NOTE

A "FRIGHTFUL POLITICAL DRAGON" INDEED: WHY CONSTITUTIONAL CHALLENGES CANNOT SUBDUE THE GERRYMANDER

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[T]he dragon appeared and came running to them, and S[t]. George was upon his horse, and drew out his sword . . . and rode hardily against the dragon . . . and smote him with his spear . . . . And after said to the maid: Deliver to me your girdle, and bind it about the neck of the dragon and be not afeared. When she had done so the dragon followed her as it had been a meek beast and debonair.

— Jacobus de Varagine[1]

INTRODUCTION

Legend has it that in 1812 a legislative committee dominated by Democratic compatriots of Governor Elbridge Gerry gathered "to consider the subject of a new law to alter the districts [then] established for the choice of counsellors and senators" in the Commonwealth of Massachusetts.[2] Based upon an understanding of their party's regional strengths and weaknesses, the bill these Democrats proposed was designed to consolidate as many Federalist votes in as few districts as possible, thus ensuring that in forthcoming elections Democratic candidates would be returned in disproportionate numbers.[3] The proposal for one northern district was especially egregious:

The extraordinary division of the county of Essex, taking a

1. 3 J. DE VARAGINE, THE GOLDEN LEGEND, OR LIVES OF THE SAINTS 128 (W. Caxton trans.) (Temple Classics ed. 1900).

2. J. DEAN, HISTORY OF THE GERRYMANDER 6 (1892) (quoting an order of the Massachusetts General Court dated Jan. 22, 1812). The Democratic party of Elbridge Gerry bears no lineal relation to today's Democratic Party. The former was "Mr. Jefferson's party," whose members were officially called Democrat-Republicans. They were Anti-federalists in ideology and origin.

3. *See* 2 J. AUSTIN, THE LIFE OF ELBRIDGE GERRY 346 (1829). Apparently, Governor Gerry himself did not support the plan:

> To the governour the project of this law was exceedingly disagreeable. He urged to his friends strong arguments against its policy as well as its effects. After it had passed both houses, he hesitated to give it his signature, . . . but being satisfied that it conformed to the constitution, . . . he accordingly permitted it to pass.

Id. at 347. It is ironic that Governor Gerry is best remembered for the passage of a law that he did not actively support. It is especially ironic in light of Gerry's prior political history. As a delegate to the Constitutional Convention in Philadelphia, Gerry had refused to endorse the final product on the grounds "that there is no adequate provision for a representation of the people [and] that they have no security for the right of election." *Id.* at 42-43 (quoting letter from Elbridge Gerry to Samuel Adams and James Warren (Oct. 18, 1787)); *see id.* at 40 ("[W]ith regret indeed but without hesitation [Gerry] refused [the Constitution] the sanction of his name.").

Gerry did sign, however, both the Declaration of Independence and the Articles of Confederation, and in addition to serving as Governor of Massachusetts, he was a member of the First Congress and later Vice President under Madison. Gerry was also the leading figure in the XYZ Affair, an incident that provoked public outrage when Gerry negotiated behind the backs of his fellow diplomats, John Marshall and Charles Pinckney, in an effort to settle long-standing disputes with France. *See generally id.* (both volumes).

> single line of towns from the outside of the county, and adding Chelsea from the county of Suffolk, in order to secure a [D]emocratic majority in the [s]enate, was such a piece of political management as to produce a general outcry. . . . The form of the district was a subject of remark, and it was said that it resembled some horrible animal, and only wanted wings to make a frightful political dragon.[4]

Wings were not wanting for long. Apparently for amusement at a dinner party, Elkanah Tisdale, a Federalist and a painter by trade, sketched a snout, talons, and wings on a map of the district, prompting someone to remark that the fanciful shape resembled a salamander.[5] Continuing the lampoon, a second onlooker interposed the Governor's name and coined the term "gerrymander."[6] Finally, the *Boston Gazette*, appreciating the potential for a political cartoon, printed a version of Tisdale's drawing for public consumption.[7] Despite the ensuing outcry, the bill's proponents secured its passage,[8] and the gerrymander has been a fixture in American politics ever since.

In 1986, the Supreme Court held for the first time that polit-

4. J. DEAN, *supra* note 2, at 3 (quoting a memorandum by Samuel Batchelder, *reprinted in* THE REGISTER, Oct. 1873, at 421). Numerous accounts credit Samuel Dana, then-President of the Massachusetts Senate, as originator of the bill and as draftsman of the curious map. *See id.* at 3, 4 & n.*, 7.

5. *See id.* at 3 (quoting the Batchelder memorandum). A few but apparently less reliable authorities attribute the original sketch to Gilbert Stuart, the acclaimed painter. *See id.* at 5-6.

