boundaries and populations for partisan or personal political purposes."<sup>6</sup> Thus, "partisan gerrymandering is gaining through discretionary districting an unjustifiable advantage for one political party as opposed to the others."<sup>7</sup>

1. 478 U.S. 109 (1986).

2. *Id.* at 132 (plurality opinion) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's . . . influence on the political process as a whole."). Although only four Justices joined the plurality opinion, two more Justices agreed that partisan gerrymandering could violate the Equal Protection Clause. *Id.* at 161-85 (Powell, J., concurring in part and dissenting in part).

3. *Id.* at 130.

4. *Id.* at 132.

5. Thus, the wisdom of the *Bandemer* opinion will not be discussed in detail. See generally Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 4 (1985) (contending that partisan gerrymandering claims should be nonjusticiable); John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984) (endorsing proportional representation). However, I will briefly explain why gerrymandering is pernicious, and why partisan gerrymandering raises constitutional questions. See *infra* notes 17-33, 181-269 and accompanying text. Even if *Bandemer* was wrongly decided, my "bipartisan compromise" test may be a viable legislative solution to gerrymandering, and may also be a way for nonpartisan district drawers to measure the fairness of possible districting plans.

6. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring).

7. Charles Backstrom et al., *Issues in Gerrymandering: An Exploratory Measure of Partisan*

District drawers use two techniques to construct a partisan gerrymander: "packing" and "cracking." Packing "packs" the opposing party's members into "a relatively small number of districts so that the [opposing party] is virtually assured of winning with overwhelmingly large majorities in those few districts but of losing in the others."<sup>8</sup> Cracking "cracks" or splits the opposing party's vote so that it "has large but inefficacious minorities in most or all of the districts."<sup>9</sup>

A gerrymander will often combine packing and cracking. For example, in 1812 the Massachusetts legislature, which was dominated by the Democrat-Republican party (known colloquially as "Republicans" and "Democrats"<sup>10</sup>), passed a redistricting plan for the state senate.<sup>11</sup> The plan packed the opposing Federalist party's vote by dividing "the state into grotesque portions . . . to place large numbers of Federalist voters into disproportionately few senate districts,"<sup>12</sup> and "cracked" the Federalist vote by "scatter[ing] the remaining Federalist voters in districts around the rest of the state."<sup>13</sup> After the bill was signed into law by Democratic Governor Elbridge Gerry, a Boston newspaper described the plan as a "gerrymander" by combining Governor Gerry's name "and the salamander, which the most convoluted senate district was said to resemble."<sup>14</sup> Ever since 1812, the term "gerrymander" has been used to describe highly partisan redistricting plans.<sup>15</sup>

Despite Federalist lampoons, the Democrats' gerrymander was quite

*Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1129 (1978).

8. Michael D. McDonald & Richard L. Engstrom, *Detecting Gerrymandering*, in POLITICAL GERRYMANDERING AND THE COURTS 178, 178-79 (Bernard Grofman ed., 1990) [hereinafter POLITICAL GERRYMANDERING].

9. *Id.* at 179.

10. See SAMUEL E. MORISON ET AL., 1 THE GROWTH OF THE AMERICAN REPUBLIC 328-29 (1969); Allan B. Moore, Note, A "Frightful Political Dragon" Indeed: Why Constitutional Challenges Cannot Subdue the Gerrymander, 13 HARV. J.L. & PUB. POL'Y 949, 950-51 (1990). The Democrat-Republicans were an anti-Federalist party led by Thomas Jefferson and James Madison, at the time of the Massachusetts gerrymander. See *id.* at 950 n.2. The Democrat-Republicans later split into Whigs and Democrats. See *id.* The Democrat-Republicans have been referred to as "Democrats," *id.* at 950-51, "Republicans," MORISON ET AL., *supra*, at 328-29, and "Jeffersonian Republicans," SOL BARZMAN, MADMEN AND GENIUSES 44 (1974).

11. See Moore, *supra* note 10, at 950.

12. David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STAN. L. REV. 1549, 1550 (1990).

13. *Id.*

14. *Id.* at 1551; see also Moore, *supra* note 10, at 951-52. Ironically, Gerry, who later became Vice President, did not actively support the gerrymander and contemplated vetoing it. *Id.* at 950 n.3.

15. See Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 279-80. However, gerrymandering had existed long before 1812. "It has been identified in this country as early as 1705, when the colonial legislature in Pennsylvania sought to retain political power within the rural, eastern counties through a representational structure discriminating [against] residents of the city of Philadelphia." *Id.* at 280.

successful. The Democrats won "29 of the [state's] 40 senate seats while losing the popular vote 50,164 to 51,766."<sup>16</sup>

## 2. What Is Wrong With Gerrymandering?

Scholars and public interest groups have criticized gerrymandering for a variety of reasons.<sup>17</sup> Even nonpartisan gerrymandering "violates the American constitutional tradition by conceding to legislatures [the] power of self-selection."<sup>18</sup> For example, if State Senator John Doe (a white Democrat) chairs the state senate's redistricting committee, he can create a safe district for himself by removing Republicans and ethnic minorities from his district.

Partisan gerrymandering is especially pernicious, for two reasons. First, a partisan gerrymander may allow "a party with only a minority of the popular vote [to] assert control over a majority of seats in the state assembly and over its state's delegation to the national House of Representatives."<sup>19</sup> Second, a partisan gerrymander may allow "a party that enjoys only a small majority in popular support over its principal competitor . . . [to] translate this popular edge into preemptive institutional dominance."<sup>20</sup> Whether a gerrymander creates a majority party or merely increases the majority's power, it may "lock in" a partisan imbalance so skillfully that the legislature is not "responsive to the changing will of the electorate."<sup>21</sup>

Other commentators have argued that partisan gerrymandering is not an unmitigated evil, for several reasons. First, it has been argued that by enlarging the majority party's power, a partisan gerrymander "reinforce[s] the majority party's capacity to govern alone, making it easier to attribute responsibility for political acts, such as legislation, to a single party."<sup>22</sup> This argument lacks merit, for two reasons. First, if the gerrymandering party does not control the executive branch, gerrymandering actually reinforces divided government and thereby makes the executive branch less rather than more accountable. For example, Democratic gerrymanders of congressional delegations may have reduced governmental accountability because the Republicans have controlled the presidency for most of the

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16. *Id.*

17. Moore, *supra* note 10, at 961-62.

18. Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 304 (1991).

19. *Id.* at 302.

20. *Id.*

21. Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 112 (1985).

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

past twenty-five years. Second, a gerrymander may not increase the majority party's seat share if it allows a party with a minority of the popular vote to narrowly win legislative control (rather than merely augmenting the majority party's dominance).

Second, it has been argued that "all districting is gerrymandering"<sup>23</sup> because "[t]he drawing of district boundaries cannot but involve political judgments and political results." [Consequently,] there is no a priori standard to follow, no politically neutral definition of 'fair and effective representation.'<sup>24</sup> This argument proves too much. If no rule is neutral, why is a rule electing the legislative candidate who gets the most votes any fairer than a rule electing the candidate with the least votes? After all, the former rule favors popular over unpopular candidates. Indeed, all political ground rules (such as the rule prohibiting racial gerrymandering) affect political outcomes.<sup>25</sup>

The idea that "no rule is neutral" rests on the assumption that "a 'neutral' rule must disregard outcomes."<sup>26</sup> As shown above, this assumption leads to absurd consequences. A more sensible definition of "neutrality" is that a "neutral" or "fair" districting plan or electoral procedure is one which accords with "accepted ideas of procedural fairness—in other words, that the person who did win, should have won, with 'should' drawing its meaning from precisely the democratic ideas that are [represented] by holding elections in the first place."<sup>27</sup>

Admittedly, it is not always clear what constitutes "fair representation" or a "neutral" districting rule. It does not follow, however, that one cannot define certain practices (such as racial or partisan gerrymandering) as unfair, because "decision makers often do, and indeed often must, move away from a wrong position without being able to specify precisely what ideal position they are moving toward."<sup>28</sup>

A third progerrymandering argument is that "gerrymandering is a self-limiting enterprise . . . [because] the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat."<sup>29</sup> Admittedly, "[w]hen gerrymanderers try to spread their party's

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23. Polsby & Popper, *supra* note 18, at 310.

24. Moore, *supra* note 10, at 970 (quoting REAPPORTIONMENT POLITICS, THE HISTORY OF REDISTRICTING IN THE 50 STATES 24 (Leroy C. Hardy et al. eds., 1981)); see also Lowenstein & Steinberg, *supra* note 5, at 4 ("[T]here are no coherent public interest criteria for legislature districting independent of substantive conceptions of the public interest.").

25. Polsby & Popper, *supra* note 18, at 310-11.

26. *Id.* at 310.

27. *Id.* at 311.

28. Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 228 (1985).

29. *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring).

voting strength thinly, in order to capture as many seats as possible, they leave themselves vulnerable to electoral tides that may sweep their party out of office.”<sup>30</sup> However, a sophisticated gerrymander can avoid such pitfalls by creating “districts with a sufficient cushion of [majority party] partisan sympathizers . . . to make the districts safe for that party.”<sup>31</sup> For example, suppose that California has forty-five state senate districts with eleven voters per district, and of the state’s 495 voters, 248 are Republican and 247 are Democrats. An unsophisticated Democratic district drawer will create forty-one districts which are 6-5 Democratic and four districts which are 10-1 or 11-0 Republican. Under this plan, the Democrats would ideally have a 41-4 lead, but might lose most of their legislators if the state moved even slightly towards the Republicans. A more sophisticated plan will create thirty-five districts which are 7-4 (or 63%) Democratic, and ten overwhelmingly (10-1 or 11-0) Republican districts. Under this plan, the Democrats are almost certain to retain about a 3-1 lead in the legislature even if they are consistently outpolled by the Republicans.

Fourth, it has been argued that voters are just as well represented by a gerrymander as by any other districting plan, because

[s]o long as candidates must compete for electoral pluralities or majorities in a district, simple political expediency dictates that they take into account the preferences and interests of all constituents whose votes they may need some day, including at least some of those who might ordinarily be expected to support their opponents.<sup>32</sup>

But if legislators tried to represent their political adversaries as well as they represented their supporters, there would be no difference between Democrats and Republicans. As this is not the case, a gerrymandered legislature is obviously less representative of the minority party’s voters (at least on ideologically divisive issues) than it would be in the absence of a gerrymander.

## B. *Judicial Intervention in Redistricting*

### 1. One Person, One Vote

In the early 1960s, the Supreme Court “stomped through decades of

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30. Grofman, *supra* note 21, at 156.

31. *Id.*

32. Peter H. Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 240, 245.



contrary precedent and into the political thicket of redistricting.”<sup>33</sup> In *Baker v. Carr*,<sup>34</sup> the Court held that challenges to the apportionment of voters between legislative districts were justiciable.<sup>35</sup> Two years later, the Court created what is known as the “one person, one vote” rule.<sup>36</sup> Under this rule, the Equal Protection Clause requires state legislatures to “eliminate population disparities among districts.”<sup>37</sup> The Court has applied this rule to both congressional<sup>38</sup> and state legislative<sup>39</sup> redistricting, on the ground that if these districts are unequally populated, residents of larger districts would have their votes unconstitutionally undervalued.<sup>40</sup>

In cases involving congressional districting, the Court has refused to create a de minimis exception to the one person, one vote rule, even where the deviation between the largest district and the smallest was under one percent and was so low that it was “smaller than the predictable undercount in available census data.”<sup>41</sup> The Court has qualified this seemingly harsh rule by suggesting that an otherwise unconstitutional plan may be upheld if a state proves “that the population deviations in its plan were necessary to achieve some legitimate state objective . . . . Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.”<sup>42</sup> However, the Court has rarely accepted such justifications in cases involving congressional redistricting.<sup>43</sup>

By contrast, the Court has held that “minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.”<sup>44</sup> Specifically, the Court has held that “an apportionment plan with a maximum population deviation [between the largest and the smallest district] under ten percent falls

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33. T. Thomas Singer, *Reappraising Reapportionment*, 22 GONZ. L. REV. 527, 529 (1987-88).

34. 369 U.S. 186 (1962).

35. *Id.* at 209-10, 237.

36. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-3, at 1065 (2d ed. 1988).

37. *Id.* § 13-3, at 1064.

38. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (basing the decision on U.S. CONST. art. I, § 2).

39. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (basing the decision on the Equal Protection Clause).

40. *Id.*

41. *Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

42. *Id.* at 740.

43. Tribe, *supra* note 36, § 13-6, at 1074 (suggesting that “as far as congressional apportionment is concerned, the possibility of justifying deviations from exact equality is more theoretical than real”).

44. *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973).

within this category of minor deviations.”<sup>45</sup> Moreover, the Court has upheld larger deviations where state and local governments have justified them.<sup>46</sup>

Before *Reynolds* and similar cases, some states had not redistricted in many years. For example, Alabama had not altered its state legislative districts between 1901 and the *Reynolds v. Sims*<sup>47</sup> litigation<sup>48</sup> (which began in 1961).<sup>49</sup> By contrast, since 1964 every state has had to redistrict every ten years in order to conform with the one person, one vote doctrine.<sup>50</sup> As a result, “legislators now have the opportunity to redesign boundary lines for their own political interests every ten years.”<sup>51</sup> Because state legislators have frequently taken advantage of their opportunities to engage in gerrymandering, the one person, one vote doctrine may have encouraged other forms of vote dilution,<sup>52</sup> including partisan gerrymandering.<sup>53</sup>

### C. Gerrymandering Before Bandemer

Over the past thirty-five years, the Court has gradually expanded its power to adjudicate gerrymandering-related disputes, and has been especially hostile to racial gerrymandering. However, the Court has been more deferential towards other forms of gerrymandering.

#### 1. Racial Gerrymandering

The Supreme Court first dealt with racial gerrymandering in *Gomillion v. Lightfoot*.<sup>54</sup> *Gomillion* struck down an Alabama law which excluded

45. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

46. *Id.* at 847 (upholding an otherwise invalid plan, partially because of a longstanding, neutrally applied policy of preserving county boundaries).

47. 377 U.S. 533 (1964).

48. *Id.* at 583.

49. *Id.* at 537.

50. *Cf. id.* at 583 (stating that decennial reapportionment is a rational approach). The *Reynolds* Court declined to directly require decennial reapportionment, but suggested that “compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.” *Id.* at 583-84.

51. Michelle H. Browdy, *Computer Models and Post-Bandemer Redistricting*, 99 YALE L.J. 1379, 1381 (1990).

52. “Vote Dilution” is “the impermissible discriminatory effect of a districting plan when it operates ‘to minimize or cancel out the voting strength of [minority] groups.’” *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 646 (N.D. Ill. 1991) (alteration in original) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). For example, gerrymandering or at-large districting may constitute vote dilution if it is sufficiently egregious to be unconstitutional or illegal under the Voting Rights Act.

53. See *Karcher*, 462 U.S. at 776 n.12 (1983) (White, J., dissenting) (suggesting that strict application of the one person, one vote rule has encouraged gerrymandering).

54. 364 U.S. 339 (1960).

African-Americans<sup>55</sup> from local elections in the City of Tuskegee by re-drawing the city's boundaries as a "strangely irregular twenty-eight-sided figure."<sup>56</sup> The new boundaries removed all but a handful of its 400 African-American voters from the city without removing a single white voter.<sup>57</sup> The plaintiffs, local black voters, did not claim that their votes were underweighed in their new jurisdiction.<sup>58</sup> Nevertheless, the Court held the Alabama law was unconstitutional, because it "single[d] out a readily isolated segment of a racial minority for special discriminatory treatment."<sup>59</sup>

The Court later expanded *Gomillion* to bar racially motivated redistricting within a state or municipality. For example, in *White v. Regester*,<sup>60</sup> the Court held that multimember state legislative districts in Dallas and San Antonio unconstitutionally diluted the votes of African-Americans and Mexican-Americans, because (1) the state's multimember districting scheme adversely affected racial minorities and (2) "the political processes leading to nomination and election were not equally open to participation by the [ethnic] group[s] in question . . . [because their] members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."<sup>61</sup>

In *City of Mobile v. Bolden*,<sup>62</sup> the Court clarified *White* by holding that a redistricting statute violates the Fourteenth and Fifteenth Amendments only if it is racially motivated.<sup>63</sup> Thus, under *White* and *Bolden*, redistricting which (1) is meant to injure an ethnic minority and (2) in fact does injure that minority, remains unconstitutional.<sup>64</sup>

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55. In this article, the terms "black" and "African-American" shall be used interchangeably.

56. *Gomillion*, 364 U.S. at 341.

57. *Id.*

58. *See id.* at 340.

59. *Id.* at 346. Although *Gomillion* was decided under the Fifteenth Amendment, later cases involving racial gerrymandering have usually been litigated under the Fourteenth Amendment. *See, e.g., White v. Regester*, 412 U.S. 755 (1973).

60. 412 U.S. 755 (1973).

61. *Id.* at 765-66. Specifically, the Court found that African-Americans and Mexican-Americans had fewer political opportunities than whites, because of: (1) Texas' history of racial discrimination, (2) social inequalities caused by such discrimination, (3) other election rules which adversely affected racial minorities, (4) local legislators' unresponsiveness to minority interests, and (5) the Dallas Democratic Party's slating system, which was unresponsive to African-American concerns. *Id.* at 766-70.

62. 446 U.S. 55 (1980).

63. *Id.* at 62-70.

64. *Bandemer*, 478 U.S. at 139-41 & n.17 (plurality opinion); *see also Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (stating that multimember districts are subject to challenge where they operate to minimize or cancel out voting strength of racial or political elements of the voting population); *Fortson v. Dorsey*, 379 U.S. 433 (1965) (suggesting that multimember districts may violate equal protection by minimizing minority representation, but upholding challenged districting plan). After *Bolden*, Congress amended the Voting Rights Act to prohibit election laws which unintentionally minimized minority voters' influence. *See Act of June 29, 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134* (codified as

In *Shaw v. Reno*,<sup>65</sup> the Court expanded its prohibition of racial gerrymandering to restrict “affirmative gerrymandering” aimed at increasing the power of ethnic minorities.<sup>66</sup> In *Shaw*, plaintiffs challenged a redistricting plan which drew “unusually shaped”<sup>67</sup> districts in order to create an additional majority-black district.<sup>68</sup> For example, one district was approximately 160 miles long, but no wider than an interstate highway.<sup>69</sup> The district wound “in snake-like fashion through tobacco country, financial centers, and manufacturing areas ‘until it gobble[d] in enough enclaves of black neighborhoods.’”<sup>70</sup> The district court dismissed plaintiffs’ complaint, because the redistricting plan was enacted “to comply with the Voting Rights Act . . . [and] did not lead to proportional underrepresentation of white voters statewide.”<sup>71</sup>

The Supreme Court reversed, holding that

a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effect to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.<sup>72</sup>

The Court added that it was not deciding what constitutes a “sufficient justification” for a redistricting plan, nor was it deciding “whether ‘the intentional creation of majority-minority districts, without more’ always gives rise to an equal protection claim.”<sup>73</sup> The Court then remanded so the lower court could determine whether the plan was “so irrational on its face that it [could] be understood only as an effort to segregate voters into separate voting districts because of their race”<sup>74</sup> and if so, whether the

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amended at 42 U.S.C. § 1973 (1988)); *Thornburg v. Gingles*, 478 U.S. 30 (1986).

65. 113 S. Ct. 2816 (1993).

66. *Id.* at 2832.

67. *Id.* at 2820. The plaintiffs contended that the reapportionment plan violated several provisions of the U.S. Constitution, including the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 2821.

68. *Id.* at 2820-21.

69. *Id.*

70. *Id.* at 2820 (Voorhees, C.J., concurring in part and dissenting in part) (quoting *Shaw v. Barr*, 808 F. Supp. 461, 476 (E.D.N.C. 1992), *rev’d sub nom.* *Shaw v. Reno*, 113 S. Ct. 2816 (1993)).

71. *Id.* at 2822 (citing *Shaw v. Barr*, 808 F. Supp. at 472-73).

72. *Id.* at 2828.

73. *Id.* (quoting *id.* at 2839 (White, J., dissenting)).

74. *Id.* at 2832. By contrast, the Court suggested that plans designed to create minority enclaves are permissible if they adhere “to traditional districting principles.” *Id.* at 2829 (citing *United Jewish Orgs. v. Carey*, 430 U.S. 144, 168 (1977) (plurality opinion) (allowing creation of districts that give minority racial groups the opportunity to be the majority if sound districting principles such as com-

plan was "narrowly tailored to further a compelling governmental interest."<sup>75</sup> In response to the dissent's claim that "racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the minority, rather than the majority,"<sup>76</sup> the Court stated that "equal protection analysis is not dependent on the race of those burdened or benefited by a particular classification."<sup>77</sup>

Thus, after *Shaw* it appears that even prominority redistricting plans may be struck down as unconstitutional racial gerrymanders if they (1) have no purpose other than to pack ethnic minorities into minority-dominated districts, and (2) are not justified by a compelling state interest. However, it is not clear where the courts will "draw the line" separating unconstitutional redistricting plans from permissible ones.

## 2. Bipartisan and Nonpartisan Gerrymandering

Although the Supreme Court has decided numerous racial gerrymandering cases, it did not address vote dilution claims brought by political groups until the case of *Gaffney v. Cummings*.<sup>78</sup> In *Gaffney*, Connecticut Democrats<sup>79</sup> challenged Connecticut's 1972 reapportionment plan, which was drawn by an ostensibly bipartisan commission<sup>80</sup> with "the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties."<sup>81</sup> Plaintiffs alleged that the Connecticut plan was "nothing less than a gigantic political gerrymander, invidiously discriminatory under the Fourteenth Amendment."<sup>82</sup>

The Court upheld the plan, holding that it had no "constitutional war-

pactness and population equality are employed)).

75. *Id.*

76. *Id.* at 2829.

77. *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)).

78. 412 U.S. 735 (1973).

79. See Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, in 1986 SUP. CT. REV. 175, 206 (Philip B. Kurland et al. eds., 1987) (noting that Democrats challenged the plan because a plan that "employed neutral districting criteria" would favor Democrats due to "the heavy concentration of Republican voters in suburban Fairfield County").

80. Engstrom, *supra* note 15, at 301 (noting although the commission was bipartisan, a Democratic member of commission objected to the plan, but a Republican and "third member of the board, who had been selected by the other two," supported the plan).

81. *Gaffney*, 412 U.S. at 752. Ironically, the plan's results were far different from the parties' expectations. The Commission intended to create "70 safe Democratic seats, 55 to 60 safe Republican seats," and about 25-30 "swing" seats. *Id.* at 738 n.4. In fact, the Democrats' share of the state's 151 House seats ranged from 58 (after the 1972 elections) to 118 (after the 1974 elections). See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 506 (1977).

82. *Gaffney*, 412 U.S. at 752.

rant to invalidate a state plan . . . because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the state.”<sup>83</sup> According to the Court, redistricting “without regard for political impact”<sup>84</sup> was impractical, for two reasons.<sup>85</sup> First, such a “politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results.”<sup>86</sup> Second, the Court added that “it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.”<sup>87</sup> Thus, *Gaffney* stands for the proposition that a bipartisan gerrymander (i.e., a redistricting plan intended to satisfy both major parties by reflecting their relative strength) is constitutional.

### 3. Partisan Gerrymandering Before *Bandemer*

In numerous pre-*Bandemer* cases, the Supreme Court stated in dictum that redistricting plans which discriminate against political groups may be unconstitutional. For instance, in *Gaffney*, the Court suggested that a multimember district would violate the Fourteenth Amendment if it is employed “to minimize or cancel out the voting strength of racial *or political* elements of the voting population.”<sup>88</sup> However, prior to *Bandemer*, the Supreme Court generally refused to decide partisan gerrymandering claims, summarily affirming both lower court opinions which adjudicated such claims and those which held that partisan gerrymandering claims were not justiciable.<sup>89</sup>

In *Karcher v. Daggett*,<sup>90</sup> every opinion addressed political gerrymandering, although the majority opinion did not directly address its constitutionality. *Karcher* invalidated New Jersey’s 1982 congressional redistricting plan because “the population deviations in the plan were not functionally equal as a matter of law, and . . . the plan was not a good-faith effort to achieve population equality using the best available census data.”<sup>91</sup> In a footnote, the majority rejected Justice White’s suggestion that its strict

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83. *Id.* at 754.

84. *Id.* at 753. Several possible techniques of achieving neutral redistricting exist. See *infra* part III.C-III.C.2.e.

85. *Gaffney*, 412 U.S. at 753.

86. *Id.*

87. *Id.*

88. *Id.* at 751 (emphasis added) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)).

89. *Bandemer*, 478 U.S. at 120.

90. 462 U.S. 725 (1983).