6. *See id.* at 3 (quoting the Batchelder memorandum). Authorities also conflict on the question of who coined the term. Some credit Benjamin Russell and others, a Mr. Alsop. *See id.* at 3-4.

With respect to proper pronunciation of the term, Mr. Dean offers the following observation: "The initial of the governor's surname (G) has the hard sound of that letter, and the *g* in gerrymander should also be pronounced hard. As this word was coined in Boston, Bostonians have an interest in the pronunciation of the word." *Id.* at 11. The Oxford English Dictionary lists both hard and soft "g" pronunciations as acceptable, but it gives preference to the hard "g." *See* 6 OXFORD ENGLISH DICTIONARY 472-73 (2d ed. 1989).

7. *See* J. DEAN, *supra* note 2, at 7. The caricature appeared in the *Boston Gazette* of March 6, 1812.

8. How effective this original gerrymander was in practice is unclear. One commentator claims that the plan "worked so well in 1812 that 'the Federalists, though casting a majority of the votes, captured only [thirty-seven] percent of the seats in the [Massachusetts] legislature.' " Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257, 277 n.63 (1985) (quoting G. BILLIAS, ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN 323 (1976)). In the senate alone, the results were even more disproportionate. There the Federalists won a majority of the vote but captured only 27.5% (eleven out of forty) of the available seats. *See* J. DEAN, *supra* note 2, at 9 (quoting an unidentified article published in 1823). The next year, however, the Federalists prevailed. In the election of 1813, "[t]he Gerrymander district itself cast 2909 federal[ist] votes to 2739 democratic, being a majority of 170 against the party which formed the district." J. DEAN, *supra* note 2, at 10.

ical gerrymandering—the alignment of legislative districts for purposes of partisan gain—raises a justiciable controversy.[9] At the same time, a plurality of the Court held that the specific facts in the case at issue, *Davis v. Bandemer*, did not rise to the level of unconstitutional discrimination under principles of equal protection.[10] Before *Bandemer* the Court had maintained that only racially motivated gerrymandering was justiciable.[11] *Bandemer*'s broader pronouncement came somewhat reluctantly and only after years of agitation during which time the Court had refused to address such claims on the ground that they posed a nonjusticiable "political question" properly reserved to the legislative branch.[12]

Since *Bandemer* the Court has had one other occasion to address the gerrymander question. *Badham v. Eu*,[13] decided last year, presented a challenge similar to *Bandemer*'s, except that it involved a plan for Congressional rather than for state legisla-

9. *See* Davis v. Bandemer, 478 U.S. 109, 118-27 (1986).

Commentators generally use the terms "political gerrymandering" and "partisan gerrymandering" interchangeably. *See, e.g., The Supreme Court—Leading Cases*, 100 HARV. L. REV. 100, 153 n.1 (1986). Both terms refer to redistricting on the basis of political viewpoint or party affiliation and they are meant to distinguish that form of gerrymandering from "racial gerrymandering"—redistricting on the basis of color or ethnicity. There is potential for confusion in two respects. First, racial gerrymandering is not just for spite; it is almost always "politically motivated" in some sense of the term. Second, a plan designed to protect incumbents is often not strictly "partisan" but rather "*bi*partisan."

This Note uses the term "political gerrymandering" to include all redistricting designed to benefit the policy-minded or ideological viewpoints of a particular interest group. "Racial gerrymandering" refers to redistricting purely on the basis of color. The author believes this designation is consistent with the Supreme Court's use of the terms. *See, e.g., Bandemer*, 478 U.S. at 118 n.8 (noting the district court's dismissal of a consolidated racial gerrymandering claim that was not appealed: " 'the voting efficacy of the NAACP plaintiffs was impinged upon because of their politics and not because of their race.' ").

10. *See Bandemer*, 478 U.S. at 127-43 (plurality opinion).

11. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (altering city boundaries to dilute black votes violates the Fifteenth Amendment); White v. Regester, 412 U.S. 755 (1973) (reapportionment that invidiously discriminates against racial and ethnic groups violates the Fourteenth Amendment). *Gomillion* was the first Supreme Court case to hold any form of gerrymandering unconstitutional.

In *Gaffney v. Cummings*, a gerrymandering case that did not involve race, the Supreme Court entertained a challenge to a state redistricting plan that had been designed as a bipartisan division of territories. The Court, however, did not directly address the threshold question of justiciability. *See* Gaffney v. Cummings, 412 U.S. 735 (1973) (upholding the challenged plan); *Bandemer*, 478 U.S. at 119 (suggesting *Gaffney* lacks precedential weight on the question of justiciability).

12. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion) ("Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.").