91. *Id.* at 744.

application of the one person, one vote rule promoted gerrymandering.<sup>92</sup> However, the majority opinion did not directly address the constitutionality of partisan gerrymandering.

Justice Stevens, one of the five Justices in the majority, joined in the majority opinion, but wrote in a concurring opinion that "political gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause,"<sup>93</sup> for two reasons. First, Justice Stevens stated that the Equal Protection Clause "requires every State to govern impartially."<sup>94</sup> Election rules which "serve no purpose other than to favor one segment [of the community] . . . or to disadvantage a politically weak segment of the community . . . violate the constitutional guarantee of equal protection."<sup>95</sup> Second, Justice Stevens found that political gerrymandering was analogous to racial gerrymandering, based on the Court's repeated statements that states could not dilute "the voting strength of racial *or political* elements of the voting population."<sup>96</sup> Justice Stevens found that the New Jersey plan's partisanship "certainly strengthen[ed] [the] conclusion that the New Jersey plan violate[d] the Equal Protection Clause"<sup>97</sup> but explicitly refused to decide whether the New Jersey plan's partisan features alone rendered it unconstitutional.<sup>98</sup>

The dissenters, like the majority, wrote two separate opinions. Justice White wrote for all four dissenters, and did not directly address the constitutionality of partisan gerrymandering.<sup>99</sup> However, he did criticize the majority's absolutist application of the one person, one vote rule by claiming that:

Although neither a rule of absolute equality nor one of substantial equality can alone prevent deliberate partisan gerrymandering, the former offers legislators a ready justification for disregarding geographic and political boundaries. . . . Legislatures intent on

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92. *Id.* at 734 n.6.

93. *Id.* at 744 (Stevens, J., concurring). Specifically, Justice Stevens wrote that a rebuttable presumption of unconstitutional gerrymandering should be found where the plan significantly impacts a defined political group adversely and "departs dramatically from neutral criteria." *Id.* at 754 (Stevens, J., concurring). Also, Justice Stevens wrote that a *prima facie* showing of discrimination may be made by reliance on the one person, one vote principle or by showing substantial divergences from a mathematical standard of compactness and extensive deviation from established political boundaries. *Id.* at 755-59 (Stevens, J., concurring).

94. *Id.* at 748 (Stevens, J., concurring).

95. *Id.* (Stevens, J., concurring).

96. *Id.* at 749 (Stevens, J., concurring) (emphasis added) (quoting *Gaffney*, 412 U.S. at 751).

97. *Id.* at 762 (Stevens, J., concurring); see *infra* notes 103-05 and accompanying text (describing evidence of the New Jersey plan's partisan nature).

98. *Karcher*, 462 U.S. at 764-65.

99. See *id.* at 765-83 (White, J., dissenting).

minimizing the representation of selected *political or racial groups* are invited to ignore political boundaries and compact districts so long as they adhere to population equality.<sup>100</sup>

Justice White added that gerrymanders are a "far greater potential threat to equality of representation"<sup>101</sup> than unequally populated districts.

Finally, Justice Powell, who joined in Justice White's dissent, wrote a separate dissent which stated that he was "prepared to entertain constitutional challenges to partisan gerrymandering that reaches the level of discrimination described by Justice Stevens."<sup>102</sup> Justice Powell suggested that the New Jersey plan might be an unconstitutional gerrymander because the plan's districts reflect no "attempt to follow natural, historical, or local political boundaries,"<sup>103</sup> created "several districts which are anything but compact, and at least one district which is contiguous only for yachtsmen"<sup>104</sup> and apparently was intended to hurt Republicans.<sup>105</sup>

In *Karcher*, Justices Stevens and Powell explicitly found that partisan gerrymandering was unconstitutional if it was sufficiently severe and lacked any neutral justification,<sup>106</sup> and Justice White, joined by Chief Justice Burger and Justices Powell and Rehnquist, hinted that gerrymandering might be unconstitutional by saying that it was a "greater potential threat" to equality of representation than unequally populated districts.<sup>107</sup> Thus, after *Karcher*, "[t]he time seemed ripe for determining whether political gerrymandering was justiciable."<sup>108</sup>

#### 4. *Davis v. Bandemer*

The full Court finally addressed partisan gerrymandering in *Davis v. Bandemer*.<sup>109</sup> *Bandemer* arose out of Indiana's 1981 state legislative redistricting plan.<sup>110</sup> When the plan was enacted, the governor was a Republican, and both houses of the state legislature were dominated by Republicans.<sup>111</sup> Not surprisingly, the legislature passed plans created by the

100. *Id.* at 776 (White, J., dissenting) (emphasis added).

101. *Id.* (White, J., dissenting) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 542, 555 (1969)).

102. *Id.* at 787 (Powell, J., dissenting).

103. *Id.* at 789 (Powell, J., dissenting).

104. *Id.* (Powell, J., dissenting) (quoting *Daggett v. Kimmelman*, 535 F. Supp. 978, 984 (D.N.J. 1982) (Gibbons, J., dissenting), *aff'd sub nom.* *Karcher v. Daggett*, 462 U.S. 725 (1983)).

105. *See id.* (Powell, J., dissenting) (describing letter by speaker of state House as "harshly partisan").

106. *Id.* at 754-59 (Stevens, J., concurring); *id.* at 787-89 (Powell, J., dissenting).

107. *Id.* at 776 (White, J., dissenting).

108. Gordon E. Baker, *The Unfinished Reapportionment Revolution*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 11, 20.

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

110. *Id.* at 113-15.

111. *Bandemer v. Davis*, 603 F. Supp. 1479, 1482-83 (S.D. Ind. 1984), *rev'd*, 478 U.S. 109



Indiana Republican Party<sup>112</sup> in order to "protect[ ] [Republican] incumbents and creat[e] every possible 'safe' Republican district possible."<sup>113</sup> In the 1982 elections (the first election under the districting plan), Democratic candidates for the state house earned 51.9% of the statewide vote, but only received 43 of 100 seats.<sup>114</sup> However, Democrats were only slightly under-represented in state senate elections, receiving 53.1% of the statewide vote and 52% of the seats.<sup>115</sup>

Indiana Democrats sued to invalidate both the house and senate plans on the ground that they constituted unconstitutional partisan gerrymanders.<sup>116</sup> The district court invalidated the plans based on Justice Stevens' concurrence in *Karcher*.<sup>117</sup> In support of this conclusion, the district court relied on the disproportionate results of the 1982 elections, the irregular shape of some district lines, the legislature's attempt to dilute the Democratic vote by putting Democratic areas in Republican-dominated multimember districts, the legislature's disregard for political subdivision boundaries, and the legislature's failure to offer an adequate explanation for the more unusual features of its redistricting plan.<sup>118</sup>

On appeal, the Supreme Court split into three blocs. Justice White wrote a plurality opinion joined by Justices Brennan, Marshall and Blackmun which held that political gerrymandering was justiciable, and upheld the Indiana plans at issue.<sup>119</sup> Chief Justice Burger and Justices Rehnquist and O'Connor voted to uphold the Indiana plan on the ground that political gerrymandering claims raise a nonjusticiable political question.<sup>120</sup> Justices Powell and Stevens dissented, on the basis that the Indiana plan was unconstitutional.<sup>121</sup> Thus, a 6-3 majority of the Court held that political gerrymandering was actionable under the Fourteenth Amendment, while a different 7-2 majority held that the Indiana redistricting plan was constitutional. Each of these issues will be briefly discussed below.

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(1986).

112. *Id.* at 1483-84.

113. *Id.* at 1488.

114. *Id.* at 1485.

115. *See id.* at 1486. According to the Democrats, however, the proportional results of the 1982 senate election were misleading because most of the Democrats' 1982 wins were in "safe" Democratic areas. *Bandemer*, 478 U.S. at 182 (Powell, J., concurring in part and dissenting in part). The results of the 1984 state senate election, in which Democrats won 42.3% of the votes and only 28% of the seats corroborates this contention. *Id.* at 182-83.

116. *Bandemer*, 603 F. Supp. at 1489.

117. *Id.* at 1490.

118. *Bandemer*, 478 U.S. at 116.

119. *Id.* at 113-43 (plurality opinion).

120. *Id.* at 143-44 (Burger, C.J., concurring); *id.* at 144 (O'Connor, J., concurring).

121. *Id.* at 161-85 (Powell, J., concurring in part and dissenting in part).

a. *Justiciability*

It is well settled that the courts should refuse to decide a case on the merits if it is nonjusticiable—that is, if it presents a “political question.”<sup>122</sup> A political question exists if there is

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>123</sup>

The *Bandemer* Court held that political gerrymandering claims were justiciable, for several reasons. First, the plurality noted that in racial gerrymandering cases, the Court had repeatedly stated that districting which might dilute “‘the voting strength of racial *or* political elements of the voting population’ would raise a constitutional question.”<sup>124</sup> Second, the plurality noted that *Gaffney*<sup>125</sup> supported justiciability because the Court considered the merits of a challenge to a bipartisan gerrymander “in the face of a discussion of justiciability in [the defendant’s] brief.”<sup>126</sup> Third, the Court held that the one person, one vote cases indicate “the justiciability of claims going to the adequacy of representation in state legislatures”<sup>127</sup> because “in formulating the one person, one vote formula, the Court characterized the question posed by election districts of disparate size as an issue of fair representation.”<sup>128</sup> Fourth, the Court relied on its racial gerrymandering cases.<sup>129</sup> The Court admitted that political groups were not as immutable or as “subject to the same historical stigma”<sup>130</sup> as racial groups, but held that their differences were irrelevant to justiciability because there was no reason to believe that

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122. See *id.* at 119-20.

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

124. *Bandemer*, 478 U.S. at 119 (alteration in original).

125. 412 U.S. 735 (1973).

126. *Bandemer*, 478 U.S. at 119.

127. *Id.* at 124.

128. *Id.* at 123.

129. *Id.* at 124.

130. *Id.* at 125.

the standards . . . set forth here for adjudicating this political gerrymandering claim are less manageable than the standards that have been developed for racial gerrymandering claims . . . [or that there is an] initial policy decision—regarding, for example, the desirability of fair group representation—we have made here that we have not made in the race cases.<sup>131</sup>

In a concurring opinion, Justice O'Connor wrote that "the partisan gerrymandering claims of major political parties raise nonjusticiable political questions that the judiciary should leave to the legislative branch."<sup>132</sup> Justice O'Connor challenged the majority's interpretation of precedent in three ways. First, the one person, one vote cases did not require adjudication of gerrymandering cases because their requirement of population equality was "relatively simple and judicially manageable"<sup>133</sup> and "the one person, one vote principle safeguards the individual's right to vote, not the interests of political groups."<sup>134</sup> By contrast, the plurality's "consistent degradation" test for deciding political gerrymandering cases protected group rights and was judicially unmanageable.<sup>135</sup> Second, *Gaffney*, which treated a claim of bipartisan gerrymandering as justiciable, was not on point because (1) the *Gaffney* Court did not directly address the justiciability issue,<sup>136</sup> and (2) *Gaffney* actually supported a finding that partisan gerrymandering is per se constitutional, as both bipartisan and partisan gerrymandering cause some voters to "lose any chance to elect a representative who belongs to their party, because they have been assigned to a district in which the opposing party holds an overwhelming advantage."<sup>137</sup> Third, Justice O'Connor argued the Court's racial gerrymandering cases were not on point, because (1) the purpose of the Fourteenth Amendment was to prohibit racial rather than political discrimination;<sup>138</sup> (2) racial gerrymandering was unconstitutional only if an ethnic minority has "essentially been shut out of the political process,"<sup>139</sup> while Republicans and Democrats "cannot claim that they [were] a discrete and insular group vulnerable to exclusion from the political process by some dominant

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131. *Id.*

132. *Id.* at 144 (O'Connor, J., concurring).

133. *Id.* at 149 (O'Connor, J., concurring).

134. *Id.* (O'Connor, J., concurring).

135. *See id.* at 155 (O'Connor, J., concurring).

136. *See id.* at 153-54 (O'Connor, J., concurring) (noting that the *Gaffney* Court "did not confront the difficulties in framing a manageable standard" because it "rejected the challenge to bipartisan gerrymandering out of hand").

137. *See id.* at 154 (O'Connor, J., concurring).

138. *See id.* at 151 (O'Connor, J., concurring).

139. *Id.* at 152 (O'Connor, J., concurring) (quoting *id.* at 139 (plurality opinion)).

group . . . [as they] *are* the dominant group”;<sup>140</sup> and (3) measuring a political party’s voting strength is far more difficult than measuring a racial group’s voting strength because “while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties.”<sup>141</sup>

Justice O’Connor also contended that there was no practical need for judicial intervention, for three reasons.<sup>142</sup> First, “there is good reason to think that political gerrymandering is a self-limiting enterprise . . . [because] [i]n order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat.”<sup>143</sup> Second, because the plurality admitted that “elected candidates will not ignore the interests of voters for the losing candidate,”<sup>144</sup> gerrymandering does not shut the minority party out of the political process. Third, individual voters are not injured by a gerrymander because voters in one district are not injured by “a supposed diminution of the *statewide* voting influence of a political group.”<sup>145</sup>

Justice O’Connor further argued that the plurality’s “consistent degradation” test was so vague that it would “either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality.”<sup>146</sup> In support of this view, Justice O’Connor noted that in racial gerrymandering cases, the courts had been forced to consider an ethnic minority’s share of seats,<sup>147</sup> and that the plurality’s “consistent degradation” test implicitly required proportionality by focusing on whether “the complaining political party could be expected to regain control of the state legislature in the next few elections.”<sup>148</sup> Justice O’Connor also contended that a rule against racial gerrymandering was more manageable than a rule against political gerrymandering, because “[d]esigning an apportionment plan that does not impair or degrade the voting strength of several groups is more difficult than designing a plan that does not have such an effect on one group.”<sup>149</sup> Justice O’Connor also noted that because political groups (unlike racial groups) are not immutable, measuring a party’s strength in the absence of discrimination would be far more difficult than measuring an

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140. *Id.* (O’Connor, J., concurring).

141. *Id.* at 156 (O’Connor, J., concurring).

142. *See id.* at 152-53 (O’Connor, J., concurring).

143. *Id.* at 152 (O’Connor, J., concurring) (citation omitted).

144. *Id.* (O’Connor, J., concurring).

145. *Id.* at 153 (O’Connor, J., concurring).

146. *Id.* at 155 (O’Connor, J., concurring).

147. *Id.* at 156-57 (O’Connor, J., concurring).

148. *Id.* at 158 (O’Connor, J., concurring).

149. *Id.* at 156 (O’Connor, J., concurring).

ethnic group's voting strength.<sup>150</sup>

Finally, Justice O'Connor said adjudication of political gerrymandering claims required the courts to make two "initial policy determination[s] of a kind clearly for nonjudicial discretion."<sup>151</sup> The plurality's first "illegitimate policy determination" was its willingness to uphold bipartisan gerrymanders while rejecting partisan ones.<sup>152</sup> Justice O'Connor wrote that the two types of cases could not be distinguished because both types of gerrymanders " 'waste' the votes of individuals."<sup>153</sup> The second illegitimate policy determination was the plurality's preference for proportionality, which was "a fundamental policy choice that is contrary to the intent of [the Constitution's] Framers and to the traditions of this Republic."<sup>154</sup>

In response, the plurality defended its use of precedent, for three reasons. First, although the one person, one vote cases were not directly on point, the plurality's preference "for a level of 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 . . . the objective of fair and adequate representation recognized in [such cases]."<sup>155</sup> Second, *Gaffney* was not on point, because bipartisan gerrymanders like the one upheld in *Gaffney* "are aimed at guaranteeing rather than infringing fair group representation."<sup>156</sup> Third, the differences between political and racial gerrymanders were irrelevant to the manageability of standards for deciding gerrymandering cases.<sup>157</sup> The plurality also rebuffed Justice O'Connor's policy concerns, stating that Justice O'Connor's focus "on the perceived need for judicial review"<sup>158</sup> would unwisely alter *Baker*, which limited nonjusticiability to cases involving a political question.<sup>159</sup>

Finally, the plurality stated:

As to the illegitimate policy determinations that Justice O'Connor believes that we have made, she points to two. The first is a preference for nonpartisan as opposed to partisan gerrymanders, and the second is a preference for proportionality. On a group level, however, which must be our focus in this type of claim, neither of

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150. *See id.* (O'Connor, J., concurring).

151. *Id.* at 155 (O'Connor, J., concurring) (quoting *Baker*, 369 U.S. at 217).

152. *See id.* at 154 (O'Connor, J., concurring).

153. *Id.* at 155 (O'Connor, J., concurring).

154. *Id.* at 158 (O'Connor, J., concurring).

155. *Id.* at 125 n.9.

156. *Id.*

157. *See id.* at 125.

158. *Id.* at 126.

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

these policy determinations is “of a kind clearly for nonjudicial discretion.” The first merely recognizes that nonpartisan gerrymanders in fact are aimed at guaranteeing rather than infringing fair group representation. The second, which is not a preference for proportionality per se but a preference for a level of 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 and the objective of fair and adequate representation recognized in *Reynolds v. Sims*.<sup>160</sup>

b. *Constitutionality of the Indiana Plan*

After resolving justiciability, the plurality should have decided whether partisan gerrymandering could be unconstitutional, because “the holding that a constitutional claim presents a justiciable question does not carry the consequence that the claim has any validity on the merits.”<sup>161</sup> Instead, the plurality plunged directly “into the specifics of the adjudication of gerrymandering claims.”<sup>162</sup> Thus, the plurality appears to have assumed that if political gerrymandering is justiciable, it must be unconstitutional if it consistently degrades the minority party’s power.<sup>163</sup> The plurality began its discussion by noting that in *Bandemer*, as in racial gerrymandering cases, “plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.”<sup>164</sup> The plurality found it unnecessary to discuss the issue of discriminatory intent in detail, stating that “[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended”<sup>165</sup> and that the record therefore supported the district court’s finding that the

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160. *Bandemer*, 478 U.S. at 125 n.9 (plurality opinion) (citations omitted).

161. Daniel H. Lowenstein, *Bandemer’s Gap: Gerrymandering and Equal Protection*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 64, 74. For example, the Court could have ruled that although partisan gerrymandering was justiciable, it was not permitted by the Equal Protection Clause. *Id.*

162. *Id.*

163. *Id.* By contrast, the concurrences were somewhat more careful. Justice O’Connor did not divide her opinion into “constitutionality” and “justiciability” sections, but did state that “no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment.” *Bandemer*, 478 U.S. at 147 (O’Connor, J., concurring). Similarly, Justice Powell argued that gerrymandering implicated the Equal Protection Clause because the “[c]lause guarantees citizens that their State will govern them impartially.” *Id.* at 166 (Powell, J., concurring in part and dissenting in part).

164. *Bandemer*, 478 U.S. at 127 (plurality opinion).

165. *Id.* at 129 (plurality opinion).

state intentionally discriminated against Indiana Democrats.<sup>166</sup>

However, the plurality rejected the district court's holding that the Indiana redistricting plan's discriminatory effects were sufficient to violate equal protection.<sup>167</sup> At the start of its discriminatory effects discussion, the plurality noted that the Court's racial gerrymandering cases "clearly foreclose any claim that the Constitution requires proportional representation."<sup>168</sup>

The plurality went on to hold that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."<sup>169</sup> Under this test, plaintiffs may not prevail by showing "the mere lack of proportional representation."<sup>170</sup> Just as racial gerrymandering plaintiffs were required to prove both disproportionate results and "strong indicia of lack of political power and the denial of fair representation,"<sup>171</sup> political gerrymandering plaintiffs were required to show "a history (actual or projected) of disproportionate results . . . in [connection] with similar indicia."<sup>172</sup> Although disproportionate results in one election did not constitute a history of disproportionate results, "[p]rojected election returns 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."<sup>173</sup>

The plurality found that the district court's findings (which were based primarily on 1982 election results)<sup>174</sup> were insufficient to satisfy the consistent degradation test, because "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory."<sup>175</sup> The plurality reasoned that there was no reason to hold that the 1982 election results "were a reliable prediction of future ones,"<sup>176</sup> where the district court (1) expressly declined to so hold, (2) declined to hold the 1982 election results "were the predictable consequence of the [gerrymander],"<sup>177</sup> (3) did not find that the Democrats could never take control of the state legislature, (4) did not consider the possibility (raised by the state on appeal) "that

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166. *Id.* at 127 (plurality opinion).

167. *See id.* at 129-30 (plurality opinion).

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

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

170. *Id.* (plurality opinion). The plurality later noted that even if this test was satisfied, the state would be allowed to show its redistricting had "valid underpinnings." *Id.* at 141 (plurality opinion).

171. *Id.* at 139 (plurality opinion).

172. *Id.* at 139-40 (plurality opinion).

173. *Id.* at 139 n.17 (plurality opinion) (emphasis in original).

174. *Id.* at 134 (plurality opinion).

175. *Id.* at 135 (plurality opinion).

176. *Id.* (plurality opinion).

177. *Id.* (plurality opinion).

had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats in both houses,"<sup>178</sup> and (5) made no finding that the 1981 redistricting "would consign the Democrats to a minority status in the Assembly throughout the 1980s or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census."<sup>179</sup> The plurality held that without such findings, the disproportionate results of the 1982 elections were inadequate to support a finding that the Democrats' influence had been consistently degraded.<sup>180</sup>

Justice Powell's dissent rejected the plurality's "consistent degradation" test.<sup>181</sup> Justice Powell agreed with the plurality that plaintiffs were required to prove both discriminatory intent and discriminatory effect,<sup>182</sup> and also agreed with the plurality's repudiation of proportional representation.<sup>183</sup> However, Justice Powell stated that the plurality's test failed to provide adequate guidance to legislators and lower courts,<sup>184</sup> and was inconsistent with racial gerrymandering cases (which, according to Justice Powell, held that a plan passed with a discriminatory purpose could be struck down even if only one election had been held under the challenged plan).<sup>185</sup>

Justice Powell endorsed Justice Stevens' concurrence in *Karcher*, which suggested that gerrymandering plaintiffs should be required to offer proof concerning various factors, including the shapes of voting districts, adherence to political subdivision boundaries, the nature of the legislative procedures by which a redistricting law was enacted, legislative history regarding the state's intent, evidence of population disparities between districts (if any), and statistics showing vote dilution.<sup>186</sup> Justice Powell added that "[n]o one [of these] factor[s] should be dispositive."<sup>187</sup> In sum, Justice Powell's test "requires consideration of all the circumstances

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178. *Id.* (plurality opinion).

179. *Id.* at 135-36 (plurality opinion).

180. *Id.* at 136 (plurality opinion). The plurality went on to criticize the district court's emphasis on the creation of multimember districts which were designed to be dominated by Republicans, because such districts are "indistinguishable from safe Republican . . . single-member districts . . . [and their existence] in no way bolsters the contention that there has been statewide discrimination against Democratic voters." *Id.* (plurality opinion).

181. *See id.* at 161-62 (Powell, J., concurring in part and dissenting in part).

182. *Id.* at 161 (Powell, J., concurring in part and dissenting in part).

183. *Id.* at 169 n.7 (Powell, J., concurring in part and dissenting in part). However, Justice Powell rejected the plurality's suggestion that supporters of a losing candidate are "usually deemed to be adequately represented by the winning candidate." *Id.* (Powell, J., concurring in part and dissenting in part) (quoting *id.* at 132 (plurality opinion)).

184. *Id.* at 171-72 (Powell, J., concurring in part and dissenting in part).

185. *Id.* at 171 n.10 (Powell J., concurring in part and dissenting in part).

186. *Id.* at 173 (Powell, J., concurring in part and dissenting in part).

187. *Id.* (Powell, J., concurring in part and dissenting in part).



surrounding the plan . . . to determine if a constitutional violation has occurred.”<sup>188</sup> Even if plaintiffs had established a prima facie case of unconstitutional gerrymandering, a state could “justify the discriminatory impact of the [redistricting] plan by showing that the plan had a rational basis in permissible neutral criteria.”<sup>189</sup>

Justice Powell wrote that under his test, the district court’s findings were “well-grounded”<sup>190</sup> because (1) “the procedures used in redistricting Indiana were carefully designed to exclude Democrats from participating in the legislative process,”<sup>191</sup> (2) the Indiana redistricting plans ignored political subdivisions,<sup>192</sup> (3) legislative leaders “openly acknowledged that their goal was to disadvantage Democratic voters,”<sup>193</sup> (4) district boundaries were “irrational” rather than compact,<sup>194</sup> (5) the legislature created multimember districts wherever “their winner-take-all aspects can best be employed to debase Democratic voting strength,”<sup>195</sup> and (6) the Indiana redistricting plans “debased the effectiveness”<sup>196</sup> of Democratic votes, because there was an unusually large gap between the Democrats’ share of the statewide popular vote and their share of legislative seats.<sup>197</sup>

### c. *Will Bandemer Survive the Rehnquist Court?*

Of the nine Justices who decided *Bandemer*, only Chief Justice Rehnquist and Justices Blackmun, Stevens, and O’Connor remain on the Court. Thus, it is possible that the Rehnquist Court will overrule *Bandemer*. For the reasons stated below, I believe that *Bandemer* will be upheld based on pre-*Bandemer* case law.