13. 488 U.S. 1024 (1989).

tive seats. Suggesting that the plaintiffs had read *Bandemer* too broadly, a three-judge district court[14] had dismissed the complaint for failure to state a claim.[15] On appeal,[16] the Supreme Court opted not to clarify its earlier decision. After first deciding that it could not entertain the case,[17] the Court granted a petition for rehearing[18] and then affirmed, six-to-three, without opinion and without even hearing oral argument.[19]

Looking at *Badham*, *Bandemer*, and their predecessors, two conclusions are self-evident. First, the Court has entered this "political thicket" apprehensively.[20] Second, it has only done so on the basis of an intuitive and inchoate sense of fairness. The Court has detected evidence of injury but as of yet has completely failed to articulate a coherent and comprehensive standard for judicial review of the perceived offense.[21] Even more fundamentally, the Court has failed to define the offense itself.

As the nation completes the 1990 census and prepares for the ensuing realignment of legislative and congressional districts, the need for a clear and defensible judicial approach to the gerrymander is both pressing and obvious. The likelihood that the Supreme Court will revisit the issue early in the decade borders on certainty.[22] What the Court decides could alter the fundamental character of American representative government. With an eye toward that prospect, this Note examines the

14. The Judicial Code of 1911, as amended, provides that a claim "challenging the constitutionality of the apportionment of congressional districts or . . . of any state legislative body" shall be heard by a federal district court composed of three judges. 28 U.S.C. § 2284(a) (1982). It also provides for direct appeal from that court to the Supreme Court. *See id.* § 1253.

15. Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988).

16. *See supra* note 14.

17. *See* Badham v. Eu, 488 U.S. 804 (1988) (dismissing appeal "for want of jurisdiction"). Justices White and Stevens indicated dissent.

18. *See* Badham v. Eu, 488 U.S. 953 (1988).

19. Badham v. Eu, 488 U.S. 1024 (1989) ("The judgment is affirmed. The Chief Justice, Justice Stevens, and Justice Kennedy would note probable jurisdiction and set the case for oral argument.").

20. *Colegrove*, 328 U.S. at 556 (plurality opinion).

21. "Neither *Bandemer* nor *Badham* . . . provide[s] sufficient guidance to state legislatures for the reapportionments that are likely to follow the 1990 census. Instead, the standards suggested by these cases provide an open invitation to political gerrymandering." Note, *The Lack of Judicial Direction in Political Gerrymandering: An Invitation to Chaos Following the 1990 Census*, 40 HASTINGS L.J. 1067, 1068-69 (1989).

22. "Just as *Baker v. Carr* encouraged litigation in the 1960s, *Davis v. Bandemer* will spawn a host of cases in the 1990s." D. Saffell, Legislative Apportionment: Interpretation by the Warren, Burger, and Rehnquist Courts 29 (1987) (unpublished manuscript), *quoted in* Note, *supra* note 21, at 1069 n.15.

nature of the gerrymander controversy, the history of judicial intervention, and the current state of the law.

The conclusion is both reassuring and foreboding. First, the Court's failure to articulate a constitutional standard for review of political gerrymandering claims is understandable and justifiable; no acceptable standard exists. Second, although it restricts and doubtless contradicts what the *Bandemer* Court thought it had done, *Badham* is a practically (but not logically) necessary reading of *Bandemer*. Third, the Court should now affirmatively recognize *Badham* as the farthest extension of the Constitution's reach into the thicket of political gerrymandering. None of this denies that the gerrymander is a menace; it is indeed a "frightful political dragon." Unfortunately, St. George does not sit on the Supreme Court.

Part I examines the nature of political gerrymandering: what exactly it is and how it works as a practical matter. Part I then attempts to identify what impact gerrymandering has on American elections: the degree to which institutionalized bias distorts electoral outcomes and the extent to which, as a matter of both statistical and political theory, such bias can legitimately be called "electoral distortion."[23] Most legal essays that have addressed the issue have assumed or denied without demonstrating that gerrymandering constitutes an appreciable harm. Part I concludes that although the *impact* of political gerrymandering is substantial, to view that impact as *harm* requires adherence to a normative definition of "fair and effective representation"[24] that has no claim to legitimacy as a matter of constitutional law. Part I thus concludes that there is no "principled" resolution to the gerrymandering question available to the courts.[25] The issue is not susceptible to remedy through constitutional adjudication.[26] Any lasting, defensible answer re-

23. Johnston, *Constituency Redistribution in Britain: Recent Issues*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 277 (B. Grofman & A. Lijphart ed. 1986).

24. Reynolds v. Sims, 377 U.S. 533, 565-66 (1964) ("fair and effective representation for all citizens is concededly the basic aim of legislative apportionment"). *Reynolds* held that "the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators" and that the legislative districts for both houses of a state legislature must be equally populated to achieve that end. *Id.* at 566.

25. The term "principled" is used in the sense of having a plausible claim to legitimacy and viability as a rule of law.

26. Daniel Lowenstein and Jonathan Steinberg have reached a similar conclusion:

> [There are no] "neutral" or "pre-political" public interest criteria for legislative districting which c[an] command assent from persons who, despite oppos-

quires not just an agreement on the standards to be applied but an initial agreement on the ideal to be sought. Currently there is no such agreement, and the courtroom is not the appropriate forum in which to forge one.

Part II traces the checkered history of judicial intervention into gerrymandering disputes from the Supreme Court's initial refusal to enter the field in *Colegrove v. Green*[27] to its most recent pronouncements in *Bandemer* and *Badham*. Demonstrating that this line of cases lacks a defensible theoretical framework, Part II explains this deficiency as a necessary result of the basic problem discussed in Part I: to establish a coherent standard for judicial review of political gerrymandering would require the Supreme Court to ascribe to a definition of fair representation that is constitutionally and politically untenable. Political gerrymandering is, therefore, a "political question" in the classical legal sense: it violates no express constitutional directive; if it is an evil, then its suppression requires either a fundamental institutional change or the adoption of a compromise system of representation, neither of which the federal courts are competent to provide. Part II then distinguishes racial from political gerrymandering and argues that only the latter should be held nonjusticiable.[28] Part II concludes that although a purist would want the Court to overrule *Bandemer*, a pragmatist could accept the holding if, but only if, *Badham* were a definitive statement of its reach.

Finally, Part III examines numerous criteria that scholars have proposed for incorporation into a new judicial standard for gerrymandering claims. Part III concludes that despite the best efforts of mathematicians, statisticians, lawyers, and political scientists, there simply are and can be no acceptable crite-

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> ing partisan affiliations and diverse ideological viewpoints, share a commitment to democratic processes and values. . . . [T]he courts ought not to make the Constitution the arbiter of competing partisan redistricting claims.

Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 4 (1985).

The 1985 *U.C.L.A. Law Review* symposium on gerrymandering, of which the Lowenstein and Steinberg article is a part, is probably the best collection of essays assembled on the subject.

27. 348 U.S. 549 (1946) (plurality opinion).

28. This Note disputes Robert B. McKay's observation that "there is no substantial dissent from th[e] proposition [that reapportionment issues should be justiciable] now despite Justice Frankfurter's caution against entering the political thicket." McKay, *Affirmative Gerrymandering*, in REPRESENTATION AND REDISTRICTING ISSUES 91 (B. Grofman, A. Lijphart, R. McKay, & H. Scarrow eds. 1982).

ria for constitutional adjudication of these claims. Firstly, the standards proposed are in their very nature not principled approaches to the problem but compromises driven by what are often implicit policy preferences.[29] Secondly, all of these measures either would be ineffective restraints on the gerrymander or else would require a radical restructuring of current notions and methods of representation. Indeed, the proposals that would most significantly curb gerrymandering are laden with implicit assumptions about what an ideal representative government looks like—assumptions that the proposals' authors do not address explicitly and appear not to recognize. Finally, Part III suggests nonjudicial approaches to the political gerrymandering problem.

I. THE POLITICAL GERRYMANDER

A. *The Nature of the Beast*

In principle, gerrymandering is quite simple. The idea is to use demographics and projected election returns to construct a set of districts that will translate into the largest number of seats for the party or interest group doing the constructing. Typically, this involves only two techniques: "splitting" votes and "packing" votes.[30] The former involves breaking up the opposition's pockets of strength. District boundaries are drawn in such a way that clusters of unfriendly votes are split among two or more districts, diluting their aggregate effect on election returns. The opposition is spread thinly across the political landscape—ideally, too thinly to constitute a majority in any single district. "Packing" (or "wasting") votes achieves the same result by the opposite approach. Rather than dilute unfriendly votes, the redistricting plan concentrates them in as few districts as possible. The opposition is guaranteed to win

29. The flaw is not that the proposed standards fall short of some Wechslerian ideal of "neutral principles." *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The criticism here is more basic. The proponents of the various standards never define the principle of "fairness" or "representativeness" that they believe is constitutionally required; indeed, they seem to take for granted that no single definition *is* defensible as *the* constitutional definition. They imply that any principled or purist approach must be compromised to produce a workable, practical standard. Their instincts are correct that the Constitution does not espouse a single principle of representativeness, but they are wrong to assume that the courts can rationally adjudicate in this area without such a principle by reading some theoretically vague compromise into the text of the Constitution. *See infra* Part III.

30. *See* ABA SPECIAL COMM. ON ELECTION LAW AND VOTER PARTICIPATION, CONGRESSIONAL REDISTRICTING 3 (1981) [hereinafter ABA SPECIAL COMM.].

these seats but at the cost of having virtually no presence in other districts. What little the opposition wins, it wins by overkill.[31]

To understand why gerrymandering occurs, one must first understand redistricting. The federal Constitution requires that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."[32] For purposes of this apportionment, the Constitution further requires the conducting of a decennial census.[33] Most state constitutions have similar requirements for their legislatures.[34] Reapportionment, therefore, has been an integral part

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31. Splitting and packing can be demonstrated with a simple example. Suppose the mythical State of Gurnet has seven legislative districts and two political parties. Party A is expected to win 53% of the statewide popular vote, and Party B is expected to win 47%. Assume Party A controls the legislature and that all seven districts are equally populated at all times.