#### (1) Justiciability

As noted above, *Baker* listed numerous reasons why an issue might be a nonjusticiable “political question.”<sup>198</sup> Two of these criteria were contested in *Bandemer*:<sup>199</sup> whether there were “judicially discoverable and manageable standards for resolving”<sup>200</sup> gerrymandering claims, and

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188. *Id.* at 173 n.13 (Powell, J., concurring in part and dissenting in part).

189. *Id.* at 184 (Powell, J., concurring in part and dissenting in part).

190. *Id.* at 185 (Powell, J., concurring in part and dissenting in part).

191. *Id.* at 175 (Powell, J., concurring in part and dissenting in part).

192. *Id.* at 176-77 (Powell, J., concurring in part and dissenting in part).

193. *Id.* at 177 (Powell, J., concurring in part and dissenting in part).

194. *Id.* at 178 (Powell, J., concurring in part and dissenting in part).

195. *Id.* at 180 (Powell, J., concurring in part and dissenting in part).

196. *Id.* at 181 (Powell, J., concurring in part and dissenting in part).

197. *Id.* at 182-83 (Powell, J., concurring in part and dissenting in part).

198. *Baker*, 369 U.S. at 217, cited in *Bandemer*, 478 U.S. at 121 (plurality opinion).

199. *Bandemer*, 478 U.S. at 121-24.

200. *Id.* at 121 (quoting *Baker*, 369 U.S. at 217).

whether gerrymandering claims required “an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>201</sup>

Admittedly, the *Bandemer* plurality’s consistent degradation test is probably too vague to be manageable without some clarification by future courts.<sup>202</sup> While the *Bandemer* rule may be judicially unmanageable in its present form, scholars have created a wide variety of rules, including the “bipartisan compromise” rule proposed in this article, which could be applied to gerrymandering claims.

As to the illegitimate policy determination prong of *Baker*, Justice O’Connor suggested that the *Bandemer* majority made two illegitimate policy determinations: its preference for “nonpartisan as opposed to partisan gerrymanders” and its “preference for proportionality.”<sup>203</sup> However, both policy determinations are analogous to policy determinations made in other constitutional cases. The *Bandemer* plurality’s preference for “nonpartisan over partisan” gerrymanders is analogous to its preference for nonracial gerrymanders or prominority “affirmative” racial gerrymanders over antiminority racial gerrymanders.<sup>204</sup> In both racial and political cases, the Court prefers one type of gerrymander to another, because of a policy determination that a gerrymander designed to assure proportionality (either by race or by political party) is less odious than one designed to favor one race or political party.<sup>205</sup>

Therefore, the Court’s “preference for proportionality” in *Bandemer* is analogous to its preference for proportionality in racial gerrymandering cases. Justice O’Connor concedes that in the latter type of case, any possible test “must make some reference, even if only a loose one, to the relation between the minority group’s share of the electorate and its share of the elected representatives.”<sup>206</sup>

Allan Moore has suggested that gerrymandering cases implicate three other political question factors cited in *Baker*.<sup>207</sup> First, Moore suggests that “a textually demonstrable constitutional commitment of the issue to a coordinate political department”<sup>208</sup> can be found in Article I’s provision that Congress is “the Judge of the Elections, Returns and Qualifications of

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201. *Id.* (quoting *Baker*, 369 U.S. at 217).

202. *Cf. id.* at 123 (suggesting that lower courts could clarify law).

203. *Id.* at 125 n.9.

204. *See* *United Jewish Orgs. v. Carey*, 430 U.S. 144, 165-66 (1977) (upholding redistricting designed to increase the number of minority legislators). *But cf. Shaw*, 113 S. Ct. at 2824-25, 2827 (limiting legislative power to enact “affirmative” gerrymanders).

205. *Cf. Shaw*, 113 S. Ct. at 2824 (stating that classifications solely based on race are “by their very nature odious”).

206. *Bandemer*, 478 U.S. at 156-57 (O’Connor, J., concurring).

207. Moore, *supra* note 10, at 992-93.

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

its own Members,”<sup>209</sup> Article I’s provision that the states have analogous powers subject to congressional preemption,<sup>210</sup> and the Tenth Amendment’s provision that powers not delegated to the federal government are reserved to the states.<sup>211</sup> One person, one vote disputes, like gerrymandering cases, affect congressional elections. It logically follows that if the Constitution commits all election-related issues to Congress and the state legislatures, one person, one vote cases (and racial gerrymandering cases as well) would be nonjusticiable. Thus, Moore’s argument that gerrymandering disputes are committed to other political departments is foreclosed by Supreme Court precedent.<sup>212</sup>

Second, Moore argues that gerrymandering disputes risk “the potentiality of embarrassment from multifarious pronouncements by various departments on one question,”<sup>213</sup> if “one looks at redistricting and reapportionment legislation not as a problem but as the legislative branch’s attempt to improve the system of representation.”<sup>214</sup> As the one person, one vote cases also involve redistricting, this argument also proves too much.

Third, Moore argues that because gerrymandering litigation might “transform the nature of political representation”<sup>215</sup> and destabilize the political system, adjudication of gerrymandering disputes would require the courts to express “lack of the respect due coordinate branches of government”<sup>216</sup> and contravene “an unusual need for unquestioning adherence to a political decision already made.”<sup>217</sup> However, the one person, one vote cases were far more destabilizing than *Bandemer*, as they “required most states to amend their constitution and virtually every state to reapportion.”<sup>218</sup> By contrast, many states do not enact partisan gerrymanders, and Moore admits some of the proposed standards for adjudicating gerrymanders are so lenient that they would affect very few partisan districting plans.<sup>219</sup> Thus, it appears that adjudication of partisan gerry-

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209. U.S. CONST. art. I, § 5, cl. 1.

210. U.S. CONST. art. I, § 4, cl. 1.

211. U.S. CONST. amend. X.

212. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964) (applying the one person, one vote rule to congressional districting). Indeed, even more egregious misconduct would be nonjusticiable if Moore’s theory is applied. For example, suppose Texas passes a law saying “no one of Mexican descent can vote in a congressional election.” If only Congress can judge disputes related in any way to congressional elections, the validity of Texas’ law would be a nonjusticiable political question.

213. Moore, *supra* note 10, at 993 (quoting *Baker*, 369 U.S. at 217).

214. *Id.* Furthermore, gerrymanders are hardly a nonpartisan attempt to improve the system of representation.

215. *Id.*

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

217. *Id.*

218. Low-Beer, *supra* note 5, at 184 n.96.

219. Moore, *supra* note 10, at 996-97 (discussing *Badham v. March Fong Eu*, 694 F. Supp. 664

mandering cases affects none of the political question factors cited in *Baker*, and that political gerrymandering cases should be justiciable.

## (2) Constitutionality

The *Bandemer* plurality, as noted above, did not fully explain why egregious partisan gerrymandering was unconstitutional.<sup>220</sup> Thus, it is difficult to say whether *Bandemer* correctly decided this question.<sup>221</sup> Nevertheless, I shall try to explain some of the arguments the plurality could have used if it had addressed the question, and then discuss the case against a proposed constitutional antigerrymandering rule.

Legislative discriminations which violate equal protection generally fall into three categories: (1) a classification which has no rational relationship to a legitimate state policy; (2) a classification which discriminates on the basis of a suspect or quasi-suspect classification such as race, alienage or gender; or (3) a classification which burdens a fundamental right as to a particular group, but does not burden other individuals or groups in a similar manner.<sup>222</sup> Each of these prongs of equal protection doctrine will be addressed in turn.

### (a) Rationality

As a rule, legislative classifications must rationally relate to a legitimate state purpose.<sup>223</sup> Justices Powell and Stevens stated that the Equal Protection Clause "requires every State to govern impartially,"<sup>224</sup> and if a state's election rules "serve no purpose other than to favor one segment . . . of the community, they violate the constitutional guarantee of equal protection."<sup>225</sup> Thus, Justices Powell and Stevens may believe that favoring one political party is not a legitimate state purpose, and gerrymandering is therefore unconstitutional.

Some language in the *Bandemer* plurality opinion supports application of the rationality test to partisan gerrymandering. The plurality explained that "[i]f there were a discriminatory effect and a discriminatory intent,

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(N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989)).

220. See *supra* text accompanying note 161.

221. One's opinion of *Bandemer* is dependent on one's views about fundamental constitutional questions which are beyond the scope of this essay, such as the issue of how much weight courts should give to the views of the framers of the Fourteenth Amendment.

222. Lowenstein, *supra* note 161, at 78.

223. TRIBE, *supra* note 36, § 16.2.

224. *Karcher*, 462 U.S. at 748-49 (Stevens, J., concurring); accord *Bandemer*, 478 U.S. at 166 (Powell, J., concurring in part and dissenting in part).

225. *Karcher*, 462 U.S. at 748 (Stevens, J., concurring).

then the legislation would be examined for valid underpinnings.”<sup>226</sup> The plurality went on to state that “evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests.”<sup>227</sup> Thus, the plurality appears to believe that partisan manipulation of boundary lines is not a legitimate state interest, and that an egregious gerrymander is therefore irrational.

Admittedly, the plurality made it clear that partisan discrimination would be constitutional unless it was so egregious that it consistently degraded<sup>228</sup> the minority party’s strength—a rule that seems hard to square with the rationality test, because if gerrymandering is not justified by any legitimate state interest, even a mild gerrymander should be irrational and therefore unconstitutional. On the other hand, it could be argued that even under a rationality test, a test is needed to screen frivolous claims where, as in *Bandemer*, the challenged legislation does not facially discriminate against a group.

In sum, under a rationality test, gerrymandering plaintiffs could prevail by showing a redistricting plan (1) in fact favors one political party, and (2) was enacted for illegitimate, discriminatory reasons. Except for the *Bandemer* plurality’s holding that small, transitory discriminatory effects did not render a districting plan unconstitutional,<sup>229</sup> this two-step test seems consistent with the *Bandemer* opinion.

It could be argued that gerrymandering itself serves a legitimate state purpose because while other forms of discrimination are “brand[s] of bigotry and ethnocentrism . . . discrimination against an opposing political interest is generally reasoned and policy-minded.”<sup>230</sup> This argument requires courts to decide whether partisan gerrymandering is an unmitigated evil or a legitimate state purpose. For the reasons stated earlier in this article,<sup>231</sup> the courts will probably continue to hold that gerrymandering is illegitimate. Furthermore, other forms of gerrymandering, such as racial gerrymandering, may also be reasoned and policy-minded. If ethnic groups differ ideologically (for example, if blacks favor higher taxes and whites favor lower taxes) racial gerrymandering is just as reasoned and policy-minded as partisan gerrymandering.<sup>232</sup>

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226. *Bandemer*, 478 U.S. at 141 (plurality opinion).

227. *Id.* (plurality opinion).

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

229. *Id.* at 139-40 (plurality opinion).

230. Moore, *supra* note 10, at 998.

231. See *supra* notes 18-33 and accompanying text (describing policy arguments against gerrymandering).

232. Cf. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1129 (1991) (stating that blacks are “ideologically homogeneous on many issues”).

It could also be argued that the *Bandemer* plurality's extensive discussion of the Indiana redistricting plans is inconsistent with rationality review, because the rationality test is ordinarily highly deferential.<sup>233</sup> However, in recent decades the Court has begun to apply rationality review in a less deferential manner.<sup>234</sup> For instance, the Court has used rationality review to strike down state laws which restrict group homes for the mentally retarded,<sup>235</sup> deny free public education to the children of illegal aliens,<sup>236</sup> distribute income from natural resources to residents based upon the year in which their residency was established,<sup>237</sup> and grant tax exemptions for Vietnam Veterans who did reside in the state before the end of the war.<sup>238</sup> Thus, the Court may apply a "rationality with bite" standard to gerrymandering cases.<sup>239</sup>

(b) *Suspect classifications*

Where a state law is premised on a suspect classification, that law may be struck down even if rationally based. Laws affecting suspect classifications are subject to strict judicial scrutiny, under which the state has the burden of proving "that it has [a] compelling interest justifying the law and that distinctions created by [the] law are necessary to further some governmental purpose."<sup>240</sup> The courts have held that suspect classifications include classifications based on race, national origin, or alienage.<sup>241</sup> Similarly, laws affecting quasi-suspect classifications are subject to intermediate scrutiny, under which a law will be struck down unless the classification bears substantial relationship to an important government interest.<sup>242</sup> The courts hold that quasi-suspect classifications include classifications based on gender or illegitimacy.<sup>243</sup>

It has been argued that *Bandemer* "implicates the 'suspect classification' branch of equal protection doctrine,"<sup>244</sup> for three reasons.

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233. Cf. *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (stating that a court that applies the rationality test will uphold any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction").

234. *TRIBE*, *supra* note 36, § 16-3, at 1444-45.

235. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

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

237. *Zobel v. Williams*, 457 U.S. 55 (1982).

238. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

239. Cf. *TRIBE*, *supra* note 36, § 16.3, at 1445 (criticizing "covert use under the minimum rationality label" of heightened scrutiny).

240. *BLACK'S LAW DICTIONARY* 1422 (6th ed. 1990).

241. *JOHN E. NOWAK & RONALD D. ROTUNDA*, *CONSTITUTIONAL LAW* § 14.3, at 576 (4th ed. 1991).

242. *Id.*

243. *Id.*

244. Lowenstein, *supra* note 161, at 80.

First, the plurality relied primarily on "racial gerrymandering cases, and the only cases cited in which the constitutional claims were upheld were cases of discrimination against racial minority groups."<sup>245</sup> Second, the plurality structured its analysis "around the requirements of intent to discriminate and discriminatory effect . . . constitutional standards that have grown up around the concept of suspect classifications."<sup>246</sup> Third, the plurality's consistent degradation test is similar to the rule that a districting plan is an unconstitutional racial gerrymander only if plaintiffs establish "a substantially greater showing of adverse effects than a mere lack of proportional representation."<sup>247</sup>

The *Bandemer* plurality stated that evidence regarding district configurations was "relevant to whether the districting plan met legitimate state interests."<sup>248</sup> Thus, the plurality seems to suggest that gerrymandering is subject to the rationality test, because under rationality review a state may prevail by establishing a legitimate purpose for its acts.<sup>249</sup> Furthermore, in *Shaw*,<sup>250</sup> a later case, the Court stated in dictum that "nothing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny."<sup>251</sup> The Court, however, did not fully explain the difference between the two types of gerrymanders, nor did it explicitly repudiate the idea that political minorities are suspect or quasi-suspect classes. It is therefore unclear whether *Bandemer* implicates the "suspect classification" branch of equal protection doctrine.

It is also unclear whether major political parties are a suspect class under pre-*Bandemer* case law. A classification is suspect when it affects a class which "(1) . . . suffer[s] a history of discrimination; (2) exhibit[s] obvious, immutable, or distinguishing characteristics that define them as a discrete group; and (3) show[s] that they are a minority or politically powerless."<sup>252</sup> In addition, strict scrutiny has been reserved for classifications that "tend to be irrelevant to any proper legislative goal."<sup>253</sup> Quasi-suspect classifications are those which "give rise to recurring consti-

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245. *Id.*

246. *Id.* at 81.

247. *Bandemer*, 478 U.S. at 131 (plurality opinion).

248. *Id.* at 141 (plurality opinion).

249. Under strict scrutiny the classification must serve a compelling governmental interest. *Plyler v. Doe*, 457 U.S. 202, 216-17, 217 n.15 (1982). Under intermediate scrutiny the classification must serve a substantial governmental interest. *Id.* at 217-18, 218 n.16.

250. 113 S. Ct. at 2816.

251. *Id.* at 2828.

252. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (stating that homosexuals are not a suspect class).

253. *Plyler*, 457 U.S. at 217 n.14.

tutional difficulties”<sup>254</sup> and affect “a class which shares some of the characteristics of the suspect classes.”<sup>255</sup>

For several reasons, it could also be argued that even if minor political groups are suspect classes,<sup>256</sup> major political parties are not. First, Justice O'Connor has argued that Democrats and Republicans are not politically powerless, nor have they suffered a history of discrimination. Indeed, Democrats and Republicans “are the dominant groups . . . [in] the political process.”<sup>257</sup> Even though major parties are occasionally excluded from redistricting, “the degree to which certain racial and ethnic groups have historically been excluded from the political process is wholly incomparable to the degree to which political parties and other groups have, at one time or another, been excluded.”<sup>258</sup>

Admittedly, neither party is perpetually powerless in most states. On the other hand, one party is often powerless at any given point in time,<sup>259</sup> and America does have a long history of political discrimination. Thus, the dispositive issue should be whether strict scrutiny is required where two groups alternate in oppressing each other. For example, if in state X (over a period of several decades) blacks and whites alternate in power, and each group enacts racial gerrymanders which succeed in keeping the other party out of power for ten or twenty years, is either group a suspect class?

The Supreme Court has answered this question by repeatedly stating that “equal protection analysis is not dependent on the race of those burdened or benefitted by a particular classification.”<sup>260</sup> In *Shaw*,<sup>261</sup> the Court held that a redistricting plan designed to segregate the races might be unconstitutional even if the plan affected both races equally,<sup>262</sup> because the plan affected the suspect classification of race. Similarly, in *City of Richmond v. J.A. Croson Co.*,<sup>263</sup> a majority of the Court held that an affirmative action plan which discriminated against whites was subject to strict scrutiny.<sup>264</sup> If an ordinarily powerful, but temporarily powerless ra-

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254. *Id.* at 217.

255. *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 196 (5th Cir. 1984), *aff'd in part and vacated in part*, 473 U.S. 432 (1985).

256. *See* Lowenstein, *supra* note 161, at 83 (suggesting that political gerrymandering is suspect only if it affects “a political group suffering pervasive discrimination”).

257. *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring).

258. Moore, *supra* note 10, at 998.

259. *See, e.g., Bandemer*, 478 U.S. at 113-14 (stating that the Democrats were politically powerless at the time of gerrymandering).

260. *Shaw*, 113 S. Ct. at 2829 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989)).

261. *Id.* at 2816.

262. *Id.* at 2829.

263. 488 U.S. 469 (1989).

264. *Id.* at 495 (plurality opinion). Although only four Justices joined in the plurality opinion, one



cial group is powerless for purposes of strict scrutiny analysis, it should follow that a temporarily powerless political group is also powerless and that discrimination against that group may be subject to heightened scrutiny.

On the other hand, Justice O'Connor's *Bandemer* concurrence argued that race is distinguishable from partisanship because "while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates for both parties."<sup>265</sup> Although partisanship, unlike race, is not immutable, alienage, which is a suspect classification,<sup>266</sup> is also mutable, because aliens may eventually qualify for citizenship. An alien, however, must wait several years to qualify for citizenship, while voters and politicians can easily switch parties.

In sum, it is unlikely that *Bandemer* and pre-*Bandemer* law support a holding that partisanship is a suspect or quasi-suspect classification. The *Bandemer* plurality opinion contains language which seems to support a rationality test, and *Shaw* states that racial gerrymandering is subject to stricter scrutiny than political gerrymandering. Nevertheless, minority parties are frequently discriminated against, and are powerless at the time of a gerrymander. Thus, it is still possible to make the argument that partisanship is a suspect classification.

### (c) *Fundamental rights*

Strict scrutiny is also applicable when governmental action affects a fundamental right,<sup>267</sup> such as voting. It could therefore be argued that gerrymandering violates a group's fundamental right to fair and effective representation.<sup>268</sup>

For example, Justice Powell has suggested that "the constitutional mandate of 'fair and effective representation' "<sup>269</sup> bars discrimination in redistricting. Similarly, the *Bandemer* plurality noted that the one person, one vote cases indicate "the justiciability of claims going to the adequacy of representation in state legislatures."<sup>270</sup>

However, the fair and effective representation theory has at least two

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of the concurring Justices agreed that discrimination against whites was subject to strict scrutiny. *Id.* at 520 (Scalia, J., concurring).

265. *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring).

266. See NOWAK & ROTUNDA, *supra* note 241, at 576.

267. See TRIBE, *supra* note 36, at § 16-10.

268. Some commentators have suggested gerrymandering violates an individual's "right to be free of governmental tampering with one's vote." Polsby & Popper, *supra* note 18, at 324; see also Low-Beer, *supra* note 5, at 164 (referring to an individual's "right to an equally meaningful vote").

269. *Karcher*, 462 U.S. at 788 (Powell, J., dissenting).

270. *Bandemer*, 478 U.S. at 124 (plurality opinion).

drawbacks. First, the idea of a right to fair and effective representation is based on a misreading of *Reynolds v. Sims*.<sup>271</sup> According to Justice Powell, *Reynolds* requires "a State to seek to achieve through redistricting 'fair and effective representation for all citizens.'"<sup>272</sup> The phrase "fair and effective representation" comes from the *Reynolds* Court's statement that:

[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.<sup>273</sup>

According to the *Reynolds* Court, fair and effective representation is not an independent constitutional right, but a purpose of legislative apportionment which justifies otherwise impermissible discrimination.<sup>274</sup>

Fair and effective representation also implies that there is some ideal, therefore constitutionally required, form of representation. Thus, a right to fair and effective representation might require the Court to mandate a particular electoral system. A constitutionally mandated electoral system is a far more radical idea than any intended by the *Bandemer* Court, the framers of the Fourteenth Amendment, or most commentators. By contrast, an antigerrymandering rule based on a rationality or suspect classification theory would merely require the Court to reject blatant unfairness, instead of forcing it to define fairness.<sup>275</sup>

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271. 377 U.S. 533 (1964) (holding that malapportioned state legislatures violate equal protection).

272. *Bandemer*, 478 U.S. at 166-67 (Powell, J., concurring in part and dissenting in part) (citing *Reynolds*, 377 U.S. at 533 ).

273. *Reynolds*, 377 U.S. at 565-66.

274. *Id.*; see also Lowenstein, *supra* note 161, at 72-73 (making the argument in more detail).

275. See Shapiro, *supra* note 28, at 228-29 (stating that the Court has historically defined unfairness without defining fairness).

(d) *Constitutional arguments against prohibiting gerrymandering*

It could be argued that even if partisan gerrymanders should be justifiable, the *Bandemer* plurality erred in creating a group right to be free from vote dilution because (1) the framers of the Fourteenth Amendment did not expect it to affect gerrymandering, and (2) the Fourteenth Amendment protects individual rather than group rights.

(i) The framers' intent

Justice O'Connor has pointed out that "no group right to an equal share of political power was ever intended by the framers of the Fourteenth Amendment."<sup>276</sup> By contrast, the Court's prohibition of racial gerrymandering is justified by the framers' intent to prohibit racial discrimination.<sup>277</sup> The other *Bandemer* opinions did not deny that gerrymandering existed at the time of the adoption of the Fourteenth Amendment or that the framers of the Fourteenth Amendment were not concerned about the issue.<sup>278</sup> Indeed, it has been argued that the framers of the Fourteenth Amendment did not intend to protect voting rights at all.<sup>279</sup> The Supreme Court, however, has rarely considered the history of the Fourteenth Amendment in redistricting-related cases.<sup>280</sup> Thus, it is unlikely the Court will use such arguments to overrule *Bandemer*.

Furthermore, the Court is especially willing to go beyond the framers' understanding of the Constitution where the social and legal conditions supporting the framers' intent have changed over time.<sup>281</sup> In a gerryman-

276. *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring).

277. *Id.* at 151 (O'Connor, J., concurring).

278. *Id.* at 147 (O'Connor, J., concurring).

279. See *Oregon v. Mitchell*, 400 U.S. 112, 152-209 (1970) (Harlan, J., concurring in part and dissenting in part) (questioning application of the Fourteenth Amendment to voting); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 268-69 n.43 (1985) (suggesting that if the Fourteenth Amendment protects voting, then the Fifteenth and Nineteenth Amendments become superfluous). But see *Mitchell*, 400 U.S. at 250-78 (Brennan, J., concurring in part and dissenting in part) (stating that the historical record is imprecise); William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, in 1965 SUP. CT. REV. 33 (Philip B. Kurland ed.) (criticizing Justice Harlan's interpretation of the Fourteenth Amendment's legislative history).

280. Levinson, *supra* note 279, at 271-72 n.52 (asking "[w]hy should intent suddenly matter now when it has been so blithely ignored in so many other voting cases?").

281. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 489-93 (1954) (construing the Fourteenth Amendment to forbid racial segregation of public schools despite the Amendment's "inconclusive" history, because public schools are far more important and blacks are far more educated than at the time of the Amendment); cf. *Tennessee v. Garner*, 471 U.S. 1, 13-15 (1985) (holding that the use of deadly force to apprehend a fleeing felon is not always reasonable under the Fourth Amendment, because at time of the Amendment the term "felony" was limited to dangerous capital crimes, a condition which is no longer true).

dering case, the Court's own rulings are such a changed condition because the one person, one vote rule made gerrymandering easier in two ways. First, the one person, one vote cases ensured that redistricting occurred every ten years, thereby increasing legislators' opportunity to gerrymander.<sup>282</sup> Second, the one person, one vote rule prevented states from relying on their own barriers to gerrymandering, such as their constitutional requirements that districts be compact and not split political subdivisions.<sup>283</sup> It could be argued that an antigerrymandering rule is necessary to correct the consequences of the Court's one person, one vote rule and that the Court should therefore go beyond the framers' intent.

Finally, it has been argued that courts should rely on the framers' understanding of the Constitution because if judges are limited by the Constitution's history, then the people will be able to decide nonconstitutional issues through their elected representatives.<sup>284</sup> This argument is entitled to less weight where legislators have elected themselves through gerrymandering, just as it would be entitled to no weight if the legislators had elected themselves by stuffing ballot boxes.

#### (ii) Individual vs. group rights

Justice O'Connor wrote that allowing group vote dilution claims would 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.' "<sup>285</sup> It could be argued, however, that individual and group rights are interrelated; for instance, an individual's right to vote is useful only because it helps elect a representative.

Furthermore, even Justice O'Connor endorses a group right to be free of racial gerrymandering. Admittedly, Justice O'Connor tries to distinguish the racial gerrymandering cases from group vote dilution cases on a variety of grounds. First, she argues that the history of the Equal Protection Clause gives the federal courts "greater warrant . . . to intervene for protection against racial discrimination."<sup>286</sup> It does not follow, however, that

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282. See Browdy, *supra* note 51, at 1381.

283. See Anderson, *supra* note 12, at 1573; Low-Beer, *supra* note 5, at 173.

284. See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 370 (1977) ("If the Court may substitute its own meaning for that of the Framers it may . . . rewrite the Constitution without limit."); Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1026 (1992) (stating that "[t]he function of originalism is to minimize the conflict between judicial review and democracy").

285. *Bandemer*, 478 U.S. at 150-51 (O'Connor, J., concurring) (quoting *Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring)).

286. *Id.* at 151 (O'Connor, J., concurring). A related argument is that "ethnic and racial minorities are largely ghettoized; the organic development of their communities establishes . . . those communi-

the Equal Protection Clause gives the courts no warrant to intervene against other forms of group discrimination. Second, Justice O'Connor states that vote dilution analysis "is far less manageable when extended to major political parties than if confined to racial minority groups,"<sup>287</sup> because the courts will have to adjudicate competing claims of several groups. However, the *Bandemer* test may be easier for a state to satisfy than the law of racial vote dilution because *Bandemer* forbids only those redistricting plans motivated by discriminatory intent.<sup>288</sup> Third, Justice O'Connor states that "the difficulty of measuring voting strength is heightened in the case of a major political party"<sup>289</sup> because voters "can—and often do—move from one party to the other or support candidates from both parties."<sup>290</sup> However, there are numerous ways of ascertaining parties' voting strength, some of which have been discussed by courts.<sup>291</sup>

Justice O'Connor has also stated that an individual voter is not harmed by the diminution of a party's statewide influence, because the voter cannot vote for candidates in other districts. She explains that "[o]n the Court's reasoning, members of a political party in one State should be able to challenge a congressional districting plan adopted in any other state, on the grounds that their party is unfairly represented in that State's congressional delegation, thus injuring them as members of the national party."<sup>292</sup> The same argument could be used to support racial gerrymandering, because a racial gerrymander dilutes a racial group's statewide strength just as a partisan gerrymander dilutes a party's statewide strength.

In sum, it appears that *Bandemer* is unlikely to be overruled, unless the Court's attitude towards gerrymandering changes radically. Although it is not clear what level of scrutiny, under the Equal Protection Clause, will be used to review politically based gerrymandering, the Court's dicta in *Bandemer* and in racial gerrymandering cases suggests that the Court will probably apply a rationality test, but will give gerrymanders more scrutiny than most classifications are given under rationality review.

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ties as natural units deserving of representation." Moore, *supra* note 10, at 998. This argument actually supports a broad antigerrymandering rule, because it suggests that all geographically compact (or "ghettoized") communities should be protected from gerrymandering.

287. *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring).

288. See *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (noting that the "intent test" for racial vote dilution was repudiated by the Voting Rights Act).

289. *Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring).

290. *Id.* (O'Connor, J., concurring).

291. See, e.g., *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 655-60 (N.D. Ill. 1991) (discussing varying ways of determining parties' voting strength).

292. *Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring).

### 5. Case Law Interpreting *Davis v. Bandemer*

Although *Bandemer* lacked a majority opinion, the lower courts have generally applied the plurality opinion because it "provides the 'narrowest grounds' for decision."<sup>293</sup> Courts in at least seven cases have applied *Bandemer* to partisan gerrymandering claims.

The first such case, *Badham v. March Fong Eu*,<sup>294</sup> upheld California's 1982 congressional districting plan, a Democratic plan which "many . . . believed to be the most egregious gerrymander of the decade."<sup>295</sup> Under this plan, "[t]hree sets of Republican incumbents were paired, and one particular Republican incumbent's district was split into six pieces."<sup>296</sup> Before the 1982 plan,<sup>297</sup> the Democrats had a one seat lead in the California congressional delegation.<sup>298</sup> By contrast, in the five congressional elections held under the challenged plan, the Democrats' won 60% of all congressional elections<sup>299</sup> even though they won only 52.2% of the statewide two-party congressional vote.<sup>300</sup>

The *Badham* court interpreted *Bandemer* to mean that even if gerrymandering plaintiffs proved " 'a history (actual or projected) of disproportionate results' "<sup>301</sup> they were also required to prove " 'strong indicia of lack of political power' and the denial of fair representation."<sup>302</sup> The court found that the lack of political power requirement had not been met, because (1) there was no evidence that Republican voters' views had been ignored by Democratic U.S. Representatives,<sup>303</sup> (2) there was no evidence of interference with California Republicans' First Amendment rights,<sup>304</sup> and (3) California Republicans were in fact a "potent . . . politi-

293. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 955 n.22 (4th Cir. 1992) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)); see also *Badham v. March Fong Eu*, 694 F. Supp. 664, 668-69 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) (addressing the plurality opinion in *Bandemer*).

294. 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989).

295. Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 816 (1992).

296. *Id.* at 811.

297. Frederick K. Lowell & Teresa A. Craigie, *California's Reapportionment Struggle: A Classic Clash Between Law and Politics*, 2 J.L. & POL. 245, 246 (1985).

298. Grofman, *supra* note 295, at 811 n.131.

299. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988 at 243 (108th ed. 1988) [hereinafter 1988 ABSTRACT]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1992 at 263 (112th ed. 1992) [hereinafter 1992 ABSTRACT]. All percentages have been calculated by the author.

300. 1992 ABSTRACT, *supra* note 299, at 257; 1988 ABSTRACT, *supra* note 299, at 236.

301. *Badham*, 694 F. Supp. at 671 (quoting *Bandemer*, 478 U.S. at 139 (plurality opinion)).

302. *Id.* at 670 (quoting *Bandemer*, 478 U.S. at 139 (plurality opinion)).

303. *Id.* at 670-71.

304. *Id.* at 670 (referring to absence of interference with Republican "registration, organizing, voting fund-raising, or campaigning" and noting that "Republicans remain free to speak out on issues

cal force"<sup>305</sup> because they elected 40% of the state's congressional delegation, a governor, and a U.S. Senator.<sup>306</sup> The *Badham* decision was summarily affirmed by the Supreme Court.<sup>307</sup> However, summary affirmances are not binding authority.<sup>308</sup> Thus, the Court's decision to affirm *Badham* may reflect factors other than approval of the *Badham* court's logic, such as "a lack of consensus . . . [or a desire] to defer consideration until greater attention could be devoted to the issue in the academic literature."<sup>309</sup>

Nevertheless, *Badham* has been cited to support the proposition that "the only groups who might have a cause of action for political gerrymandering are essentially suspect classes, 'discrete and insular minorities' whose political influence is minimal and whose exclusion from the political process is virtually complete."<sup>310</sup> For example, in *Pope v. Blue*,<sup>311</sup> North Carolina Republicans challenged a congressional districting plan which was allegedly a Democratic gerrymander. The court held that even if the plaintiffs could prove a " 'projected history' of disproportionate results,"<sup>312</sup> plaintiffs could not prevail because they "do not allege, nor can they, that the state's redistricting plan has caused them to be 'shut out of the political process.' "<sup>313</sup> In support of this holding, the court noted that (1) a number of safe Republican districts were created by the Democrats' redistricting plan, (2) plaintiffs did not allege the Republicans were precluded from influencing Democratic legislators, and (3) there were no allegations anyone interfered with the Republicans' First Amendment rights,<sup>314</sup> except insofar as the district's "distorted and elongated shapes" interfered with all candidates' activities.<sup>315</sup> *Pope* was also summarily affirmed by the Supreme Court.<sup>316</sup> Like *Badham*, *Pope* seems to hold that in the absence of First Amendment violations, a gerrymander against a major political party is nearly always constitutional, since a viable minority party will usually have some safe districts.<sup>317</sup>

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of public concern").

305. *Id.* at 672.

306. *Id.* at 672-73. The Court also rejected claims based on Article I, Section 2 of the Constitution, the First Amendment, and the Guaranty Clause. *Id.* at 673-76.

307. *Badham v. March Fong Eu*, 488 U.S. 1024 (1989).

308. *Bandemer*, 478 U.S. at 121 (plurality opinion).

309. Moore, *supra* note 10, at 997.

310. *Id.* at 997.

311. 809 F. Supp. 392 (W.D.N.C.), *aff'd mem.*, 113 S. Ct. 30 (1992).

312. *Id.* at 397.

313. *Id.*

314. *Id.* The court also rejected claims based on Art. I, § 2 of the Constitution, the First Amendment, and the Privileges and Immunities Clause of the Fourteenth Amendment. *Id.* at 397-99.

315. *Id.* at 397.

316. *Pope v. Blue*, 113 S. Ct. 30 (1992).

317. Gerrymandering often requires the majority party to pack as many minority party supporters

In *Terrazas v. Slagle*,<sup>318</sup> a district court adopted an only slightly broader interpretation of *Bandemer*. The *Terrazas* court upheld an alleged Democratic gerrymander of the Texas congressional delegation, because the Republicans were not excluded from the state's political process as a whole.<sup>319</sup> In support of this finding, the court noted that the Republicans won numerous statewide elections,<sup>320</sup> elected 40% of the state's House of Representatives, and chaired some legislative committees.<sup>321</sup> However, the court rejected the *Badham* court's emphasis on the existence, or lack thereof, of First Amendment violations, because "[g]errymandering is concerned with dilution of political influence through the manipulation of elective district boundaries, not with other abuses of the electoral process or First Amendment violations."<sup>322</sup>

Other cases interpret *Bandemer* more broadly. In *Republican Party of North Carolina v. Martin*,<sup>323</sup> North Carolina Republicans challenged the state's method of electing trial court judges as a partisan gerrymander. Under North Carolina law, judicial candidates were nominated "in local party primaries held in each district, and thereafter, the successful primary candidates from each district [ran] against each other in a general, statewide election."<sup>324</sup>

Plaintiffs alleged that North Carolina's at-large system diluted Republican votes because Republican judicial candidates had won only one election since 1900,<sup>325</sup> even though they won 43% in 1986<sup>326</sup> and 46% in 1984<sup>327</sup> of the statewide vote in contested races. The Fourth Circuit found the plaintiffs stated a valid claim under *Bandemer*, for two reasons. First, the plaintiffs alleged a history of disproportionate results, because "consistency of voter habits combined with the geographical distribution of party affiliation throughout the state renders it likely that [the Democrats' dominance of judicial elections] will continue into the foreseeable future."<sup>328</sup> Second, the plaintiffs' complaint showed that

not only are the election results disproportionate, but also that the

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as possible in a particular district in order to keep them out of other districts. See *supra* note 8 and accompanying text (describing "packing").

318. 821 F. Supp. 1162 (W.D. Tex. 1993).

319. *Id.* at 1174.

320. *Id.* at 1175 n.17.

321. *Id.* at 1174 & n.15.

322. *Id.* at 1174.

323. 980 F.2d 943 (4th Cir. 1992).

324. *Id.* at 947.

325. *Id.* at 948.

326. *Id.* at 949 n.11.

327. *Id.* at 949.

328. *Id.* at 956-57.



nomination and slating of candidates is affected . . . because . . . few Republicans will offer to run since the chance of success is almost nonexistent . . . [and] potential contributors are unwilling to donate money or other resources to a candidate who is perceived to be an almost certain loser.<sup>329</sup>

The court admitted that Republicans were not barred from “ ‘the processes by which candidates are nominated and elected,’ ”<sup>330</sup> but added that Republican success in other statewide elections actually supported the plaintiffs’ claim, because the Republicans’ statewide strength proved they could elect judges under a more equitable districting system.<sup>331</sup>

The court emphasized that its holding was “narrow and wholly dependent on the . . . alleged facts, including the unique claim of a near century-long dearth of political diversity among superior court judges in North Carolina and the certainty of a similar future.”<sup>332</sup> Nevertheless, *Martin* supports the proposition that a gerrymander is unconstitutional where it results in grossly disproportionate results, and makes it difficult for the minority party to attract contributors or candidates. Furthermore, *Martin* squarely rejects the *Badham* and *Pope* courts’ suggestion that minority party success in elections unrelated to a gerrymander, such as elections for senator or governor, may preclude a gerrymandering claim.

Other post-*Bandemer* case law is too narrow to be relevant to most gerrymandering cases. Two district courts have rejected gerrymandering claims where the plaintiffs’ complaint was based solely on the fact that the minority party’s incumbents were disproportionately forced to run against each other.<sup>333</sup> Furthermore, another district court upheld a state house apportionment plan favoring the Democrats where the plan “was a result of a political compromise that allowed the Republicans to craft the Senate apportionment plan while the Democrats fashioned the [house apportionment] plan.”<sup>334</sup>

In sum, post-*Bandemer* case law unanimously holds that plaintiffs in gerrymandering cases may not rely solely on disproportionate results, and

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329. *Id.* at 957.

330. *Id.* at 958 (quoting *Bandemer*, 478 U.S. at 137).

331. *Id.* at 957-58. The court went on to reject the plaintiffs’ First Amendment claim. *Id.* at 958-61.

332. *Id.* at 958.

333. See *Illinois Legislative Redistricting Comm’n v. LaPaille*, 782 F. Supp. 1272, 1276 (N.D. Ill. 1992) (noting that “there is no allegation that any [other] particular harm has already befallen the Democrats”); *Republican Party of Va. v. Wilder*, 774 F. Supp. 400, 405-06 (W.D. Va. 1991) (pairing of minority party incumbents alone is insufficient to support a motion for a preliminary injunction against the redistricting plan).

334. See *Fund for Accurate & Informed Representation v. Weprin*, 796 F. Supp. 662, 669 (N.D.N.Y.), *aff’d mem.*, 113 S. Ct. 650 (1992).

must prove some sort of exclusion from the political process.<sup>335</sup> However, the lower courts are sharply divided as to the meaning of exclusion from the political process. Under *Martin*, it appears that plaintiffs may prevail if they can prove unusually disproportionate results and difficulty in obtaining candidates or contributors.<sup>336</sup> The latter criterion should not be difficult to meet, because a party with little chance of winning an election is unlikely to recruit its best possible candidates.<sup>337</sup> By contrast, under *Badham* or *Pope* it is questionable whether a major political party can ever prevail in the absence of a First Amendment violation.<sup>338</sup> Similarly, under *Terrazas* a major party can win a gerrymandering case only in a one-party state where it completely lacks statewide political influence.<sup>339</sup> Other post-*Bandemer* gerrymandering cases are so narrowly confined to their facts that they are of little precedential value.

### III. DISCUSSION: THE SEARCH FOR STANDARDS

#### A. *The Nature of the Problem*

As noted above, lower courts are divided as to the proper interpretation of *Bandemer*. Indeed, *Bandemer* has "confounded legislators, practitioners, and academics alike. Some find the case internally incoherent; others find a method to the madness."<sup>340</sup> Most commentators<sup>341</sup> agree that the *Bandemer* plurality opinion fails to give "any real guidance to lower courts forced to adjudicate"<sup>342</sup> gerrymandering cases.

Thus, it appears that lower courts have wide discretion to create a

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335. See *supra* text accompanying notes 293-334.

336. See *supra* text accompanying notes 323-31.

337. Indeed, the minority party often will be unable to recruit candidates at all. For example, in 1990, 85 U.S. representatives were elected without any major party opposition. 1992 ABSTRACT, *supra* note 299, at 256.

338. See *supra* text accompanying notes 294-317.

339. See *supra* text accompanying notes 318-22.

340. Edward Still, *The Hunting of the Gerrymander*, 38 UCLA L. REV. 1019, 1020 (1991) (reviewing POLITICAL GERRYMANDERING, *supra* note 8).

341. See Grofman, *supra* note 295, at 816 ("[A]s far as I am aware, I am one of only two people who believe that *Bandemer* makes sense. Moreover, the other person, Daniel Lowenstein, has a diametrically opposed view as to what the plurality opinion means.").

342. TRIBE, *supra* note 36, at 1083; see also Charles Backstrom et al., *Partisan Gerrymandering in the Post-Bandemer Era*, 4 CONST. COMMENTARY 285, 304 (1987) (concluding the *Bandemer* plurality was "unable to devise a workable, practicable measure for gerrymandering"); Stephen S. Gottlieb, *Fashioning a Test for Gerrymandering*, 15 J. LEGIS. 1, 7 (1988) (referring to the Court's "inability to find any measure of gerrymandering short of a very high threshold"); Michael A. Hess, *Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer*, 9 CAMPBELL L. REV. 207, 219 (1987) (*Bandemer* "leaves unanswered a perplexing question: What are the applicable criteria for measuring and adjudicating a political gerrymander?"); Moore, *supra* note 10, at 994 (referring to the plurality's "confessed inability to articulate a meaningful and manageable standard"). But see Lowenstein, *supra* note 161, at 115 n.49 (contending that *Badham* properly interpreted *Bandemer*).

standard to determine when a redistricting plan is an unconstitutional partisan gerrymander, as long as the standard is consistent with the *Bandemer* plurality opinion and otherwise workable. By "workable" I mean a standard that is simple enough to be applied by district court judges who are not highly skilled in mathematics, and does not lead to obviously absurd results.

B. *A Proposed Test—The "Bipartisan Compromise" Rule*

1. Why a Bipartisan Compromise Rule?

In order to decide what sort of districting plan is unconstitutional, we must first ask ourselves what sort of districting plan, other than proportional representation, would be constitutional under even the most proplaintiff, antigerrymandering interpretation of *Bandemer*. One obvious answer is a nonpartisan or bipartisan redistricting plan of the sort approved in *Gaffney*,<sup>343</sup> because the drafters of a bipartisan plan most likely lack discriminatory intent and are unlikely to draw a plan with severely discriminatory effects. However, even a nonpartisan plan is unlikely to achieve proportional representation, because in a single-member district system, "any additional votes [above 50%] that one party gets will first make a difference in several marginal districts, tipping them more rapidly into the majority party's column than the proportion by which that party's statewide vote has risen."<sup>344</sup> The resulting gap between a party's vote share and its share of legislative seats is known as the "balloon effect."<sup>345</sup>

Since the existence of a balloon effect does not render a redistricting plan unconstitutional,<sup>346</sup> the mild balloon effect caused by a bipartisan plan would not be sufficiently severe to render such a plan unconstitutional. It follows that even a partisan plan should be upheld if its balloon effect is as small as the balloon effect resulting from a bipartisan plan, and that a partisan plan with a substantially larger balloon effect raises constitutional questions.

Accordingly, the courts should ordinarily uphold a redistricting plan if it is produced through a bipartisan compromise,<sup>347</sup> or yields actual or

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343. 412 U.S. at 735.

344. Charles Backstrom et al., *Establishing a Statewide Electoral Effects Baseline*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 145, 162. For example, if a presidential candidate wins 60% of the popular vote, he or she will usually win at least 90% of the states. See 1992 ABSTRACT, *supra* note 299, at 251-52 (listing popular vote totals and state-by-state results for the 1948-88 presidential elections).

345. Backstrom et al., *supra* note 344, at 162.

346. See *Bandemer*, 478 U.S. at 130 (plurality opinion).

347. Two examples of a bipartisan compromise are the consensus of a bipartisan commission, or a

projected results which deviate from proportionality to roughly the same extent as the results of a bipartisan compromise.

## 2. How the Test Would Work

### a. *In Theory*

As noted above, it is obvious that any districting plan based on a bipartisan compromise should be upheld,<sup>348</sup> absent highly unusual circumstances.<sup>349</sup> A more difficult question is posed by a plan passed by a one-party government.<sup>350</sup> If such a plan is challenged under my test, the court would have to compare the plan's actual and projected results to those of an actual or hypothetical bipartisan compromise plan. A plan's future results may be projected by relying on the conventional wisdom among politicians and the press<sup>351</sup> or by examining expert testimony based on prior election returns in the newly created districts.<sup>352</sup> In addition, if one election has occurred under the plan, and the results did not indicate an unusual partisan tide or were unusually close, then the court could assume the results of the first election were typical.

Even if the past and likely future results of a redistricting plan are clear, the court must also decide what results a bipartisan plan would have

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compromise between a legislative chamber or chambers dominated by one party and a governor of another.

348. See, e.g., *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 796 F. Supp. 662 (N.D.N.Y.), *aff'd. mem.*, 113 S. Ct. 650 (1992) (upholding the alleged Democratic gerrymander of the state house where the Republican state senate agreed to trade influence in one chamber for influence in another).

349. One could imagine situations where one party could pass a gerrymander by attracting defectors from the other party. For example, if 54 of the 100 seats of State X's senate were held by Republicans, and the Democrats persuaded five Republicans to support a Democratic gerrymander by promising them the only five safe Republican seats, such a plan would hardly be bipartisan.

350. A "one party" government is one in which the governor and both legislative chambers belong to the same political party.

351. *Bandemer*, 478 U.S. at 128 (plurality opinion) (politicians usually know the "likely political composition of the new districts"); see also *Redistricting in the States*, CONG. Q. SPEC. REP., Feb. 29, 1992, at 12 (describing likely results of redistricting in various states).

352. See, e.g., *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (choosing one congressional redistricting plan over another based on expert testimony as to the likely partisan balance). The court in *Hastert* discussed expert testimony predicting a plan's results by analyzing the district-by-district results of an election in which voting turned on party affiliation rather than issues or candidate personalities. *Id.* at 657. The court referred to this election as a "base line race." *Id.* Under this method of analysis the results of the base line race are used to predict each district's partisan leanings. *Id.* The court also discussed a method of analysis which uses prior legislative returns. *Id.* at 656. Under this method, the prior legislative returns are disaggregated and applied to the new districts to predict the result. *Id.* at 656-57. Either method seems consistent with my approach, and the courts should adopt whichever one seems to be more accurate. Cf. Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 29, 45 (stating that the methods "are useful complements to one another").

reached. Unless the prior redistricting plan of the forum state<sup>353</sup> was bipartisan, the courts should compare the plan at issue with a bipartisan plan in an otherwise similar state. An otherwise similar state must resemble the forum state at least two ways. First, the similar state must have a partisan balance comparable to that of the forum state, because a closely balanced state will usually have a smaller seats/votes gap<sup>354</sup> than an overwhelmingly Democratic or Republican state.<sup>355</sup> Second, the similar state must have a legislative chamber or congressional delegation which is about the same size as the forum state, because a small delegation will usually have a larger balloon effect than a large delegation. For example, if Nebraska has only three U.S. Representatives and an evenly balanced electorate it will always have at least a 17% seats/votes gap, since its delegation will be at least 67% Democratic or Republican. By contrast, if California has forty-five U.S. Representatives and an evenly balanced electorate, the state can come far closer to proportionality than Nebraska.<sup>356</sup>

Once the court has made findings about the forum state's actual and projected election results and past election results<sup>357</sup> in a similar state with a bipartisan or nonpartisan plan, it should compare the seats/votes gap for each state. If the seats/votes gap is substantially greater for the forum state, its redistricting plan should be held *prima facie* unconstitutional. A substantial gap is one which would give the gerrymandering party at least one congressional or legislative seat per election, because any ruling which barred smaller discrepancies might force the forum state to actually come closer to proportionality than an analogous state with a bipartisan plan, or even reduce the majority party's seat share below a proportional share. Of course, the state should be permitted to rebut the *prima facie* case of unconstitutionality by showing that "the districting plan met legitimate state interests."<sup>358</sup> For example, a plan which led to

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353. A forum state is the state whose plan is being challenged, and whose district court will decide the suit.