The columns below demonstrate expected outcomes under a hypothetical configuration of districts before gerrymandering, with splitting, and with packing:

	Before Gerrymandering			With Splitting			With Packing		
	A	B	Winner	A	B	Winner	A	B	Winner
1	52%	48%	A	52%	48%	A	59%	41%	A
2	63%	37%	A	57%	43%	A	60%	40%	A
3	43%	57%	B	51%	49%	A	24%	76%	B
4	49%	51%	B	53%	47%	A	58%	42%	A
5	48%	52%	B	52%	48%	A	55%	45%	A
6	67%	33%	A	55%	45%	A	58%	42%	A
7	49%	51%	B	51%	49%	A	57%	43%	A
	53%	47%		53%	47%		53%	47%	
	A wins 3 (42.9%)			A wins 7 (100%)			A wins 6 (85.7%)		

By splitting Party B's votes, Party A can capture all seven seats, but the margin of victory is narrow in several districts. Alternatively, Party A can pack Party B voters into the third district, where Party B is initially quite strong. This strategy sacrifices one seat in order to "insure" the other six. Party A can also afford a greater margin of error in its election projections under a packing strategy.

This is an oversimplified example. Both techniques may appear in the same legislative plan, and both may be adapted to situations involving any number of parties or districts. They may also be used in a bipartisan fashion to form a "treaty" of sorts, dividing territory and protecting incumbents.

32. U.S. CONST. amend. XIV, § 2. This portion of the Fourteenth Amendment superseded the infamous "three-fifths" clause of Article I, under which a slave counted as three-fifths of a citizen for purposes of apportionment. The three-fifths clause had been a political compromise between northern and southern states.

33. *See id.* art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.").

34. *See, e.g.*, CAL. CONST. art. XXI, § 1 (mandating a decennial reapportionment for state legislative seats on the basis of the national census); N.J. CONST. art. IV, §§ 2-3 & art. XI, § 5 (same); N.Y. CONST. art. III, §§ 3-5 (same); PA. CONST. art. 2, §§ 16-17 (same); *see also* N.Y. CONST. art. VI, § 6 (mandating reapportionment for judicial dis-

of American politics since the first census in 1790,[35] and redistricting—the reconfiguration of legislative districts—has been a regular practice for almost as long.[36]

In accordance with a federal statute[37] enacted pursuant to the Constitution's requirements, the Executive Branch must conduct the census,[38] and the President must deliver the final tally to Congress during the first week of its first regular session following completion of the tally. Within fifteen days thereafter, the Clerk of the House of Representatives must transmit to the chief executive of each state a certification of the number of Representatives to which that state is entitled.[39] The states then have the responsibility of ensuring that their delegation to the next five Congresses meets that number. Apparently, so long as their methods do not violate explicit constitutional provisions,[40] how the states choose to apportion their allotted seats

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tricts); PA. CONST. sched. 1, § 14 (same) & art. 9, § 11 (mandating reapportionment for municipal districts). Massachusetts is apparently unique in basing reapportionment for the state legislature on the state's own decennial census. *See* Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 181 n.25 (1985).

35. The first census was conducted by seventeen federal marshals who earned between thirty-three cents and one dollar for every fifty people they counted. Despite the incentive, the marshals tallied just under four million Americans—a figure widely regarded as an underestimation today. "Never, perhaps, had so few counted so many for so little." DiBacco, *Jargon, Cost, Fears Plagued First Census*, Wash. Times, Mar. 2, 1990, at B6.

Demographers expect the tally from the 1990 census to top 250 million, which would represent a 10.5% increase over the 1980 figure. The nation's daily growth rate is about 6,400, which represents a surplus of births (10,600) over deaths (6,200) plus the arrival of 2,000 immigrants each day. *See* Anderson, *U.S. Population Passes Quarter-Billion Mark*, United Press Int'l, Mar. 6, 1990 (daily wire service).

36. "Technically, the words 'apportionment' and 'reapportionment' apply to the 'allocation of a finite number of representatives among a fixed number of pre-established areas,' while 'districting' and 'redistricting' refer to the drawing of district lines." *Bandemer*, 478 U.S. at 161 n.1 (Powell, J., concurring and dissenting) (quoting Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1121 n.1 (1978)). At least for purposes of determining the size of state delegations to Congress, reapportionment is an express constitutional requirement, while redistricting is not. *See supra* note 32 and accompanying text. The former need not always involve the latter, but as a practical matter, it usually does.