354. A seat/votes gap is the difference between "the percentage of the statewide vote cast for a party's legislative candidates [and] the percentage of seats in the legislature won by those candidates." Alfange, *supra* note 79, at 221.

355. For example, in the 1982 congressional election, 14 states with two or more U.S. Representatives had a larger balloon effect than California, even though California enacted the notorious gerrymander upheld in *Badham*. In all but two of the 14 states, the majority party's share of the vote was larger than the California Democrats' 51.8% share. See 1988 ABSTRACT, *supra* note 299, at 236, 243.

356. See Backstrom et al., *supra* note 344, at 169 n.16 (stating that any standard based on disproportionality "becomes lumpy in a three seat state having only 100%, 67%, 33% and 0% of the seats to aim for").

357. All states undergo redistricting at the same time. Thus, it would be difficult to project future election results under another state's plan, because the courts would not know what other states' redistricting plans looked like at the time of a lawsuit.

358. See *Bandemer*, 478 U.S. at 141 (plurality opinion) (suggesting that if discriminatory intent and effect are proven, then the gerrymander should be "examined for valid underpinnings").

grossly disproportionate results might be justified on the ground that it created many highly competitive districts, and that as a result a party with 51% of the statewide vote would always receive an inordinately high percentage of the seats.

### b. *In Practice*

To demonstrate how the bipartisan compromise test would work in practice, I have chosen to analyze past election results under two districting plans which have been upheld by district courts: California's 1982 congressional plan<sup>359</sup> and North Carolina's 1992 congressional plan.<sup>360</sup>

#### (1) California

Under the plan upheld in *Badham*, California Democrats won 60% (135 of 225) of all congressional elections<sup>361</sup> between 1982 and 1990 but only 52.2% of the two-party vote.<sup>362</sup> Although no state is as large as California, New York had a bipartisan redistricting plan<sup>363</sup> during the 1980s, had more legislators than any state besides California, and had a roughly similar partisan balance.<sup>364</sup> Thus, New York is somewhat analogous to California for redistricting purposes. Under the New York plan, the Democrats won 101 of 170 elections, or 59.4% of the elections, and 54.7% of the two-party vote.<sup>365</sup> Thus, the New York Democrats benefitted from a

359. *Badham v. March Fong Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989).

360. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C.), *aff'd mem.*, 113 S. Ct. 30 (1992).

361. 1988 ABSTRACT, *supra* note 299, at 243; 1992 ABSTRACT, *supra* note 299, at 263 (percentages calculated by author).

362. 1988 ABSTRACT, *supra* note 299, at 236; 1992 ABSTRACT, *supra* note 299, at 257 (percentage calculated by author). For the purposes of this article, I am defining a party's vote as the number of votes received by the party's congressional candidates. I note, however, that some commentators prefer averaging the parties' percentages in favor to avoid "overweighing" high-turnout districts. *See, e.g.* Lowenstein & Steinberg, *supra* note 5, at 50-52 (asserting that measuring a mean district-vote percentage for each party is more consistent with the actual basis of districting). *But see* Backstrom et al., *supra* note 344, at 163-64 (recognizing use of mean district vote percentage method, but noting that arguably, "districts should lose or gain potential impact in partisanship by their actual turnout"). As long as the method is used to count "vote shares" is the same in both the forum state and in a similar state, I doubt that this issue would alter the outcome of many cases. I also note that, for reasons of convenience, my "vote shares" include votes received by unopposed candidates. However, omitting votes cast for unopposed candidates is perfectly acceptable under my approach.

363. Richard Morrill, *A Geographer's Perspective*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 212, 221 (noting that in a table describing congressional redistricting plans, the New York plan is listed as bipartisan); *see also* CONGRESSIONAL QUARTERLY, INC., *CONGRESSIONAL DISTRICTS IN THE 1980s* 361 (Martha V. Gottron ed., 1983) [hereinafter Gottron].

364. 1992 ABSTRACT, *supra* note 299, at 276.

365. 1988 ABSTRACT, *supra* note 299, at 243; 1992 ABSTRACT, *supra* note 299, at 263 (per-

4.7% seats/votes gap, while California Democrats benefitted from a 7.8% seats/votes gap.<sup>366</sup> Moreover, in the absence of gerrymandering, New York should have had a larger seats/votes gap than California, since it was slightly more Democratic and slightly smaller than California.<sup>367</sup> Thus, California Democrats won at least 3% more seats, or about one and one-half more legislators per year than a bipartisan plan would have produced. As the gerrymander gave Democrats at least one extra victory per year, the courts should have rejected the California plan upheld in *Badham*. However, a slightly less egregious plan, one with about a 5% seats/votes gap favoring the Democrats, would have been upheld under my test.

## (2) North Carolina

Under the plan upheld in *Pope*, the North Carolina Democrats won eight of twelve congressional seats, or 66.7%, even though they got only 51.6% of the statewide congressional vote.<sup>368</sup> Thus, Democrats benefitted from a 15.1% "seats/votes gap".<sup>369</sup>

Although Massachusetts, Georgia, and New Jersey are all about the same size as North Carolina, New Jersey is most analogous to North Carolina because, unlike Massachusetts, it is closely balanced between the parties and, unlike Georgia, its redistricting process was bipartisan in 1990-91.<sup>370</sup> In the first congressional election held under New Jersey's redistricting plan, the Democrats won 47.3% of the votes and 53.8% of the seats.<sup>371</sup> Thus, it seems that in North Carolina a bipartisan plan might have created a 6.5% seats/votes gap in favor of the Democrats, while the plan actually enacted created a 15.7% seats/votes gap in favor of the Democrats.<sup>372</sup> It follows that the North Carolina Democrats' skill at gerrymandering gave the Democrats an extra 9.2% of congressional seats, or about one extra representative, and that if the 1992 election results were

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centages calculated by author).

366. *Id.*

367. *See supra* notes 354-56 and accompanying text (noting that the seats/votes gaps are usually larger when one party dominates and when legislative delegations are smaller).

368. THE WORLD ALMANAC AND BOOK OF FACTS 110 (Mark S. Hoffman ed., 1993) [hereinafter WORLD ALMANAC] (percentages calculated by author).

369. *Id.*

370. *See* Charles Mahtesian & Ines P. Alicea, *Redone District Lines Nudge Dwyer, Pursell from House*, 50 CONG. Q. WKLY. REP. 825 (1992) (noting that the redistricting plan was drawn up by a bipartisan commission).

371. WORLD ALMANAC, *supra* note 368, at 109 (percentages calculated by author). Under a strictly proportional scheme, the Republicans rather than the Democrats would have won by a 7-6 margin. However, the Republican popular vote edge was partially caused by the Republican advantage in high turnout districts, which, of course, was not reflected in the number of seats won. For example, the Democrats won all three districts in which under 200,000 votes were cast. *Id.*

372. *Id.* at 110.

typical,<sup>373</sup> the courts should have rejected the districting plan upheld in *Pope*.

In sum, under my bipartisan compromise test both *Badham* and *Pope* were wrongly decided.<sup>374</sup>

### 3. Possible Disadvantages of a "Bipartisan Compromise Test"

As noted above, any standard for deciding gerrymandering cases must be consistent with *Bandemer* and workable. Each of these issues will be addressed in turn.

#### a. Consistency with *Bandemer*

The *Bandemer* plurality held that an especially egregious gerrymander would be unconstitutional, but also found that a majority party is entitled to some sort of balloon effect.<sup>375</sup> Thus, the *Bandemer* plurality's consistent degradation test requires gerrymandering plaintiffs to show, at a minimum, that a partisan gerrymander is "(1) intentional, (2) severe, and (3) predictably nontransient in its effects."<sup>376</sup> Common sense suggests that if a redistricting plan gives the majority party a "victory bonus" substantially larger than that created by a bipartisan redistricting plan, the plan's consequences are severe and, unless the victory bonus is a fluke caused by some unusually narrow victories or a statewide partisan landslide, "predictably nontransient" as well. Thus, it would seem that my bipartisan gerrymandering test is consistent with *Bandemer*.

In response, it could be argued that (1) *Bandemer* allows claims only by "pariah groups" who have been completely excluded from policymaking, as opposed to "Democrats and Republicans under normal conditions,"<sup>377</sup> and (2) *Bandemer* expressly states that the Constitution

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373. It appears likely that the 1992 results were typical, for two reasons. First, there was no evidence of an overwhelming partisan tide, since North Carolina elected a Republican senator and a Democratic governor. See *WORLD ALMANAC*, *supra* note 368, at 105, 113. Second, no congressman won with under 53% of the vote. *Id.* at 110 (percentages calculated by author). Thus, the Democrats could not argue that their 8-4 majority was a fluke caused by one narrow election or a statewide Democratic landslide.

374. The above analysis also applies to cases involving state legislative elections. I have chosen congressional elections as examples only because statewide congressional vote totals for the parties are somewhat easier to find and calculate. Statewide congressional vote totals are calculated in the annual Statistical Abstract, while state legislative vote totals are listed district-by-district in scattered state records.

375. See *Bandemer*, 478 U.S. at 130 (plurality opinion) (if most districts were competitive, "even a narrow statewide preference for either party would produce an overwhelming majority for the winning party . . . we cannot hold that such a reapportionment law would violate the Equal Protection Clause").

376. Grofman, *supra* note 352, at 30.

377. See Lowenstein, *supra* note 161, at 83.



does not require bipartisan redistricting. Each of these arguments will be addressed in turn.

(1) Does *Bandemer* preclude claims by major parties?

The *Badham* and *Pope* courts suggested that a political group cannot raise a gerrymandering claim unless it is wholly "shut out of the political process."<sup>378</sup> For example, the *Badham* court denied relief to California Republicans because, *inter alia*, the Republicans had elected a governor and a U.S. Senator,<sup>379</sup> and *Pope* denied relief to North Carolina Republicans because, *inter alia*, plaintiffs did not allege that "Republicans in the Democratic majority districts are precluded from influencing the actions of their Congressmen."<sup>380</sup> Similarly, Daniel Lowenstein argues that *Bandemer* prohibits gerrymandering only when a gerrymander victimizes a "pariah group" such as "Blacks, communists, and homosexuals"<sup>381</sup> or a gerrymander allows the minority party to become a "permanent majority."<sup>382</sup>

In support of this theory, Lowenstein argues that (1) *Bandemer* bars most gerrymandering suits because party affiliation is not a "suspect classification" and (2) *Badham* and *Pope* correctly hold that gerrymandering is actionable only where plaintiffs lack influence in "the political process as a whole."<sup>383</sup> For the reasons stated below, both arguments are without merit.

(a) *Bandemer* and suspect classifications

As noted above, the *Bandemer* plurality opinion requires plaintiffs in gerrymandering cases to prove both discriminatory intent and discriminatory effect.<sup>384</sup> Lowenstein reasons that because these standards "have grown up around the concept of 'suspect classifications,'" <sup>385</sup> a suit under *Bandemer* is actionable only if the plaintiffs belong to a group which is protected by the "suspect classification" doctrine—that is, "groups that are already victimized by pervasive discrimination . . . [such as] political groups that have suffered from discrimination to the degree that their

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378. *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C.), *aff'd mem.*, 113 S. Ct. 30 (1992); *Badham*, 694 F. Supp. at 670.

379. *Badham*, 694 F. Supp. at 672. *But see* *Republican Party of N.C. v. Martin*, 980 F.2d 943, 957-58 (4th Cir. 1992).

380. *Pope*, 809 F. Supp. at 397.

381. Lowenstein, *supra* note 161, at 83.

382. *Id.* at 87-89. Lowenstein admits that this example does not seem very plausible. *Id.* at 89.

383. *Id.* at 83 (quoting *Bandemer*, 478 U.S. at 133 (plurality opinion)).

384. *Bandemer*, 478 U.S. at 127 (plurality opinion).

385. Lowenstein, *supra* note 161, at 81.

status under the Equal Protection Clause is analogous to the status of racial minorities.”<sup>386</sup>

Lowenstein’s suspect classification interpretation of *Bandemer* is incorrect for two reasons. First, if the *Bandemer* plurality had intended to bar claims by major political parties it probably would have done so directly, because such a rule would have rendered most of its analysis unnecessary. Instead of discussing political gerrymandering in detail, the plurality could have stated that a redistricting plan is unconstitutional only when it discriminates against voters belonging to a pariah group or highly unusual circumstances require the Court to intervene in the political process. As *Bandemer* was a relatively ordinary case of gerrymandering, the Court would not have had to specify what such “unusual circumstances” were. Second, even Lowenstein admits that “just as the Court blazed new doctrinal trails when confronted with *Baker* and *Reynolds*, the Court should and would, if confronted with [a sufficiently egregious situation] . . . find a way to restore ‘democratic order.’ ”<sup>387</sup> It may be that if the plurality had explained its reasoning more fully, *Bandemer* might have blazed a new doctrinal trail. For example, the Court could have believed that political partisanship is itself a suspect classification because discrimination based on partisanship is pervasive even if the victims are not permanently powerless in every state.<sup>388</sup> The Court might have also believed gerrymandering should be dealt with under the rational basis test. Under this test, legislation may be upheld if it rationally singles out a class of people in order to achieve a “legitimate public purpose.”<sup>389</sup> It could be argued that the purpose of gerrymandering, favoring one group of voters over another, is illegitimate, and that gerrymandering is therefore irrational and unconstitutional.<sup>390</sup> Finally, the Court may have believed the right to “fair and effective” representation was a fundamental right which was infringed by gerrymandering.<sup>391</sup>

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386. *Id.* at 80-81.

387. *Id.* at 87.

388. See *supra* notes 260-66 and accompanying text (suggesting that political affiliation may be a “suspect classification” even where major political parties victimized).

389. *TRIBE*, *supra* note 36, § 16-2, at 1440. Indeed, Justices Powell and Stevens appear to have endorsed this view. Cf. *Bandemer*, 478 U.S. at 166 (Powell, J., concurring in part and dissenting in part) (stating that a gerrymander violates the state’s duty to govern impartially).

390. See *supra* notes 233-37 and accompanying text (noting that “rationality review” is less deferential in recent decades, especially when noneconomic issues are involved).

391. See *supra* notes 223-92 and accompanying text (describing possible doctrinal bases of *Bandemer* in more detail and suggesting that the Court meant to apply some form of rationality review).

(b) *Bandemer and exclusion from the political process*

A more plausible argument is that *Bandemer* excludes most claims by major political parties, because the plurality stated that:

1. Unconstitutional discrimination occurs only when "the electoral system is arranged in a manner that will consistently degrade [a group's] influence on the *political process as a whole*"<sup>392</sup>

2. Supporters of a losing candidate are "usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district"<sup>393</sup> and

3. Racial gerrymandering is unconstitutional only where "disproportionate results appeared in conjunction with *strong indicia of lack of political power and the denial of fair representation* . . . [unconstitutional political gerrymandering] may be found only where a history (actual or projected) of disproportionate results appears in conjunction with *similar indicia*."<sup>394</sup>

Although the "exclusion from the political process" interpretation of *Bandemer* is not irrational, it is probably not correct, for two reasons. First, if the plurality had intended to virtually prohibit gerrymandering claims by major parties, it could have done so by saying: "This case is about Democrats; Democrats are a major party in a two-party state; major parties are never discriminated against in the same way that racial minorities are; therefore, even though gerrymandering is justiciable, the Democratic claim must be rejected. Q.E.D."<sup>395</sup> Instead, the plurality meandered through the evidentiary record, creating the vague consistent degradation standard and pointing out, *inter alia*, that (1) "[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory"<sup>396</sup> and (2) the district court failed to: (a) find that "the 1982 election results were the predictable consequences of the 1981 Act . . . [or] hold that those results were a reliable prediction of future ones"<sup>397</sup> (b) "ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate"<sup>398</sup> or (c) find that "the 1981 reapportionment would consign the Democrats to a minority status in the assembly throughout the 1980's [or thereafter]."<sup>399</sup> Second, if the *Bandemer* plurality had believed that its creation of a gerrymandering cause of action

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392. *Bandemer*, 478 U.S. at 132 (plurality opinion) (emphasis added).

393. *Id.* (plurality opinion).

394. *Id.* at 139-40 (plurality opinion) (emphasis added).

395. Grofman, *supra* note 352, at 48 (criticizing the theory).

396. *Bandemer*, 478 U.S. at 135 (plurality opinion).

397. *Id.* (plurality opinion).

398. *Id.* (plurality opinion).

399. *Id.* (plurality opinion).

merely provided "a potential basis for protecting outcast political groups,"<sup>400</sup> the plurality would have bothered to explain, as the *Badham* court in fact did,<sup>401</sup> why the plaintiffs were not an "outcast political group."

Admittedly, the plurality noted that minority party voters are "usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district"<sup>402</sup> and that "Indiana is a swing State."<sup>403</sup> However, neither observation was part of an explanation why Indiana Democrats were not an outcast political group. The plurality's observation that supporters of a losing party can influence winning candidates was used to justify its holding that "a failure of proportional representation alone does not constitute impermissible discrimination,"<sup>404</sup> while its statement that "Indiana is a swing State" was followed by its exhaustive discussion of the evidentiary gaps in the record,<sup>405</sup> and its conclusion that "[w]ithout findings of this nature [*i.e.*, that the 1981 redistricting act would consistently hurt the Democrats], the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause."<sup>406</sup> Therefore, the plurality did not state that the Indiana Democrats could not obtain relief merely because they were not an outcast political group.

In sum, the *Bandemer* plurality opinion is simply too vague and incomplete to have held that gerrymandering plaintiffs must belong to a "pariah" or "outcast" group. The "political pariah" interpretation of *Bandemer* is

"too clever by half"-[because the supporters of this theory are] interpreting a set of judicial opinions which are less logical, less coherent, and less readable than [their] exegesis of them. It may turn out the Justices of the Supreme Court simply have not thought through the whole problem of gerrymandering and might not agree with [such an] analysis of what they meant.<sup>407</sup>

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400. See Lowenstein, *supra* note 161, at 102. Admittedly, the plurality could have shown without much difficulty that the Indiana Democrats were not "outcasts," by quoting Justice O'Connor's discussion of this point. See *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring) (comparing political parties and racial minorities).

401. *Badham*, 694 F. Supp. at 672-73.

402. *Bandemer*, 478 U.S. at 132 (plurality opinion).

403. *Id.* at 135 (plurality opinion).

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

405. *Id.* at 135 (plurality opinion).

406. *Id.* at 136 (plurality opinion).

407. Still, *supra* note 340, at 1028.

(2) Does *Bandemer* bar judicial consideration of bipartisan redistricting?

The *Bandemer* plurality noted that in *Gaffney*,<sup>408</sup> the Court upheld a redistricting plan which created "as many safe seats for each party as the demographic and predicted political characteristics of the State would permit . . . [and thereby left] the minority in each safe district without a representative of its choice."<sup>409</sup> The plurality did not question *Gaffney*, but added that "*Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case."<sup>410</sup> It could be argued that the *Bandemer* plurality's discussion of *Gaffney* precludes lower courts from requiring states to adopt a plan similar to a bipartisan redistricting plan. This argument lacks merit, because state legislators may adopt a bipartisan compromise or a plan yielding similar results without creating "as many safe seats for each party as [possible]."<sup>411</sup> For example, in an evenly balanced state with a bipartisan redistricting plan, the number of safe districts for each party could range from zero for each party to 50% of the districts for each party. In fact, one survey of 1980s redistricting showed that bipartisan redistricting plans created just as many competitive seats as "strongly partisan" plans.<sup>412</sup> Thus, a bipartisan compromise test does not require the sort of bipartisan gerrymander upheld in *Gaffney*.

b. *Workability*

If, as I believe, *Bandemer* does little to limit lower courts' discretion, lower courts must choose a workable test from among numerous possibilities. I define a "workable" test as one which is relatively easy to apply, even for district judges who lack mathematical expertise, and otherwise makes sense.

On the surface, the bipartisan compromise test seems easy to apply. If a plan is challenged, the court need only resolve minor technical issues,<sup>413</sup> find a state with a bipartisan or nonpartisan plan which is other-

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408. *Gaffney*, 412 U.S. at 752-54.

409. *Bandemer*, 478 U.S. at 130-31 (plurality opinion).

410. *Id.* at 131 (plurality opinion).

411. *Id.* (plurality opinion).

412. Morrill, *supra* note 363, at 223 (noting that in states operating under "strong partisan" plans, 22% of congressional seats were competitive between 1982 and 1986, while in states with "bipartisan" plans, 23% were competitive). I note, however, that states with court-drawn plans or plans created by nonpartisan commissions had more vigorous competition than both groups. *Id.* Morrill defines "competitive" seats as seats won with under 60% of the vote. *Id.* at 220.

413. Minor technical issues which would have to be resolved include whether to define a party's "vote share" as its average district percentage or its percent of its total vote, and whether to count unopposed candidates in a party's seat and vote shares. These issues should rarely be outcome-determinative because they will affect the parties' vote shares in both the forum state and the allegedly

wise similar to the forum state, and compare the actual or likely results of the partisan and nonpartisan plans.

Moreover, the bipartisan compromise test will deter litigation for three reasons. First, gerrymandering litigation will be automatically foreclosed in most states where districts are redrawn by a bipartisan commission or by a state government divided between the parties. Second, if the bipartisan compromise test is adopted, the dominant party will try to limit its gains from redistricting in order to avoid litigation. Third, if a bipartisan compromise test is adopted, the minority party will know that the Constitution does not require proportional representation, and will be deterred from challenging redistricting plans which are likely to yield nearly proportional results.

Nevertheless, the bipartisan compromise plan suffers from the same alleged disadvantages as any method based on the seats/votes gap. Numerous commentators have criticized tests based on the seats/votes gap on the grounds that: (1) it is impossible for the courts to project future election results while applying seats/votes tests, (2) the concept of a statewide "party total" is flawed because legislative elections are decided based on the quality of the individual candidates, (3) an unusually large seats/votes gap may be caused by the geographic distribution of the parties' statewide strength rather than by gerrymandering, (4) judicial reliance on the seats/votes gap would encourage parties to run sluggish campaigns in order to avoid gerrymandering suits, and (5) parties will engage in bipartisan "incumbent protection" gerrymandering in order to avoid litigation.<sup>414</sup> Each of these objections will be dealt with below.

### (1) The problem of future results

One commentator argues that seats/votes tests "wait until an election has been held under the new plan, note the percentage of legislators elect-

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comparable state.

414. Other objections to seats/votes tests have been implicitly dealt with above. For example, some commentators point out that seats/votes tests fail to take into account uncontested races, or disparities in voter turnout between districts. See Alfange, *supra* note 79, at 223; Lowenstein & Steinberg, *supra* note 5, at 49-53. However, neither bias is intrinsic to a votes/seats analysis, because courts could adjust vote totals by excluding uncontested elections or using a party's average district percentage of the vote as its vote percentage instead of its statewide total. Of course, one advantage of comparing a state's seats/votes gap to that of another state (instead of comparing it to an ideal of proportionality) is that such issues fade in importance, because many states have partisan disparities between high- and low-turnout districts or the occasional uncontested election. It has also been argued that a seats/votes test "ensures litigation in every state after every redistricting, which would be a certainty since the losing party after each election would claim they lost because of the way the districts were drawn." Backstrom et al., *supra* note 344, at 156. However, the "bipartisan compromise" test, unlike seats/votes tests which are not tied to the existence of partisanship in the redistricting process, actually deters litigation by immunizing bipartisan plans from lawsuits.

ed from one party, and then compare this with the percentage of aggregate votes for all legislators of that party."<sup>415</sup> If true, this argument might render any seats/votes test impractical for two reasons. First, the *Bandemer* plurality explicitly prohibited lower courts from relying solely on the results of one election to establish unconstitutional gerrymandering.<sup>416</sup> Thus, plaintiffs cannot overturn a redistricting plan based solely on the results of the first election under the plan. Second, it has been argued that if no measure of partisan gerrymandering is available before the next election of legislators "[district drawers] have no way, even with the best of intentions, to tell whether they have drawn a permissible plan."<sup>417</sup>

In fact, a seats/votes test can consider future as well as past election results. For example, in *Hastert v. State Board of Elections*,<sup>418</sup> a district court projected election results based on assumptions about the parties' vote shares. In *Hastert*, Illinois' failure to adopt a 1992-2000 congressional redistricting plan forced the court to choose between Democratic and Republican redistricting plans. The court found that both plans were constitutional,<sup>419</sup> but adopted the Republican plan because, *inter alia*, it was more "likely to produce a fair distribution of congressional seats across party lines."<sup>420</sup> Both parties addressed the "political fairness" issue by submitting expert testimony which projected likely election results under the two plans. The Republicans' expert projected likely election results by disaggregating 1982-90 congressional vote tallies and applying them to congressional districts proposed in the two plans.<sup>421</sup> Thus, the Republicans' expert implicitly assumed the Republican share of the statewide congressional vote would be the same as it was between 1982 and 1990, approximately 45.8%.<sup>422</sup> Based on this assumption, the Republicans' expert projected that Republicans would win 7-9 of 20 congressional seats, or 35-45% of the seats, under the Republican plan and 6-8 seats, or 30-40% of the seats, under the Democratic plan.<sup>423</sup> Thus, the Republican expert's testimony should have been interpreted as a finding

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415. Backstrom et al., *supra* note 342, at 305-06.

416. *Bandemer*, 478 U.S. at 135 (plurality opinion).

417. Backstrom et al., *supra* note 342, at 156.

418. 777 F. Supp. 634 (N.D. Ill. 1991).

419. *Id.* at 662.

420. *Id.* The court also found that the Republican plan "achieves precise mathematical equality of population across congressional districts" and was "superior . . . with respect to fairness to the voting rights of racial and language minorities." *Id.*

421. *Id.* at 656-57.

422. 1988 ABSTRACT, *supra* note 299, at 236; 1992 ABSTRACT, *supra* note 299, at 257 (percentages calculated by author). In fact, the court explicitly stated that according to the Republicans' expert, the "Democrats enjoyed slightly greater support." *Hastert*, 777 F. Supp. at 656 n.35.

423. *Hastert*, 777 F. Supp. at 656-57. All experts assumed that one or two seats would be "toss-ups" which would probably go back and forth between the parties. *Id.*

that the seats/votes gap favoring the Democrats would be about 1-11% under the Republican plan and 6-16% under the Democratic plan.<sup>424</sup>

By contrast, the Democrats' expert "disaggregated election data from elections for statewide offices down to the precinct level, weighted them and reapplied them to the [proposed] new district[s]."<sup>425</sup> Based on this data, the Democrats' expert assumed that the state was evenly split between the parties,<sup>426</sup> and concluded that the Democratic plan would yield 9-11 Democratic seats, while the Republican plan would yield 9-10 Democratic seats.<sup>427</sup> Thus, the Democrats' expert evidently believed that neither plan would deviate by more than 5% from proportional representation, because the Democrats would get 50% of the vote and 45-55% of the congressional seats under either plan. The court adopted a modified version of the Democratic expert's method but held that under this method the Republican plan's results were fairer.<sup>428</sup>

However, the ultimate decision of the *Hastert* court is less important than the court's reliance on expert projections of the parties' seat shares and vote shares. *Hastert* shows that even if no election has been held under a districting plan, expert testimony can give a court some clue as to the likely seats/votes gap caused by a districting plan.<sup>429</sup>

Moreover, the results of the 1992 election show the experts correctly estimated the seats/votes gap. In 1992, the first House election was held under the Republican plan, the Republicans captured 44.4% of the statewide vote and 40% of the seats.<sup>430</sup> Thus, the seats/votes gap was 4.4% result which was perfectly consistent with the Republicans' expert's apparent belief that the Democratic "seats/votes advantage" under the Republi-

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424. The gap is calculated as the difference between the projected win percentage and the assumed share of the vote, e.g., 45.8% minus a projected range of 35-45% yields a gap of 1-11 percentage points.

425. *Id.* at 657.

426. *Id.* at 656 n.35.

427. *Id.* at 657.

428. The court altered the expert's methodology by using one obscure statewide election as a means of determining the district-by-district balance (instead of weighing various elections). *Id.* at 658. The use of statewide elections to determine a state's party balance is known as the "base line race" method, since it uses statewide races to determine a party's long-term base. *Id.*; see *infra* notes 567-88 and accompanying text (criticizing base line race method). Based on that election, the court concluded that the state was evenly balanced and that the Republican plan would reflect this fact more accurately than would the Democratic plan. *Hastert*, 777 F. Supp. at 658-59.

429. Once the future "seats/votes" gap under a redistricting plan is established, it should not be difficult to ascertain the seats/votes gap for an otherwise comparable state with a bipartisan plan. All the court needs to do is (1) find a state with (a) a bipartisan redistricting plan in the prior decade, (b) a partisan balance similar to the forum state, and (c) a congressional delegation or legislative chamber of similar size and (2) calculate the seats/votes gap in the comparable bipartisan state over the past decade.

430. WORLD ALMANAC, *supra* note 368, at 107-08 (percentages calculated by author).



can plan would be 1-11% of the seats, and less than one full seat away from the Democratic expert's estimate that the Republican plan would lead to proportional representation or a slight Republican advantage.<sup>431</sup>

The 1992 election results also suggest that the *Hastert* court erred in using the results of statewide results to project congressional district results, since the Republican expert's findings, based on past congressional election results, that the Democrats were the majority party was more accurate in 1992 than the court's assumption, based on statewide election results, that the state was evenly balanced between the parties.

However, the correct method for determining a district's likely partisan balance will undoubtedly emerge over time through trial and error. Some courts will, as I suggest, rely on prior returns for the office being redistricted, whether it be Congress or state legislature, while others will follow *Hastert* and rely on statewide returns. Either method will allow courts to project seats/votes gaps, since each will allow courts to project district-by-district vote shares.

Admittedly, using expert testimony may lead courts into a morass of conflicting statistics, and make a seats/votes test more complicated than a court would like. However, the experts are unlikely to disagree dramatically, because the likely results of a redistricting plan will often be public knowledge and will be publicly discussed by politicians and the press.<sup>432</sup> In fact, the *Bandemer* plurality noted 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 either party] or is a competitive district that either candidate might win."<sup>433</sup>

## (2) The problem of candidate personalities

One popular argument against seats/votes tests is that the use of seats/votes gaps to measure political fairness

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431. *Id.*

432. See, e.g., CONG. Q. WKLY. SPEC. REP., *supra* note 351. Indeed, politicians privately use projected election results in creating new districts. See Samuel Kernell & Bernard Grofman, *Determining the Predictability of Partisan Voting Patterns in California Elections, 1978-1984*, in POLITICAL GERRYMANDERING, *supra* note 8, at 289, 290.

When political consultants advise legislators on redistricting they customarily provide legislators with evaluations of the political and demographic characteristics of the new districts as compared to the old . . . Such information would not be provided if the previous electoral history of the geography that goes to make up the new districts were not thought to be informative about its probable future voting behavior.

*Id.*

433. *Bandemer*, 478 U.S. at 128 (plurality opinion).

is grounded in an assumption which need have no basis in reality—that a person who votes for a candidate of one party in one district would vote for the candidate of the same party in another district and would want that party to be in the majority in the legislature. Individual legislative elections are often intensely personal matters, turning not in the slightest degree on which party the voter wants to control the legislature, but on local issues or on the voters' perceptions as to the individual merits of the opposing candidates. It just cannot be assumed that a vote for a particular candidate in a particular district is a vote for that candidate's party statewide.<sup>434</sup>

In fact, there is usually a strong correlation between a district's partisan alignment in one election and its alignment in other elections.<sup>435</sup> Moreover, the argument that every election is unique ignores the fact that whatever unusual circumstances affect vote totals will also affect seat totals. For example, if the Democrats have an unusual number of popular incumbents, both their statewide vote total and their share of legislative seats will increase. Thus, the popularity of a party's candidates will rarely affect the gap between its proportion of votes and its proportion of seats.

Of course, it is possible that in a given year, the seats/votes gap will be unusually large because one party wins a large number of close elections, perhaps because of a statewide partisan landslide or the quality of its candidates. Under a bipartisan compromise test, the forum state's seats/votes gap will be calculated using projected as well as actual results.<sup>436</sup> Thus, the results of one election will rarely be dispositive.<sup>437</sup> Even if plaintiffs rely heavily on one election, defendants could be allowed to rebut a *prima facie* case of unconstitutional gerrymandering through a "fluke defense."<sup>438</sup> Under this defense, a defendant could de-

434. Alfange, *supra* note 79, at 223-24; *see also* Hastert, 777 F. Supp. at 658 (questioning the utility of statewide legislative seats/votes gap because statewide legislative vote totals mix "races including different candidates and issues . . . and fails to account for the power of incumbency") (citation omitted); Lowenstein & Steinberg, *supra* note 5, at 59-60 ("There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts . . . [V]oters do not vote for the House of Representatives or the state legislature, but for particular candidates"); Backstrom et al., *supra* note 342, at 306 n.110 (statewide legislative party totals not useful because in a given year "there may be different candidates, different campaigns, different issues, and different voters . . . . The search for a partisan index should not also have to overcome the burden of non-party components of the vote for specific legislative candidates.").

435. *See, e.g.*, Kernell & Grofman, *supra* note 432, at 294 (noting that in congressional elections, the correlation between the 1980 and the 1982 Republican vote was .77).

436. *See supra* text accompanying notes 351-52, 418-33.

437. *See supra* part III.B.2.(a).

438. *See supra* note 373 and accompanying text (emphasizing that North Carolina's 1992 congres-

feat a claim of unconstitutional gerrymandering by showing that the plaintiffs' gerrymandering claim is based primarily on an unusually large seats/votes gap in one election, and that the seats/votes gap occurred because defendant benefitted from an unusual number of elections which were so close that they could not be the result of a gerrymander,<sup>439</sup> as district drawers who are creating a gerrymander will want to create as many "safe" seats for their party as possible. Even if plaintiffs rely partially on one postgerrymander election, such fluke defenses are likely to be rare, because strongly partisan plans yield fewer competitive seats than other redistricting plans.<sup>440</sup> For example, a survey of 1980s congressional redistricting plans divided congressional redistricting plans into six categories (strong partisan, weak partisan, bipartisan, court, court-drawn but partisan, and commission) and concluded that the "strong partisan" plans yielded the smallest number of competitive seats between 1982 and 1986, because only 22% of all elections held under such plans were won with under 60% of the vote.<sup>441</sup>

### (3) The problem of "natural partisan boundaries"

Even if there is a long-term seats/votes gap in a state, it could be argued that such a gap "may in fact be the result of natural advantage—the inordinate concentration of partisans in one place—rather than any deliberate partisan districting scheme."<sup>442</sup> This argument has numerous flaws. First, it is unclear when, if ever, it would not be applicable. For example, one commentator argues that:

If the parties' supporters are perfectly evenly distributed across the state so that the minority party will be a sizeable minority everywhere but a majority nowhere, all of its legislative votes will be naturally wasted, and, without any gerrymandering at all, it will win no legislative seats. On the other hand, if a party's strength is concentrated in particular geographic areas so that it will normally

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sional redistricting was arguably unconstitutional because the 1992 results were not caused by unusual factors which would not recur in future elections).

439. See *supra* note 373 and accompanying text.

440. Morrill, *supra* note 363, at 223.

441. Morrill, *supra* note 363, at 220, 223. Figures for the other categories were as follows: Court-drawn partisan—23%; bipartisan—23%; weak partisan—27%, court—33%, commission—41%. *Id.* For example, the plans upheld in *Badham* and *Pope* yielded no extremely close elections (*i.e.*, elections won with under 51% of the two-party vote) in the first post-redistricting election. See AMERICA VOTES 15, at 70-71 (Richard M. Scammon & Alice V. McGillivray eds., 1983); WORLD ALMANAC, *supra* note 368, at 110 (percentages calculated by author).

442. Grofman, *supra* note 21, at 120 (quoting *Bandemer v. Davis*, 603 F. Supp. 1479, 1501 (S.D. Ind. 1984) (Pell, J., concurring in part, dissenting in part), *rev'd*, 478 U.S. 109 (1986)).

win by very large majorities in those areas, it can expect to win a substantially smaller percentage of seats in the legislature than its proportional share of the statewide legislative vote because so many of its votes will be wasted as in excess of its needs. However unfair these results may be, they are not brought about by "gerrymandering except in the sense that 'all districting is gerrymandering.'"<sup>443</sup>

In other words, the minority party is underrepresented both when its support is dispersed, and when its support is not dispersed. The natural partisan boundaries theory begs one question: Is there ever a situation where the minority party is not underrepresented? If not, seats/votes gaps should be equal in all (similarly sized and equally competitive) states in the absence of gerrymandering.

The natural partisan boundary theory has also been used to explain why, in the absence of deliberate gerrymandering, Democrats are always underrepresented in highly urbanized Northern states (where their support is concentrated in large cities).<sup>444</sup> Table 1 shows the 1982-90 seats/votes gap for non-Southern states with over fifteen legislators.<sup>445</sup> Based on Table 1, it appears that the Democrats were not significantly underrepresented in any major Northern state, even in the one state with a Republican-drawn plan (Pennsylvania).

TABLE 1

	Democratic Vote Share	Democratic Seat Share	Democratic Advantage	Type of Redistricting
New York	54.6	59.4	+ 4.8	Bipartisan
Pennsylvania	51.9	53.1	+ 1.2	Strong partisan (R)
Ohio	51.5	51.4	- 0.1	Bipartisan
Illinois	54.2	61.0	+ 6.8	Court-drawn Partisan (D)
Michigan	55.9	62.2	+ 6.3	Court-drawn Partisan (D)
California	52.2	60.0	+ 7.8	Strong partisan (D)

443. Alfange, *supra* note 79, at 222.

444. For instance, one article raising the "partisan boundaries" issue uses Michigan as an example of a "naturally Republican" state. See Backstrom et al., *supra* note 7, at 1127.

445. The "type of redistricting" is based on Richard Morrill's article dividing redistricting plans into six categories (strong partisan, weak partisan, bipartisan, court, court partisan, commission). See Morrill, *supra* note 363, at 222-23. The other statistics are from the Statistical Abstract. See 1988 ABSTRACT, *supra* note 299, at 236, 243; 1992 ABSTRACT, *supra* note 299, at 257, 263 (percentages calculated by author).

Even if a seats/votes gap is related to “natural advantages—[such as] the inordinate concentration of partisans in one place,”<sup>446</sup> it is still a valid indicator of gerrymandering for two reasons. First, *Bandemer* requires “intentional discrimination against an identifiable political group [as well as] an actual discriminatory effect.”<sup>447</sup> Therefore, if the dominant party’s natural advantages, rather than any discriminatory intent, caused a seat-vote gap, no gerrymandering claim would lie under *Bandemer* even if the court used a seats/votes test of some kind to define “discriminatory effect.”<sup>448</sup> Second, the notion of natural partisan advantages is itself muddled, because there is no obvious reason why one set of district boundaries is natural and another is not. Indeed, the *Gaffney* court implicitly rejected the idea of natural district boundaries when it stated that a neutral, “politically mindless” districting plan may

produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.<sup>449</sup>

#### (4) The problem of unintended consequences

One commentator has pointed out that:

A further flaw in using election result of legislative elections to test for partisan gerrymandering is that this would neutralize the effects of quality candidates and targeted campaign efforts in the legislative contests. What would be the incentive for a party to engage in careful candidate recruitment and vigorous campaigns if their victory might be countermanded because their efforts were too successful?<sup>450</sup>

This argument lacks merit because a party’s successful campaign effort will probably be reflected in both its vote totals *and* its seat totals.<sup>451</sup> Similarly, if a party decided *not* to vigorously contest elections,

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446. Backstrom et al., *supra* note 7, at 1127.

447. *Bandemer*, 478 U.S. at 127 (plurality opinion).

448. *Id.* at 131-32 (plurality opinion).

449. *Gaffney*, 412 U.S. at 753.

450. Backstrom et al., *supra* note 342, at 156.

451. For example, if the Democrats nominated unusually appealing candidates, the Democrats would get more votes *and* get more seats.

both its vote share and its seat share would probably suffer.<sup>452</sup> Admittedly, it is theoretically possible that a party could, by allocating its resources to its closest races, increase its seat share without increasing its vote share. However, it is unlikely that any conceivable antigerrymandering rule would discourage such targeting, because no rational political party would forego election victories now in order to avoid a lawsuit which might not invalidate a redistricting plan for several years. While the litigation proceeded, the more vigorous party's candidates would be winning elections, serving constituents, and benefiting from the advantages of incumbency. Thus, it seems highly unlikely that the possibility of winning a lawsuit tomorrow would discourage vigorous partisan competition today.

#### (5) The problem of incumbent protection

It could also be argued that by encouraging bipartisan districting plans, a seats/votes test, especially my bipartisan compromise test, will encourage legislators to adopt bipartisan "incumbent protection plans" in order to avoid gerrymandering suits.<sup>453</sup>

Even if this argument is correct, it is entitled to little weight, for two reasons. First, bipartisan districting plans are no more anticompetitive than partisan ones.<sup>454</sup> Thus, a shift from partisan to bipartisan plans makes the partisan balance fairer, and would not appreciably diminish political competition. Second, bipartisan plans distort public policy less than partisan plans, because bipartisan plans do not distort the party balance in the legislature and therefore do not distort the ideological balance as much as partisan plans. Admittedly, a seats/votes test would allow incumbents to protect themselves to a greater extent than would some other antigerrymandering tests. Nevertheless, I believe that the advantages of a seats/votes test outweigh this disadvantage.<sup>455</sup>

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452. This possibility supports the inclusion of unopposed elections in the parties' vote shares for purposes of any seats/votes test. If the dominant party wins an election with no opposition (as opposed to winning with 60% or 70% of the vote), its vote share would both increase and would move closer to its seat share (assuming that its statewide seat share exceeded its statewide vote share). Consequently, the votes/seats gap would be reduced, and it would be harder for the minority party's gerrymandering claim to succeed. Thus, a seats/votes test may encourage the minority party to contest seemingly hopeless elections.

453. Cf. Bruce Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist and Reformer*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 117, 128 (postulating that incumbents could use *Bandemer* "to justify anti-competitive or non-competitive bipartisan gerrymanders").

454. Morrill, *supra* note 363, at 223-26 (comparing competitiveness of strongly partisan and bipartisan plans).

455. Indeed, it has been argued that incumbency protection is not a "disadvantage" at all, because incumbency protection ensures the election and retention of more experienced legislators and the existence of "safe districts" which allow both parties to be represented even after partisan landslides. See Alfange, *supra* note 79, at 226-27. Whether these factors support a seats/votes test depends on one's

### C. *Alternative Standards*

The bipartisan compromise test, like any other proposed legal standard, should not be evaluated in isolation. Instead, it should be compared to other tests for evaluating districting plans.

Tests for detecting or preventing gerrymandering can be divided into two types. The first type, "process-oriented" or "formal" tests, seek to deter gerrymandering by removing partisan considerations from the redistricting process. The second type, "result-oriented" tests, require courts to consider the possible results of a redistricting plan.<sup>456</sup>

#### 1. Process-Oriented Tests

Possible process-oriented tests include (1) requiring courts to adopt the most compact district possible and (2) evaluating redistricting plans solely on the basis of discriminatory intent, without considering discriminatory effects. Each of these standards will be addressed in turn.

##### a. *Compactness*

Some commentators argue that courts should require states to adopt the most compact districts possible (subject to the one person, one vote rule, a requirement that districts be contiguous,<sup>457</sup> and other nonpartisan rules governing redistricting). For example, Daniel Polsby and Robert Popper argue that a *prima facie* case of gerrymandering would be established where plaintiffs proffered a more compact plan than the plan enacted by a state.<sup>458</sup> In response, the state would have to "provide acceptable, nonpartisan reasons for having drawn its district lines as it did."<sup>459</sup> Polsby and Popper make three arguments in favor of a compactness stan-

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estimates of how much incumbency protection is ideal, and on whether redistricting under a seats/votes test would cause states to exceed the "ideal" amount of incumbency protection. *Id.* at 227.

456. *Cf.* Lowenstein & Steinberg, *supra* note 5, at 12 (dividing possible tests into "formal" and "result-oriented" criteria). Lowenstein and Steinberg list numerous criteria for redistricting that are not addressed below (including representation of racial minorities and proportional representation, among others). *Id.* at 11. These criteria are omitted for different reasons. Some of these criteria are omitted because they are irrelevant to partisan gerrymandering (such as representation of racial minorities). Others are not discussed because they are already mandated by law (such as equal population) or foreclosed by law (like proportional representation). Further, other criteria are omitted because, as far as I know, they have never been suggested as the primary basis for upholding or rejecting redistricting plans (for example, preserving political subdivisions).

457. A district is contiguous when "every part of the district is reachable from every other part without crossing the district boundary." Grofman, *supra* note 21, at 84.

458. Polsby & Popper, *supra* note 18, at 326.

459. *Id.*; see also Richard H. Bagger, *The Supreme Court and Congressional Apportionment: Slippery Slope to Equal Representation Gerrymandering*, 38 RUTGERS L. REV. 109, 135-36 (1985) (endorsing a similar rule).

dard. First, compactness has an "independent normative value . . . [because] where one lives is a dominant fact in a person's life."<sup>460</sup> For example, "[t]he strangers that impinge on one's life tend to live nearby rather than far away, and the public concerns of virtually every local community tend first of all to things near to home: property taxes, roads, public schools, police and fire service, snow removal, trash collection and so on."<sup>461</sup>

Second, a compactness test would undoubtedly limit gerrymandering to some extent, because any gerrymander requires that votes "be placed in appropriate districts. Toward this end, district lines are stretched and shrunk, and in the process districts become noncompact. Thus, where compactness is a constraint, a gerrymanderer's job is noticeably harder."<sup>462</sup>

Finally, a compactness test would be easy to implement. Scholars have created numerous mathematically precise measures of compactness.<sup>463</sup> Possible measures include (1) division of "the longest straight line whose endpoints were within a district by the longest line perpendicular to it whose endpoints were also in the district,"<sup>464</sup> (2) comparison of "the length of a district's minimum diameter to the length of its maximum diameter,"<sup>465</sup> (3) division of the "area of a district . . . by the area of the smallest circle which can circumscribe the district,"<sup>466</sup> (4) calculating "the sum of the squared distances of every point in the [district in relation to its] . . . center,"<sup>467</sup> (5) a requirement "that the length of all district lines in a state, when added together, be as short as possible,"<sup>468</sup> and (6) examining "the effectiveness of a shape's perimeter in capturing area . . . [as defined by] the ratio of a [district's] perimeter to its area."<sup>469</sup>

Despite its advantages, a compactness standard has several serious flaws. First, commentators' inability to agree on an appropriate measure of compactness may render any compactness-based standards unworkable. If judges are forced to choose between half a dozen measures of compactness, they may erroneously adopt a measure which would be inadequate or counterproductive. This problem is exacerbated by the fact that supporters

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460. Polsby & Popper, *supra* note 18, at 338 n.175.

461. *Id.*

462. *Id.* at 332.

463. *Id.* at 339; *see also* Karcher v. Daggett, 462 U.S. 725, 756 n.19 (1983) (Stevens, J., concurring) (describing numerous possible measures of compactness).

464. Polsby & Popper, *supra* note 18, at 343.

465. *Id.* at 344.

466. *Id.*

467. *Id.* at 345.

468. *Id.* at 347.

469. *Id.* at 347 (citing Joseph E. Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of "Compactness,"* 50 MINN. L. REV. 443 (1966)).



of one compactness measure are quite critical of other measures.

For example, Polsby and Popper support measuring compactness as the perimeter/area ratio of a district<sup>470</sup> (method (6) above) and state that methods (1) through (5) respectively do "not adequately discriminate against partisan behavior,"<sup>471</sup> allow "partisans to manipulate district boundaries,"<sup>472</sup> may lead to "a bad result, actually a perverse result . . . [which] does not prevent gerrymandering,"<sup>473</sup> "requires more mathematics than the average lawyer can command,"<sup>474</sup> and "is relatively easy to subvert."<sup>475</sup> Presumably, supporters of the other five measures would say similar things about perimeter/area ratios.

Admittedly, any seats/votes test would also require resolution of some technical issues and some understanding of both politics and arithmetic. Because most judges know more about politics than they do about geometry, the technical issues surrounding a seats/votes test are far less daunting than those which must be addressed in order to create an effective compactness rule.

Second, even if some agreed-upon measure of compactness existed, a compactness standard would be far more inconsistent with *Bandemer* than a seats/votes test. In response to Justice Powell's partial reliance on Indiana districts' bizarre shapes,<sup>476</sup> the plurality stated that "deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to intent," but not to the issue of discriminatory effect.<sup>477</sup> Thus, the Supreme Court would have to explicitly reject the *Bandemer* plurality's statements in order to adopt a compactness standard. By contrast, the Court could plausibly harmonize *Bandemer* and a seats/votes test by interpreting unusually disproportionate election results, whether actual or projected, as evidence of consistently degraded minority party strength.