Despite the distinction, scholars occasionally use the terms interchangeably. *See, e.g.*, Grofman, *supra* note 34, at 78 n.6. This Note considers redistricting issues a subset of reapportionment issues and uses the terms accordingly.

37. *See* 2 U.S.C. § 2a(a) (1988).

38. As the return address on 1990 census forms indicates, the Department of Commerce has been charged with the task.

39. *See* 2 U.S.C. § 2a(b).

40. The primary constitutional limitations on the States' authority to reapportion and redistrict are the Fourteenth and Fifteenth Amendments. *See supra* note 11. Some apparently have thought that the Guaranty Clause provides a further limitation, but a fair reading of that clause suggests that the only obligation it imposes is upon the federal government, not upon the States. *See* U.S. CONST. art. IV, § 4 ("The United States

is not relevant as a matter of federal law.[41] As a matter of state law, of course, there may be any number of limitations.[42] The important point is that reapportionment, for both congressional and state legislative seats, is the responsibility of the individual states, and they have relatively free rein.

Redistricting plans in most states proceed through the legislative process in much the same manner as other bills.[43] They are drafted by committees that are appointed by the legislative leadership and the composition of which usually reflects a bias in favor of the majority party. Passage requires a simple majority vote and sometimes occurs late in the legislative session in order to avoid provoking unwanted attention. In forty-one states the legislatures have complete responsibility.[44] The other nine use redistricting boards or commissions, but in only three of these are the commissions meant to be nonpartisan.[45] Where the governor is a member of the majority party, he will customarily sign the legislature's bill as a matter of course. If,

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shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion . . ."). More importantly, the Supreme Court has held that the Guaranty Clause does not give rise to a federal cause of action. *See* City of Rome v. United States, 446 U.S. 156, 183 n.17 (1980) ("We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause . . . since that issue is not justiciable.") (citing Baker v. Carr, 369 U.S. 186 (1962)); Colegrove v. Green, 328 U.S. 549, 556 (1946) ("[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts") (citing Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912)).

41. The Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4. Congress has exercised the authority granted to it under this provision exceedingly sparingly. Its only significant legislation in the area is 2 U.S.C. §§ 2a-c, which provides for the transfer of census figures to the states and for the allocation of congressional seats among them. *See* ABA SPECIAL COMM., *supra* note 30, at 1-2.

42. For a thorough summary of state constitutional and statutory redistricting requirements, see Grofman, *supra* note 34, at 177-83 (table).

43. *See* REAPPORTIONMENT POLITICS, THE HISTORY OF REDISTRICTING IN THE 50 STATES 21-22 (L. Hardy, A. Heslop & S. Anderson ed. 1981) [hereinafter REAPPORTIONMENT POLITICS].

44. *See* R. MORRILL, POLITICAL REDISTRICTING AND GEOGRAPHIC THEORY 44 (1981).

45. *See id.* The three states with allegedly nonpartisan redistricting commissions are Colorado, Hawaii, and Montana. In Colorado, an eleven-member commission is responsible for the state's legislative districts while the general assembly is still responsible for the state's congressional districts. The commission is composed of legislative, executive, and judicial branch appointees, no more than six of whom may be members of the same political party. In Hawaii and Montana, each party selects an even number of the commission's members, and then together those members pick one additional member—a ninth in Hawaii, a fifth in Montana. *See* REAPPORTIONMENT POLITICS, *supra* note 43, at 60-61, 90-91, 189. Thus, in all three states the commissions are more "bipartisan" than "nonpartisan."

however, he has a veto power and is a member of the opposition, he may be able to force the majority party to submit a friendlier bill before he endorses it. Similarly, where the two parties' strength in the legislature is closer to parity, the bill that ultimately passes is likely to be more sensitive to the concerns of both.

Redistricting, in short, is no less subject to the pressures and biases of politics than any other legislation. The now famous plan that Tisdale caricatured was hardly the first attempt to restructure political boundaries for partisan gain.[46] Such attempts predate the Constitution.[47] The gerrymander was not novel in 1812, and it cannot be dismissed as some reptile outliving its time today; "the manipulation of the boundary and composition of districts for some partisan purpose"[48] is a practice indigenous to our political system.

B. *The Severity of the Impact*

How pernicious gerrymandering has been is a matter for de-

46. The 1812 statute "was not the first instance of the kind in state legislation. The districts for the election of members of congress had always been arranged by the federal[ist] party, as far as could be done, with the same object and on the same system." 2 J. AUSTIN, *supra* note 3, at 347.