Third, it is not clear whether compactness-based tests will substantially restrict gerrymandering. The purposes of any restraint on gerrymandering are to prevent a minority party from frustrating the will of the majority<sup>478</sup> and to prevent a minority from being dramatically underrepresented.<sup>479</sup> As regulating the shape of districts does not directly

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470. *Id.* at 348.

471. *Id.* at 343.

472. *Id.* at 344.

473. *Id.* at 344-45.

474. *Id.* at 346.

475. *Id.* at 347.

476. *Bandemer*, 478 U.S. at 173, 178-80 (Powell, J., concurring in part and dissenting in part).

477. *Id.* at 141 (plurality opinion). The deliberate drawing of district lines would need to be accompanied by evidence of a partisan legislative process to be relevant to intent. *Id.* (plurality opinion).

478. Polsby & Popper, *supra* note 18, at 302.

479. *Bandemer*, 478 U.S. at 133 (plurality opinion) (redistricting plan invalid if it leads to frustra-

affect the seats/votes gap, it is possible that "[g]errymandering may take place even though districts are perfectly regular in appearance."<sup>480</sup> Indeed, if one party's support is concentrated in certain areas, a redistricting plan with compact districts could lead to gerrymandered results.<sup>481</sup> Thus, compactness is neither necessary nor sufficient to ensure nonpartisan districting.

Fourth, compactness is not always inherently valuable in itself, for two reasons. First, a compactness requirement may actually fragment "cohesive communities of interest that are not conveniently concentrated in a compact geographical location but are scattered across a wider area in an eccentric pattern."<sup>482</sup> For example, let us suppose that in city X, which is dominated by Latinos and non-Latin whites, non-Latin whites live primarily on a ten-mile long strip of land near a bay, and the nearest suburban concentration of non-Latin whites is several miles inland. A compact districting plan for any office would fragment white neighborhoods, dividing them between districts shaped like circles or squares and dominated by inland Latinos. However, it may well be that bayfront non-Latin whites would be better represented in an odd-looking but more socially homogenous district. Second, the ideal of compactness assumes that socially homogenous districts are desirable. However, it could be argued that "a state as a whole would be better represented if legislators' districts were not designed so that their constituents' interests were as narrowly defined as possible,"<sup>483</sup> or that compact, socially homogenous districts are so likely to be "safe" for one party or another that a legislature composed of such districts would be unresponsive to shifts in public opinion.

As noted above, any proposed standard for defining gerrymandering should be at least arguably consistent with *Bandemer* and must be workable.<sup>484</sup> A compactness standard is inconsistent with *Bandemer*, would be difficult to implement, is an inappropriate means of reaching the question-

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tion of majority's will or effective exclusion of minority).

480. Grofman, *supra* note 21, at 91.

481. Indeed, it has been argued that a compactness requirement "is a Republican Trojan horse" because Democratic support is concentrated in urban ghettos. Lowenstein & Steinberg, *supra* note 5, at 27. *Contra* Polsby & Popper, *supra* note 18, at 334-35 (questioning existence and effect of such a "natural gerrymander"); Grofman, *supra* note 21, at 92 n.67 (contending that Lowenstein and Steinberg's argument on this issue "is sketchy to the point of nonexistence, and they review no empirical data whatsoever for the United States").

482. Alfange, *supra* note 79, at 213.

483. Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185, 189 (1985); see also Gottlieb, *supra* note 342, at 10 (noting that in drafting the Constitution, Madison "sought a plan which would juxtapose different groups").

484. See *supra* text accompanying notes 375-77.

able goal of homogenous districts, and may not even do much to limit gerrymandering.

b. *Discriminatory Intent*

Under another process-oriented test, the Court would prohibit "the use of party voting data or other related criteria"<sup>485</sup> in redistricting, in order to prevent gerrymandering. Thus, the legislature's intent,<sup>486</sup> rather than discriminatory results, would be dispositive because "[b]efore invalidating an election, the Court would not require a showing that ballot staffers would have lost absent the fraud. Why should it require disproportionate effects before invalidating a politically gerrymandered districting scheme?"<sup>487</sup>

The idea that discriminatory intent alone suffices to invalidate a redistricting plan was flatly rejected in *Bandemer*. Even the district court, which struck down Indiana's redistricting plan and was reversed, agreed with the plurality that the "plaintiffs were required to prove . . . an actual discriminatory effect."<sup>488</sup> Moreover, the *Gaffney* Court also rejected the idea of neutrality, explaining that a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results."<sup>489</sup> Even if politicians somehow manage to create a randomly drawn plan with computers, the political impact of a plan would almost certainly be discovered by the time it was adopted, "in which event the results would be both known and, if not changed, intended."<sup>490</sup> Thus, a pure "intent" rule would be difficult to enforce, because politicians might dissemble instead of being frank about their intent. Inevitably, the courts would be forced to inquire into legislative motives, and to infer discriminatory intent from discriminatory effects.<sup>491</sup> Therefore, a pure "intent" rule is not only inconsistent with Supreme Court precedent, but may in fact be impossible to enforce unless judges consider the results of a districting plan.

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485. Neil A. Capobianco, Note, *Political Gerrymandering—The Unconstitutional Threat to Fair Representation*, 33 N.Y.L. SCH. L. REV. 673, 697-98 (1988).

486. *Id.* at 697.

487. *Id.*

488. *Bandemer*, 478 U.S. at 127 (plurality opinion).

489. *Gaffney*, 412 U.S. at 753.

490. *Id.*

491. Cf. Alfange, *supra* note 79, at 229-31 (criticizing attempts to make districting process nonpartisan); Jon M. Anderson, Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After Davis v. Bandemer*, 136 U. PA. L. REV. 183, 222-28 (1987).

## 2. Result-Oriented Tests

Result-oriented tests for detecting gerrymandering are somewhat more numerous than process-oriented tests. Standards proposed by commentators include: (1) a "totality of the circumstances" test,<sup>492</sup> (2) requiring states to adopt the most symmetrical plan, in other words, the one which allows each party to win the same share of seats with a given vote share,<sup>493</sup> (3) allowing states to adopt a plan only if "its partisan consequences are likely to have occurred 'naturally,' that is, without conscious design,"<sup>494</sup> (4) computing proposed districts' results in statewide "base line race" elections, and rejecting a districting plan if a disproportionate number of districts support the majority party,<sup>495</sup> (5) striking down plans with a high number of noncompetitive seats, as measured by a statistic known as the "swing ratio,"<sup>496</sup> (6) the *Badham* court's suggestion that a redistricting plan be rejected only if it adversely affects a group which has been wholly excluded from the political process,<sup>497</sup> and (7) proportional representation.<sup>498</sup>

### a. *Totality of the Circumstances*

Numerous commentators,<sup>499</sup> as well as Justices Powell and Stevens,<sup>500</sup> have urged courts to weigh various factors in gerrymandering cases, and to reject a plan if a "totality of the circumstances" supports a finding of gerrymandering. For example, Gordon Baker has suggested that courts might consider, *inter alia*, the following factors in deciding gerrymandering cases: (1) unusual district contours, (2) legislative disregard of compactness and contiguity, (3) extensive deviation from political subdivision boundaries, (4) fragmentation of communities of interest, (5) legislative intent, (6) the fairness of procedures used to enact a redistricting plan, (7) discriminatory partisan impact, and (8) a low number of competitive seats.<sup>501</sup>

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492. See discussion *infra* part III.C.2.(a).

493. See discussion *infra* part III.C.2.(b).

494. Lowenstein & Steinberg, *supra* note 5, at 61; see discussion *infra* part III.C.2.(c).

495. See discussion *infra* part III.C.2.(d).

496. See discussion *infra* part III.C.2.(e).

497. See discussion *infra* part III.C.2.(f).

498. See discussion *infra* part III.C.2.(g).

499. E.g., Gordon E. Baker, *The "Totality of Circumstances" Approach*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 203-11; Grofman, *supra* note 352, at 47; Hess, *supra* note 342, at 219-26; Morrill, *supra* note 363, at 214.

500. *Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part); *Karcher v. Daggett*, 462 U.S. 725, 755-61 (1983) (Stevens, J., concurring).

501. Baker, *supra* note 499, at 205-10; see also *Bandemer*, 478 U.S. at 173 (Powell, J., concurring in part and dissenting in part); *Karcher v. Daggett*, 462 U.S. at 755-61 (Stevens, J., concurring); Hess,

Supporters of the totality test make three arguments. First, it has been argued that *Bandemer* should not foreclose the totality test because “the totality argument was never made to the *Bandemer* Court . . . [which therefore] cannot be said to have rejected what it did not review.”<sup>502</sup> This argument is supported by the plurality’s statement that the factors cited by Justice Powell are not “entirely irrelevant”<sup>503</sup> because “district configurations may be combined with vote projections to predict future election results, which are also relevant to the effects showing.”<sup>504</sup> It has been argued that if irregular district configurations and disproportionate impact are relevant to discriminatory effects, other factors cited by Justice Powell—such as compactness, adherence to political subdivision boundaries, irregular legislative procedure, and legislative intent<sup>505</sup>—are also relevant if plaintiffs “tie these factors to specific [discriminatory] effects.”<sup>506</sup> However, other statements in the *Bandemer* plurality opinion suggest that a totality test could not be harmonized with *Bandemer* without substantial revision. The *Bandemer* plurality stated that “evidence of exclusive legislative process and deliberate drawing of district lines in accordance with accepted gerrymandering principles would be relevant to intent.”<sup>507</sup> If discriminatory intent and discriminatory effect were shown by plaintiffs, the state could rebut by showing “evidence of valid . . . configuration [which] would be relevant to whether the districting plan met legitimate state interests.”<sup>508</sup> Thus, *Bandemer* appears to reject Justice Powell’s totality test, which would weigh every relevant factor, in favor of discrete inquiries into discriminatory intent, discriminatory effect, and state justification for an otherwise invalid gerrymander. Each of these inquiries would consider some, but not all, of the factors suggested by Justice Powell and other supporters of a totality test.

Second, it has been argued that a totality test is arguably more workable than other possible standards, because it would give courts the flexibility to consider factors that narrower tests disregard. For instance, Bernard Grofman notes that seats/votes tests may understate the discriminatory effects of gerrymanders which displace the minority party’s incumbents, because the “incumbency displacement will reduce the observed discrepancy between votes and seats by reducing the votes of the party that has its incumbents eliminated by gerrymandering, and thus reduce the appearance

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*supra* note 342, at 222-26; Grofman, *supra* note 21, at 117-19.

502. Hess, *supra* note 342, at 226.

503. *Bandemer*, 478 U.S. at 141 (plurality opinion).

504. *Id.* (plurality opinion).

505. *Id.* at 173 (Powell, J., concurring in part and dissenting in part).

506. Hess, *supra* note 342, at 227.

507. *Bandemer*, 478 U.S. at 141 (plurality opinion).

508. *Id.* (plurality opinion).

of gerrymandering.”<sup>509</sup> By contrast, a totality test would allow the courts to consider problems like incumbent displacement that occur in some but not all redistricting cases.

Despite this advantage, the totality test’s vagueness renders it unworkable. Under a totality test, no judge, and therefore no district drawer, would have any definite way of knowing “how much compactness is required, how few subdivision lines must be split, the criteria for making tradeoffs required by simultaneously applying multiple and quite possibly conflicting criteria, or even how much perfunctory participation the controlling legislative caucus must allow the minority.”<sup>510</sup> As a result, district drawers governed by the totality test would have no way to tell if they had drawn a constitutional plan,<sup>511</sup> and any redistricting plan could be challenged in court.<sup>512</sup>

Third, it has been argued that the courts could make sense of the totality test because they have done so in cases under the Voting Rights Act.<sup>513</sup> Under section 2 of the Voting Rights Act, a voting procedure, including a districting plan, is illegal if “based on the totality of circumstances,”<sup>514</sup> members of an ethnic or language minority “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>515</sup> The totality test, as described in the legislative history, requires courts to weigh at least seven factors.<sup>516</sup>

Shortly after the present version of section 2 was enacted, the Supreme Court was forced to clarify the law by developing a three-part test which section 2 plaintiffs were required to meet.<sup>517</sup> Under this test, plaintiffs challenging multimember districts must show that a minority group is sufficiently large and geographically compact to constitute a majority in a

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509. Grofman, *supra* note 352, at 96.

510. Backstrom et al., *supra* note 344, at 156.

511. *Id.* at 154.

512. See McDonald & Engstrom, *supra* note 8, at 182 (noting that the totality test “will not be of much assistance to legislators during the process of choosing lines, inasmuch as the totality can almost always be debated” and the totality test will therefore foster “ambiguity and possible capriciousness”).

513. See Baker, *supra* note 499, at 203-04 (citing 42 U.S.C. § 1973 and noting “striking similarities” between issues arising under the Act and those arising under *Bandemer*).

514. 42 U.S.C. § 1973(b) (1988).

515. *Id.*

516. The factors include, *inter alia*, (1) a jurisdiction’s history of official discrimination, (2) racial polarization in voting, (3) the use of practices which restrict minority representation (e.g., large districts, majority vote requirements), (4) refusal to give minorities access to a candidate slating process, (5) discrimination in areas affecting the opportunity to participate in the political process, (6) overt or subtle racial appeals in campaigns, and (7) the extent of minority success in elections. Grofman, *supra* note 21, at 130 n.227 (citation omitted). Obviously, most of these factors are not relevant to partisan gerrymandering cases. See *id.*

517. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

single-member district, that the minority group is politically cohesive, and that bloc voting by the majority (usually whites) usually defeats the minority's preferred candidate.<sup>518</sup> Thus, it appears that the totality test was not workable even in Voting Rights Act cases.

Furthermore, the Supreme Court's interpretation of the section 2 totality test is inapplicable to partisan gerrymandering cases, because all three elements of the Voting Rights Act test are satisfied in most partisan gerrymandering cases.<sup>519</sup> The minority party (1) nearly always can elect one or two state legislators and, in any state with more than a few U.S. Representatives, a representative as well, (2) is usually politically cohesive, and (3) will usually lose some districts because of bloc voting by the other party's supporters.<sup>520</sup> Thus, the courts cannot decide partisan gerrymandering cases by applying the totality test of the Voting Rights Act.

### b. *Neutrality and Symmetry*

Some experts have urged courts to require neutral redistricting by mandating a neutral, but nonproportional, result rather than a nonpartisan redistricting process.<sup>521</sup> For example, one scholar states that "neutrality can best be defined by symmetry."<sup>522</sup> Symmetry means that "if one party wins  $y$  seats for  $x$  percent of the vote, the other party should also win approximately  $y$  seats [if it wins] for  $x$  percent of the vote."<sup>523</sup> Thus, symmetry does not prevent the majority party from gaining a victory bonus as long as the minority party would gain a similar victory bonus if it became the majority.<sup>524</sup> Unfortunately, it is impossible to calculate how the minority party would have done if it had won more votes, since vote switches are not uniformly distributed across districts.<sup>525</sup> Even if vote switches were uniformly distributed across districts, it is not clear how to create a plan which would allow the parties to win exactly the same share of the seats with the same share of the vote.<sup>526</sup>

Finally, even if a symmetrical plan could be created, it might yield

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518. *Id.*

519. See McDonald & Engstrom, *supra* note 8, at 198 (applying *Gingles* to political gerrymandering).

520. See *id.* The Supreme Court in *Gingles* specifically referred to the "white" vote. *Gingles*, 478 U.S. at 50-51. Here the white vote is analogous to a political, rather than racial, majority.

521. Gottlieb, *supra* note 342, at 11.

522. *Id.*

523. Lowenstein & Steinberg, *supra* note 5, at 55.

524. *Id.* In other words, "symmetry can accommodate the strong tendency for majority parties to receive disproportionate seat majorities." *Id.*

525. *Id.* at 56-57.

526. See *id.* at 56 (stating that it is impossible to know hypothetical results if the other party had won).

results similar to those created by a gerrymander.<sup>527</sup> For instance, if a state was 60% Democratic and every district was 60% Democratic, the plan would be symmetrical but nevertheless unfair, because the minority party would get no districts with only 40% of the votes.<sup>528</sup>

Other commentators have sought to create some degree of symmetry by requiring a plan that is in between the most extreme plan in favor of one party and the most extreme plan in favor of another.<sup>529</sup> For example, Michael McDonald and Richard Engstrom have proposed the following test: First, a computer "would construct *every possible plan* meeting population and contiguity requirements."<sup>530</sup> Second, district drawers should calculate the symmetry of each possible districting plan through a statistic known as "skewness."<sup>531</sup> Third, district drawers should calculate the standard deviation for each possible districting plan.<sup>532</sup> The standard deviation is a statistic which "describes the general degree of dispersion of the group percentages around the mean."<sup>533</sup> Thus, a plan with a low standard deviation has districts that are quite similar.<sup>534</sup> For example, a gerrymander which fragments, or "cracks" the minority party's support by splitting the minority among numerous districts, thus giving the minority party "large but inefficacious minorities" in each district will have a low standard deviation.<sup>535</sup> By contrast, a gerrymander which "packs" all minority party voters into a few districts will have a high standard deviation, since the districts will be quite different.<sup>536</sup> Thus, a neutral plan will have a

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527. See *id.* at 58-59 (suggesting that a symmetry plan can still lead to unfair results).

528. McDonald & Engstrom, *supra* note 8, at 185.

529. See *id.* at 179.

530. Still, *supra* note 340, at 1033 (citing McDonald & Engstrom, *supra* note 8, at 179).

531. McDonald & Engstrom, *supra* note 8, at 195. "Skewness" is a statistic measuring the symmetry of a distribution of possible outcomes. *Id.* Thus, a perfectly symmetrical districting plan has a skewness of zero. *Id.* Under such a plan, every district would either reflect the statewide party balance or differ from the statewide balance by the same margin as another district favoring the opposing party. *Id.* at 189. For instance, if a state is 51-49 Republican and has three districts, one district is 51-49 Republican, and another district is five points more Republican than the state as a whole (*i.e.*, 56% Republican), the third district should be five points more Democratic than the state as a whole (*i.e.*, 54% Democratic). *Id.* By contrast, "the absence of perfect symmetry means one group is more or less 'packed'; one group has its voters concentrated into a relatively small number of districts compared to the other group." *Id.* If a party's support is measured, and its "mean [statewide support] is higher than the median, the distribution [of voters] may be said to be positively skewed; when the mean is lower than the median, the distribution is negatively skewed." RICHARD P. RUNYON & AUDREY MABER, FUNDAMENTALS OF BEHAVIORAL STATISTICS 86 (1976). For a more technical discussion of skewness, see *id.* at 51, 85-6; THAD R. HARSHBARGER, INTRODUCTORY STATISTICS: A DECISION MAP 79, 105-06 (2d ed. 1976).

532. McDonald & Engstrom, *supra* note 8, at 189.

533. *Id.*

534. See *id.* at 189-91.

535. *Id.* at 191.

536. Cf. *id.* at 189-91 (explaining that a lower standard deviation indicates group percentages are closer to the mean, and vice versa).



high degree of skewness and an average standard deviation.<sup>537</sup> Fourth, "the linedrawers would determine the number of districts each party would be expected to win"<sup>538</sup> under a districting plan with "perfect symmetry and a[n] [average] standard deviation."<sup>539</sup> This figure would rely on "empirical research that has shown that the percentage of seats won by two parties is roughly proportional to the cube of their respective vote percentages."<sup>540</sup> Fifth, after the likely results of each districting plan have been calculated, district drawers should (1) accept arrangements with a partisan balance similar to the likely partisan balance in a plan with perfect symmetry and an average standard deviation,<sup>541</sup> (2) among the schemes acceptable under (1) "accept the arrangement that is most symmetrical and has a standard deviation most nearly equal to the expected [average] value,"<sup>542</sup> and (3) "[i]f there is not just one single arrangement that dominates all others on both symmetry and dispersion [standard deviation], then exclude any plan that is dominated by another and select any one from among the undominated set."<sup>543</sup> Thus, the modified symmetry test requires district drawers and courts to balance three factors: symmetry, closeness to an average standard deviation, and unusually disproportionate results.<sup>544</sup>

The major advantage of the modified symmetry test is that it encourages symmetry and would "not allow one to move so far toward avoiding cracking so as to institute packing, nor can one move so far toward avoiding packing as to institute cracking."<sup>545</sup>

Although the modified symmetry test is not obviously contradicted by *Bandemer*, its workability and fairness are questionable, for two reasons. First, any plan which requires legislatures to adopt one "ideal" plan (such as a plan with a high symmetry level and an average standard deviation), or one of several such plans, necessarily deprives state legislatures of most of their discretion over redistricting.<sup>546</sup> In a federalist system, such draconian rules should be highly disfavored, because a rule requiring states to

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537. *Id.* at 195 (suggesting that the best scheme will permit neither packing nor cracking, and will have the lowest skewness).

538. Still, *supra* note 340, at 1033 (citing McDonald & Engstrom, *supra* note 8, at 194).

539. McDonald & Engstrom, *supra* note 8, at 193.

540. Still, *supra* note 340, at 1033 (citing McDonald & Engstrom, *supra* note 8, at 194). For example, if the minority party has 47% of the vote, the expected standard deviation is 13.4, and districts are perfectly symmetrical, the minority party should win 41% of the districts. *Id.* at 1033 n.74.

541. McDonald & Engstrom, *supra* note 8, at 193-95.

542. *Id.* at 194. McDonald & Engstrom also suggest that district drawers be allowed to consider the compactness of proposed districts. *Id.* at 199.

543. *Id.* at 195.

544. *Id.* at 193-95.

545. *Id.*

546. See generally *id.* at 187 (noting politicians' interest in affecting redistricting lines).

adopt the “one best plan” might force every state into endless litigation. Even if district drawers thought their plans were the best possible plans under the modified symmetry test, interests disadvantaged by a redistricting plan would challenge its technical imperfections. By contrast, a bipartisan compromise test would deter litigation by barring challenges to most bipartisan districting plans.<sup>547</sup>

Second, the modified symmetry test may be too complex to be easily applied by district drawers and federal judges, because most lawyers and legislators probably would not know a standard deviation from a shillelagh. It follows that if any technical difficulties<sup>548</sup> arise in the application of the test, district drawers and judges are unlikely to reach the correct answer. By contrast, less technical seats/votes tests require judges and politicians to have a lot of information and a keen understanding of the political process—both of which are more common in courtrooms and legislative chambers than expertise in calculus or statistics.<sup>549</sup>

c. *The “Chalk Test” and Random Districting*

Another possible rule would require courts to uphold a districting plan only if “its partisan consequences are likely to have occurred ‘naturally,’ that is, without conscious design.”<sup>550</sup> Under this test, the court would proceed as follows: First, program a computer to randomly create a large number of possible plans with varying partisan outcomes.<sup>551</sup> Second, determine the likelihood of each possible outcome, in order “to determine the probability that the predicted [partisan] outcome of the plan being tested could have occurred randomly.”<sup>552</sup> Third, “[i]f this probability is too low, then the plan is regarded as defective and . . . [should] be struck down.”<sup>553</sup> This method has been described as the “chalk test” because a “chalk player” is a gambler who bets on favorites.<sup>554</sup>

The chalk test is not particularly useful as a means of preventing gerrymandering, because “[t]he fairness of the likely partisan outcome under a plan has nothing at all to do with how many different plans could

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547. See *supra* text accompanying notes 413-14.

548. See McDonald & Engstrom, *supra* note 8, at 198-201 (describing possible technical problems including appropriate ways of measuring party allegiance, relevance of compactness, and possibility that computers could “produce sets of ‘all possible’ district plans that differ in important respects”).

549. *Id.* at 62-63 n.153.

550. Lowenstein & Steinberg, *supra* note 5, at 61; see also Engstrom, *supra* note 15, at 316-17 (proposing a similar test).

551. Lowenstein & Steinberg, *supra* note 5, at 61.

552. *Id.* at 61-62.

553. *Id.* at 62.

554. *Id.* at 61 n.149.

have been drawn to yield the same outcome.”<sup>555</sup> Indeed, the chalk test strongly favors the majority party because “the great majority of possible ways to draw lines usually benefit the majority party.”<sup>556</sup> For example, one chalk test experiment involved Iowa’s 1970 congressional redistricting.<sup>557</sup> Although the Republicans had received only 54% of the statewide congressional vote in 1968, 541 of 700 randomly generated districting plans gave the Republicans a 4-2 majority, eighty-one led to 5-1 Republican majorities, and only seventy-seven yielded a nearly proportional 3-3 split.<sup>558</sup> Thus, it appears the chalk test would probably degrade the minority party’s influence to the same extent as a gerrymander—obviously an absurd outcome.

#### d. *The “Base Line Race” Test*

Another test relies on “base line races” to detect gerrymandering.<sup>559</sup> Under this test, the court must determine “the number of districts in which the majority party adherents dominate,”<sup>560</sup> as determined by the results of a “base line race”—defined as “a previous statewide election in which the choice between candidates appears to have been largely determined by partisan sentiments of the voters rather than transient issues or grossly dissimilar charismatic personal appeal of the candidates.”<sup>561</sup> A district is “majority-dominated” if its support in the district exceeds its statewide percentage.<sup>562</sup> Under this test, courts should reject a redistricting plan as an unconstitutional gerrymander if the number of majority-dominated districts is “other than one over 50% of the districts . . . unless further adjustments of district lines are impossible.”<sup>563</sup>

The base line race approach has numerous advantages. Because the base line race test relies on statewide election results, courts need not adjust for the power of incumbency, transient issues, or the “grossly dissimilar charismatic personal appeal”<sup>564</sup> of a party’s individual legislative candidates. Second, the base line race test does not force courts to abolish the victory bonus which the majority party ordinarily receives under single-member districting.<sup>565</sup> Third, the base line race test does not force

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555. *Id.* at 62.

556. *Id.* at 62-63.

557. *Id.* at 62-63 n.153.

558. *Id.*

559. Backstrom et al., *supra* note 344, at 160.

560. *Id.*

561. *Id.*

562. *See id.* at 163.

563. *Id.* at 164.

564. *Id.* at 160.

565. *See* Cain, *supra* note 453, at 141.

judges to become mathematical experts, since it requires courts to answer one easily understood question: In how many districts is the majority party stronger than it is statewide?<sup>566</sup>

Nevertheless, the base line race test has three disadvantages. First, the base line race test may become extremely inflexible because it allows only one type of plan: a plan in which the majority party controls just over half the districts.<sup>567</sup> Although the base line race test is not as inflexible as a proportional representation standard,<sup>568</sup> it may give district drawers very little leeway to make political compromises, consider differences between legislative voting patterns and voting patterns in other elections, or consider nonpartisan factors like preservation of social communities of interest. By contrast, a bipartisan compromise test allows district drawers to adopt any plan which does not deviate "too much" from proportionality.

Second, judgments about what courts will define as a base line race are so subjective that no district drawer can possibly decide when a plan is unconstitutional. In order to ascertain how courts will calculate base race returns, district drawers must answer three questions:

1. Will courts examine election returns for one office or for several?<sup>569</sup>

2. If the courts consider election results for just one office, which office will it be? The authors of the base race test admit that "[w]hat is a suitable base race to estimate partisan strength will not be the same in every state."<sup>570</sup>

3. No matter what base line races the courts consider, will they consider election returns from one election year or several?<sup>571</sup>

If a state has several statewide elections every two years, there are dozens of possible combinations of base line races which courts could rely upon, especially if races are assigned different weights.<sup>572</sup> Thus, district drawers will often "have no way, even with the best of intentions, to tell whether they have drawn a fair plan."<sup>573</sup> For the same reason, in the absence of arbitrary judicial rules as to what constitutes a base line race, nearly any districting plan will be open to a constitutional challenge. Therefore, the base line race rule will make it extremely difficult for dis-

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566. See generally Backstrom et al., *supra* note 344, at 161-64 (proposing the base line race test).

567. See *id.* at 160.

568. See *id.* at 164-65.

569. See *id.* at 161.

570. *Id.*

571. Cf. *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 657-58 (N.D. Ill. 1991) (rejecting weighted results of statewide races against each other because they were "subjective" and considered only one election).

572. *Id.*

573. Backstrom et al., *supra* note 344, at 156 (criticizing other proposed rules).

strict drawers to avoid litigation.

By contrast, a bipartisan compromise test would bar almost all gerrymandering lawsuits in states with a bipartisan redistricting process.<sup>574</sup> Even in more partisan states, district drawers could gain a rough idea of how much of a "victory bonus" was acceptable by looking at past legislative election returns in bipartisan states of similar size.

Third, the base line race method will often lead to erroneous decisions. Under an ideal districting standard, courts should uphold districting plans not generally regarded as gerrymanders. Under the base line race test, courts would reject many such plans.

For example, I tested the base line race method by applying it to the 1982-90 congressional districting plans of New York and Illinois. The New York plan is generally believed to be bipartisan, while the Illinois plan is generally regarded as a partisan Democratic plan.<sup>575</sup> Thus, a sensible gerrymandering test would require courts to uphold the New York plan, and either reject the Illinois plan as a Democratic gerrymander or uphold it as a de minimis deviation from proportionality.

In evaluating the New York plan, I used the 1976 senatorial race<sup>576</sup> as a base line race because the Democratic candidate's percentage of the two-party vote, 55%<sup>577</sup> was nearly identical to the Democrats' 1982-90 share of the congressional vote. The Republican share of the base line race vote in the 1980s congressional districts exceeded the party's statewide share in twenty-one of thirty-four congressional districts.<sup>578</sup> Thus, the base line race method would have falsely labelled the New York plan as a Republican gerrymander.

In evaluating the Illinois plan, I used the 1980 U.S. Senate race as the base line race. The Democratic candidate won 56.8% of the statewide vote in that election,<sup>579</sup> only about two points more than the Democrats' 1982-90 congressional vote share.<sup>580</sup>

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574. According to one study, only about half the states had partisan redistricting plans. See Morrill, *supra* note 363, at 222-23 (describing 23 of 44 congressional districting plans in states with more than one U.S. Representative as "strong partisan," "weak partisan" or "court partisan," 10 states as "bipartisan," and 11 as having court or commission-drawn nonpartisan plans).

575. See Gottron, *supra* note 363, at 153, 361.

576. Ideally, I would have used an obscure race in which voters were unaware of candidates' personalities. However, even the authors of the base line race test support using high-profile statewide races where the parties' statewide totals reflect the state's partisan balance. See Backstrom et al., *supra* note 7, at 1141 (using gubernatorial election as a "base race" where the Democratic candidate's percentage was close to the party's "normal vote").

577. 32 CONGRESSIONAL QUARTERLY ALMANAC, 94th Cong., 2d Sess. 1976, at 841 (1976); see also *supra* note 365 and accompanying text (noting 1982-90 congressional vote totals for New York).

578. Gottron, *supra* note 363, at 364-99 (listing district-by-district returns).

579. CONGRESSIONAL QUARTERLY INC., POLITICS IN AMERICA, MEMBERS OF CONGRESS IN WASHINGTON AND AT HOME 1986, at 422 (Alan Ehrenhalt ed., 1985).

580. See *supra* note 422 and accompanying text (noting that the 1982-90 Republican vote share in

The Republican candidate's vote share in this base line race exceeded his statewide vote total in fourteen of twenty-two districts.<sup>581</sup> Thus, under the base line race test, the Illinois districting plan, generally regarded as a Democratic gerrymander, would be struck down as a Republican gerrymander!

The inaccuracies of the base line race test should not be surprising, because a standard which relies on elections for other offices is unlikely to predict the results of legislative elections.<sup>582</sup> For example, in *Hastert v. State Board of Elections*<sup>583</sup> two experts disagreed as to the likely consequences of a Republican-drawn districting plan for Illinois which the court chose to adopt. One expert divided districts between the party based on the results of statewide base line races, and testified that Republicans would usually win 10-11 of Illinois' twenty congressional seats.<sup>584</sup> The other expert divided districts based on past congressional election results, and found that the Republicans would win 7-9 seats.<sup>585</sup>

In 1992, the Republicans elected eight legislators<sup>586</sup>—about the number predicted by the expert who relied on congressional results, but fewer than the number predicted by the expert who relied on base races.<sup>587</sup> As legislator won with under 55% of the vote,<sup>588</sup> the 1992 results were not a fluke caused by one or two close elections. In sum, even if district drawers could predict what courts would define as a base line race, the base line race method might well become highly inflexible and could lead to absurd results.

#### e. The "Swing Ratio" and Competitiveness

Richard Niemi has suggested that courts adjudicating gerrymandering cases examine the "swing ratio," which is "the rate at which seats change as votes change." More formally, it is "the change in the proportion of seats won by a party when there is a one percent change in the votes won

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Illinois was 45.8%).

581. Gotttron, *supra* note 363, at 156-77 (listing district-by-district returns).

582. See *supra* text accompanying notes 569-70.

583. 777 F. Supp. 634, 657 (N.D. Ill. 1991).

584. *Id.* The court noted that the expert's analysis was not based solely on base line races, but employed a weighted average of the results of several statewide races. *Id.* at 658. The court had no objection to such data manipulations so long as they were reasonable, but gave no indication as to what type of manipulation was reasonable. *Id.*

585. *Id.* at 656. However, the experts disagreed partially because they also disagreed as to the parties' likely statewide vote. *Id.* The Democrats' expert erroneously assumed that the state was evenly divided between the parties, while the Republicans' expert correctly assumed that the Democrats were the majority party. *Id.* at 656 n.35.

586. WORLD ALMANAC, *supra* note 368, at 107.

587. See *supra* notes 584-85 and accompanying text.

588. WORLD ALMANAC, *supra* note 368, at 107-08.

by that party.”<sup>589</sup> For example, if the Republicans gain two percent more seats when they win one percent more votes, the swing ratio is two.

The effect of a high swing ratio is “that, if a party gains votes, it gains seats at a relatively rapid rate and, if it loses votes, it loses seats at an equally rapid rate.”<sup>590</sup> Thus, the “main utility of the swing ratio lies in preserving competitiveness between the parties.”<sup>591</sup> Niemi suggests that one key issue in gerrymandering cases should be “whether the swing ratio associated with a particular plan is particularly low in comparison with historical experience in the jurisdiction in question.”<sup>592</sup>

However, even Niemi admits that because (1) there is no ideal swing ratio and (2) courts should consider goals other than competitiveness in calculating districting plans,<sup>593</sup> “the swing ratio approach is unlikely to yield a unique, simple, and easily interpretable measure, such as exists for population equality. Nonetheless, as one measure of districting quality, to be used alongside other measures, it may prove useful.”<sup>594</sup> Thus, Niemi implicitly admits that the swing ratio should merely be a factor in a totality of the circumstances analysis, rather than an independent test for determining the validity of a districting plan.

#### f. *Total Exclusion from the Political Process*

It could be argued that courts should apply the *Badham* court’s rule that only groups wholly shut out from the political process should be able to raise gerrymandering claims.<sup>595</sup> Under this test, gerrymandering claims could be raised only “when there is a genuine civil rights violation against an oppressed group . . . [as opposed to] routine partisan disputes between Democrats and Republicans.”<sup>596</sup>

Two major arguments have been made in support of the *Badham* rule.

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589. Richard G. Niemi, *The Swing Ratio as a Measure of Partisan Gerrymandering*, in *POLITICAL GERRYMANDERING*, *supra* note 8, at 171, 171-72.

590. Niemi, *supra* note 483, at 200.

591. *Id.*

592. Niemi, *supra* note 589, at 176.

593. *Id.* at 176-77.

594. *Id.* Indeed, the “swing ratio” could be used as part of the “bipartisan compromise” test. For example, if a plan has an unusually high seats/votes gap, the state could argue the plan is not an unconstitutional gerrymander because it has a large number of highly competitive seats (i.e., seats which could change parties in response to a small change in the statewide vote), and could rely on the plan’s swing ratio to support such a defense. *See supra* note 358 and accompanying text.

595. *See* *Badham v. March Fong Eu*, 694 F. Supp. 664, 670-73 (N.D. Cal. 1988), *aff’d mem.*, 488 U.S. 1024 (1989); Lowenstein, *supra* note 161, at 115 n.49 (noting that in a footnote to an article proposing that only “pariah groups” could raise claims under *Bandemer*, the author states that *Badham* “adopted an interpretation of *Bandemer* quite similar to the one I propose.”).

596. Lowenstein, *supra* note 161, at 95.

First, it has been argued that *Bandemer* mandates the *Badham* rule.<sup>597</sup> This argument has been thoroughly rebutted above.<sup>598</sup> Second, it has been argued that *Bandemer* is wrong, and that *Badham* correctly turns *Bandemer* into a "dead letter."<sup>599</sup> A full discussion of whether *Bandemer* was correctly decided is beyond the scope of this article, because the constitutionality of gerrymandering has already been addressed adequately by numerous commentators.<sup>600</sup> However, the major argument against allowing courts to adjudicate gerrymandering claims, especially those involving major political parties, is that "courts attempting to adjudicate partisan gerrymandering claims will find it impossible to vindicate those claims unless they adopt a proportional representation standard."<sup>601</sup> However, all of the tests discussed above stop short of proportional representation: that is, under any of the tests, some redistricting plans which do not achieve proportional representation will be upheld. Thus, the dispositive issue is not whether *Bandemer* leads to proportional representation, but whether any conceivable middle ground between *Badham* and proportional representation is judicially manageable. For the reasons stated above, I maintain that at least one test (some variant of my bipartisan compromise test) is workable.

#### g. *Why Not Proportional Representation?*

In *Reynolds*, the Court stated that "[f]ull and effective participation by all citizens in state governments requires therefore, that each citizen have an equally effective voice in the election of members of his state legislature."<sup>602</sup> Some commentators have interpreted the concept of "equally effective" representation to mean that equal protection requires proportional representation.<sup>603</sup> These commentators say votes are not "equally effective" unless "each voter has an equal amount of power over the decisions of her representative once elected. This can be achieved fully only through proportional representation . . . which ensures that each voter has an equal share in a representative he actually voted for."<sup>604</sup> By contrast,

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597. *Id.* at 69-90.

598. *See supra* part III.B.3.a.(1); *see also* Grofman, *supra* note 352, at 47-53 (criticizing the *Badham* rule).

599. Moore, *supra* note 10, at 995-97.

600. *See, e.g.,* Polsby & Popper, *supra* note 18, at 304-26 (endorsing judicial remedy for partisan gerrymandering). *But see* Lowenstein & Steinberg, *supra* note 5, at 64-75 (contending that partisan gerrymandering claims should be nonjusticiable); Moore, *supra* note 10, at 991-1010. *See generally supra* part II.C.4.(c) (discussing arguments for and against constitutional restriction on gerrymandering).

601. Schuck, *supra* note 32, at 240.

602. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

603. Low-Beer, *supra* note 5, at 164 n.3.

604. *Id.*; *see also* Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Represen-*



under single-member districting a minority voter may actually be worse off than if she lives in a malapportioned district, because “[m]alapportionment reduces the weight of the individual’s vote, but not to zero; gerrymandering in contrast, completely wastes an opposition vote.”<sup>605</sup> Although “neutral,” nongerrymandered single-member districting reduces the number of “wasted votes,” it does not eliminate the problem, because under any single-member system supporters of a losing candidate will not have contributed to the election of their representative.<sup>606</sup>

Supporters of proportional representation (PR) add that even if PR is not constitutionally required, it is desirable as a matter of policy, for several reasons. First, PR has been successfully used in other countries. Most European democracies use PR, and “[m]any of these countries have long histories of successful democratic government.”<sup>607</sup> In order to prevent a multiplication of parties or an elimination of geographical representation, states could combine PR and geographical representation. For example, in West Germany, half of the national legislature is elected through PR and half are elected through single-member districts.<sup>608</sup> Similarly, courts could allow states to apply PR in relatively small multimember districts.<sup>609</sup> Second, PR is the only system which fully accommodates both majority rule and minority representation,<sup>610</sup> because political minorities are represented through minority parties but cannot govern unless they join a broader coalition. Third, PR is simpler than any other possible antigerrymandering rule, and would eliminate decennial redistricting disputes.<sup>611</sup> Fourth, PR would increase party cohesion, because voters would be able to support a party rather than an individual legislator.<sup>612</sup> Fifth, PR might increase voter turnout and the legitimacy of the political system,<sup>613</sup> by ensuring that even the most unpopular points of view are represented.<sup>614</sup>

Although PR may be desirable as a matter of policy, it cannot easily be described as a constitutional right. In *Bandemer*, all nine Justices explicitly repudiated the idea of proportional representation.<sup>615</sup> As various

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tation): *Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991 (1993).

605. Low-Beer, *supra* note 5, at 181.

606. *Id.*

607. *Id.* at 185 n.99.

608. *Id.* at 187-88.

609. *Id.* at 187 n.104.

610. *Id.* at 164.

611. Inman, *supra* note 604, at 2024-25.

612. Low-Beer, *supra* note 5, at 164.

613. Inman, *supra* note 604, at 2008-09.

614. Low-Beer, *supra* note 5, at 183.

615. See *Bandemer*, 478 U.S. at 130 (plurality opinion); *id.* at 145 (O'Connor, J., concurring); *id.*

Justices noted, nothing in the traditions of this country, the history of the Fourteenth Amendment or the Court's earlier case law<sup>616</sup> supports the theory that voters must have an equal amount of influence over their representative. Even supporters of PR concede that "PR has not found as fertile ground in the United States as abroad."<sup>617</sup>

Furthermore, the rationale for PR, if taken seriously, leads to rules far more radical than even its supporters would endorse. For example, most PR systems set some threshold for representation, such as one percent or five percent,<sup>618</sup> so that a party which gets 0.5% of the vote would be unrepresented in the legislature. It follows that even under PR, the votes of the smallest minority groups would be wasted, and their constitutional rights would be violated, to the same extent as under the present system.<sup>619</sup> Similarly, some advocates of PR support compromises to allow geographic subunits to be represented, such as allowing some legislators to be elected through single-member districts.<sup>620</sup> However, if single-member districts are unconstitutional merely because they waste opposition votes, it follows that a system with 50% single-member districts is as unconstitutional as a system dominated by single-member districts. Indeed, a constitutional PR rule might even affect presidential elections. Although presidential elections are governed by Article I of the Constitution, the Fourteenth Amendment follows, and therefore modifies, Article I. It logically follows that if the Fourteenth Amendment requires PR, the requirement could be applied to presidential elections so that states' electoral votes would be allocated through PR.<sup>621</sup>

As a matter of policy, PR may be undesirable because PR would make states ungovernable where the executive and legislative branches of government are controlled by different parties.<sup>622</sup>

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at 169 n.7 (Powell, J., concurring in part and dissenting in part).

616. *Id.* at 145 (O'Connor, J., concurring).

617. Low-Beer, *supra* note 5, at 186. However, some American cities have experimented with PR. *Id.* at 186 n.103.

618. Levinson, *supra* note 279, at 273-74.

619. Inman, *supra* note 604, at 1993-94.

620. Low-Beer, *supra* note 5, at 185-88.

621. Levinson, *supra* note 279, at 279-81. However, Senate elections would be unaffected because the Seventeenth Amendment, which was enacted after the Fourteenth Amendment, reiterates the rule that each state is entitled to two senators. U.S. CONST. amend. XVII. Obviously, statewide PR is impractical in Senate elections, since only one senator may be elected at a time.

622. I admit that statewide PR may make government more efficient where the executive and legislative branches are controlled by the same majority party or coalition, because the legislator would probably be nominated by the party, and would follow the "party line" set by the executive. By contrast, under today's system of district elections, "the enactment of party programs is electorally not very important to members . . . . What is important to each congressman, and vitally so, is that he be free to take positions that serve his advantage." DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 99 (1974).

To understand why, imagine the following hypothetical: The governor of state *X* is Republican, and the legislature is 60% Democratic and 40% Republican.<sup>623</sup> Under a single-member district system, a party's candidates will be nominated through primaries, and some Democrats will be more centrist than the rest of their party in order to attract "split-ticket" voters. Thus, divided government need not lead to chaos because a Republican governor may be able to govern by forming a "conservative coalition" of Republicans and moderate Democrats.

By contrast, under a statewide PR system, a party's candidates will be nominated by and accountable to a party bureaucracy.<sup>624</sup> Thus, the majority party's legislators, or those of each party within a majority coalition, will be ideologically homogenous and politically cohesive. Thus, the governor will probably be unable to attract moderate Democrats' support, and will therefore be ineffective.<sup>625</sup>

Admittedly, such gridlock might be avoided through a modified PR system which allows voters to support individual candidates instead of parties. For example, under a "cumulative voting" system, "a voter has as many votes as there are seats to be filled and may cumulate them among a smaller number of candidates."<sup>626</sup> Similarly, the "single transferable vote" (STV) system allows voters to number all "candidates in the order of their preference from favorite to least favorite,"<sup>627</sup> so that once a voter's first choice has accumulated the minimum number of votes needed for election,<sup>628</sup> her "surplus votes" are transferred to the voter's second choice "or [to] the next sequential choice who is not already elected."<sup>629</sup> Although STV seems mind-numbingly complex, it can minimize the num-

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623. The same analysis, of course, would apply if the President was a Republican, and the House of Representatives was elected through statewide PR. *See id.*

624. *See* Levinson, *supra* note 279, at 273. This is true for two reasons. First, under statewide PR, voters vote for a party and, therefore, cannot "split their ticket" in order to support unusually moderate members of the opposing party. Second, where dozens of legislators must be "slated," it would be impractical to nominate them through a primary. *Id.*

625. My argument suggests that PR would lead to an overly stable, permanently "gridlocked," government, and thereby contradicts the popular argument that PR causes political instability because it creates "congeries of political parties each organized around a narrow base of issues." Levinson, *supra* note 279, at 272. However, the "instability" argument against PR makes little sense where there is an independent executive, because the survival of the executive branch would "not depend on the support of a stable legislative coalition." Low-Beer, *supra* note 5, at 185 n.100.

626. Inman, *supra* note 604, at 2000 n.35 (citation omitted).

627. *Id.* at 2000.

628. The minimum percentage required for election under STV will usually be just over one divided by the number of seats plus one. Thus, if one seat is at stake, a candidate can win with no less than 1/2 of the votes (plus one), and if nine seats are at stake a candidate can win with 1/10 of the votes (plus one). *Id.* at 2001 n.38 (explaining mathematics in detail); *see also* Guinier, *supra* note 232, at 1139 n.299 (computing the threshold for victory is similar under cumulative voting).

629. Inman, *supra* note 604, at 2001.

ber of wasted votes.<sup>630</sup> The STV system has been utilized in elections for the Irish Parliament, the Australian Senate, the Cambridge, Massachusetts City Council, and the New York City school board.<sup>631</sup>

STV and cumulative voting are actually more impractical than statewide PR, for two reasons. First, because legislators will not be selected by parties, either through primaries or through a central party apparatus,<sup>632</sup> party ties would be even weaker than they are now, and the legislature could never be held collectively responsible for its deeds. As a result, voters would be unable to fix blame for governmental incompetence, even when all branches of government are run by the same party. Second, STV supporters admit that in large states “like California, New York, and Texas, it may be necessary to adopt multimember rather than at-large districts”<sup>633</sup> because even the most educated voter is incapable of ranking hundreds of candidates. For the same reason, STV and cumulative voting could not function on a statewide level in state legislative elections. As a result, most elections would be held in small multimember districts, and groups would have to get a far higher level of support to elect a candidate than under a statewide PR system.<sup>634</sup> Thus, modified PR systems, like STV and cumulative voting, are actually less effective at preventing wasted votes than are statewide PR systems.

#### IV. CONCLUSION

If, as the *Bandemer* Court held, an unusually egregious partisan gerrymander is unconstitutional, the courts must decide what separates a permissible redistricting plan from an unconstitutional gerrymander. In order to resolve this question, lower courts must answer two questions. First, the courts must decide what *Bandemer* commands or forecloses. For the reasons stated above, I conclude that *Bandemer* is indeterminate, except insofar as it specifically rejects certain possible rules. Specifically, I reject the theory that *Bandemer* excludes claims by major political parties, as opposed to minor parties or other social groups which have been shut out of the political process.

Second, the courts must choose the most workable and sensible stan-

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630. *Id.* at 2002.

631. *Id.* at 2000 n.32.

632. *See id.* at 2015.

633. *Id.* at 2005 n.59.

634. Even if only four seats are at stake (and a candidate could therefore be elected with 20% of the votes plus one), voters would choose among at least eight major party candidates. Thus, it is unlikely that districts would include more than 5-10 seats. It follows from this that cumulative voting and STV may be quite practical in small, nonpartisan legislative bodies such as city councils, because the threshold of exclusion for such bodies could not be lowered through jurisdiction-wide PR. *Cf.* Guinier, *supra* note 232, at 1138-40 (endorsing cumulative voting in some local elections).

dard for implementing the *Bandemer* plurality's consistent degradation test. Although no test as simple as the one person, one vote standard has been developed, one possible test is the bipartisan compromise test. Under this test, a redistricting plan should be upheld if it is the result of a bipartisan compromise or yields results similar to those of bipartisan redistricting plans in a state with a similar legislative delegation size and partisan balance. Unlike some tests, the bipartisan compromise test does not require enormous mathematical expertise. Also, unlike other possible standards, the bipartisan compromise test is directly tied to the key evil arising from gerrymandering—the imbalance between the parties' vote shares and their share of legislative seats. As a result, the bipartisan compromise test will rarely require courts to strike down innocuous districting plans or uphold the most extreme gerrymanders. Thus, the bipartisan compromise test is more practical than other possible standards.