47. "There was nothing particularly new about this political practice, for it had been used since colonial times." G. BILLIAS, ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN 316 (1976), *quoted in* Levinson, *supra* note 8, at 277 n.63. If the practice was not novel, one reasonably may ask why this one particular redistricting plan attracted such attention. James Austin, writing only seventeen years after the Massachusetts law's enactment, offers some insight:

> From the period of Mr. Jefferson's election to the presidency, in March 1801, the government of the United States, in all its departments had been decidedly in the hands of the democratic party . . . . In Massachusetts however, the case was directly the reverse. For nearly the whole period, in which the people had divided themselves into political parties, the government had been in federal[ist] hands.
>
> . . . [In 1812, however,] Mr. Gerry seemed to have been awakened from his long inactivity, and to come before the electoral population like the last of the Romans . . . .

2 J. AUSTIN, *supra* note 3, at 315-17. The election pitted Gerry, an esteemed Founding Father, against the incumbent Governor Gore, who "had been too young to engage in the great struggle for independence." *Id.* at 318. Gerry triumphed and a Democratic majority swept into the legislature on his coattails. In a spirit of bitter retaliation, the Democrats passed their famous law, and although it was not the first of its kind, the charged atmosphere nearly made it seem so:

> There was an apparent management, too plain not to be perceived, and which being seen, was universally reprobated.
>
> . . . [T]he design and management were instantly reprobated by the opposition, as fiercely as if they had themselves always been innocent of a similar transgression.

Id. at 346-47.

48. R. MORRILL, *supra* note 44, at 2 (defining "gerrymandering").

bate. The mere claim that it is an illegitimate practice is itself open to question. Because there is no "neutral" or "natural" way to draw district boundaries, any attempted configuration of districts is inherently somewhat arbitrary. Even a blindly drafted plan will more than likely have a disparate impact on the various candidates and parties.[49] Indeed, there is no inherent justice in the election returns produced by a set of districts that have *not* been gerrymandered. It is definitional that someone's policy preferences must guide the redistricting process. In a democracy, that "someone" is the majority, and if anything is natural, it is that the majority will exercise its discretion to further its own political aims. Many observers think that the majority has a *right* to manipulate district boundaries: it is one of the rewards of victory, a privilege of political spoil.[50]

In the era of information technology, however, the ability of experts to gerrymander districts has attained new heights. Computers are now capable of recasting whole states and the entire nation to comply with very detailed demographic specifications. Tacticians can summarize and evaluate the particular characteristics of voters to reveal patterns and to project trends with tremendous accuracy. By subjecting their findings to an iterative and interactive process of refinement, they can generate the model redistricting plan.[51] Compared to the Rorschach forms of today's legislative maps, Elkanah Tisdale's sketch is the awkward inkblot of an amateur. Even the most hearty defendants of the legislative process must admit to an uneasiness in the face of this technology.

To say that gerrymandering is *politically legitimate*, therefore, is not to say that the practice has no appreciable impact on the quality or nature of political representation. On the contrary, most scholars who have undertaken to study the effects of gerrymandering have concluded that it has substantially biased election results in the past, that it continues to do so, and that it undermines the effectiveness and integrity of government. Richard Morrill has concluded that, when used as a tool to un-

49. *See supra* note 31 (demonstrating hypothetical election outcomes before and after gerrymandering). In the demonstrated hypothetical, Party A won 53% of the popular vote and 42.9% (three of seven) of the contested districts *before* gerrymandering. There is no necessary logic, illogic, justice, or injustice in this conversion ratio.

50. *See, e.g.*, Lowenstein & Steinberg, *supra* note 26, at 65 ("[D]istricting by the legislature is acceptable precisely because by winning the postcensus election the incumbents and the majority party win the right to devise the next districting plan.").

51. *See* R. MORRILL, *supra* note 44, at 33-44.

dercut the electability of black candidates and to preserve the control of eroding parties, "gerrymandering has in fact been very effective."[52] For decades the United States Conference of Mayors has considered unequal representation due to gerrymandering "the major source of troubles for municipalities."[53] In the mayors' view, cities are victims of taxation without representation; a disproportionately low number of urban representatives is forever being held hostage to rural and agricultural interests.[54] Finally, the Republican National Committee has also decried gerrymandering, claiming with considerable justification that it is a prime reason that the G.O.P. has become the perennial minority party in the House and at the state and local levels.[55]

Those who have been adversely affected by gerrymandering are not the only complainants. The American Bar Association, other public interest groups, and numerous scholars have concluded that gerrymandering (a) unfairly discriminates against minority interests; (b) unduly rewards incumbency; (c) reduces political competition and thereby undercuts the quality and responsiveness of legislators; (d) discourages voter participation by preordaining election results; and (e) wastes time and money.[56] In light of current re-election rates—ninety-eight percent for Representatives and eighty-five percent for Senators choosing to run[57]—such claims of entrenchment seem very compelling.

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52. *Id.* at 13.

53. Baker, *Whatever Happened to the Reapportionment Revolution in the United States?*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 260 (B. Grofman & A. Lijphart ed. 1986).

54. *See id.*

55. *See, e.g.*, Mandel & McGurn, *How the Democrats Hold on to Congress*, 41 NAT'L REV. 37 (Nov. 24, 1989).

56. *See* R. MORRILL, *supra* note 44, at 44; ABA SPECIAL COMM., *supra* note 30, at 5-7. The American Bar Association (ABA) has been joined in these claims and in its calls for reform by the American Civil Liberties Union (ACLU), Common Cause, the League of Women Voters, the National Association for the Advancement of Colored People (NAACP), the National Municipal League, and the Mexican American Legal Defense Fund (MALDEF), among others.

See also Stern, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. CHI. L. REV. 398, 405 (1974) (Gerrymandering "diminishes effective representation by decreasing the number of politically competitive districts .... [T]he controlling party is not forced to select its best candidate .... Incumbents may be able to continue in office without accounting to the voters in any significant way.... [G]errymandered districts minimize the need to fuse various small or single-issue groups into an electoral coalition ....").

57. *See* Berke, *An Edge for Incumbents: Loopholes That Pay Off*, N.Y. Times, Mar. 20, 1990, at A1 (late ed.).

Still, a stalwart few deny that gerrymandering has had a significant or adverse impact on the composition of legislatures. First, these commentators point to the practical impossibility of isolating gerrymandering as a causal factor in producing any given election result. Second, they flatly claim that, as a matter of theory, the potential power of gerrymandering has been overstated. Third, they point out that comparing the percentage of votes gained with the percentage of seats won proves nothing when no seat-to-vote ratio constitutes an a priori norm.[58] The first point is technically correct but dismissible as a red herring; the second is demonstrably naive; the third, however, betrays an important realization—one that ultimately leads to an understanding of why political gerrymandering is not remediable by judicial methods and not amenable to adjudication as a constitutional offense.

The first point is well-taken as far as it goes. To demonstrate a cause-and-effect relation between gerrymandering and a particular election result is indeed difficult. It is a problem that has plagued lawyers and social scientists alike. The quality and characteristics of the individual candidates, the effectiveness of their campaigns, the amount of money invested, the predominant issues of the day, the state of the economy, the level of voter participation, and voter shifts are all variables in the equation. No single variable can be isolated and analyzed for its specific contribution to the outcome. The conclusions of scholars like Robert Morrill and organizations like the A.B.A. are therefore necessarily speculative; the true impact of gerrymandering cannot be demonstrated for empirical observation.

Inability to measure impact, however, does nothing to deny impact, nor does it justify a laissez-faire attitude toward gerrymandering. If gerrymandering were not so effective, why would it be so prevalent? It is undeniable that all else being equal, gerrymandering does bias election results. This much *is* demonstrable.[59] On a more sophisticated level, though, the answer to the claim that gerrymandering has no observable impact in practice lies in turning one's attention from practice to theory. In an important work on the techniques of gerryman-

58. *See supra* notes 31 & 49 (demonstrating that there is no neutral, natural, or inherently just correlation of seats to votes in a set of districts that has *not* been gerrymandered).

59. *See supra* note 31 (demonstrating effects of gerrymandering).

dering, Philip Musgrove has demonstrated that for any given community that is to be divided into legislative districts there is a theoretically "perfect gerrymander."[60] What Musgrove means is that for any fixed percentage of the popular vote and any fixed number of seats to fill there is an optimal arrangement of districts: a "set of districts such that no other set, or no possible redistricting, could increase the advantage to the favored party."[61] The perfect gerrymander need not be cartographically unique; an infinite number of slightly varying plans may achieve optimality.[62] There is, however, an absolute maximum proportion of districts that a fixed percentage of the popular vote can carry.[63]

The importance of Professor Musgrove's work for reformers and critics of gerrymandering is that it dispenses with their need to prove that gerrymandering has had a demonstrable ef-

60. *See* P. MUSGROVE, THE GENERAL THEORY OF GERRYMANDERING 7 (1977) ("We can have an exact definition of a perfect gerrymander without having, or requiring, a precise definition of what a gerrymander is in general.").

61. *Id.* at 6-7. A rudimentary understanding of calculus is necessary to appreciate Musgrove's work. The essence of his methodology is as follows:

1. *Define the "safe region."* First, determine the total area that can be safely carried by the controlling party. To do this, plot points of P on a map of the state, where P is the percentage of votes likely to be received by the party in whose favor the state is to be gerrymandered. Gradually, contour lines will reveal themselves with peaks being areas within which $P > 0.5$ and valleys being areas within which $P < 0.5$. Circumscribe the largest possible area within which $P > 0.5$. This area need not be one contiguous space; it may be composed of several, discrete peaks.
2. *Define an initial district.* From the summit of any single peak where $P > 0.5$, extend two diverging rays downhill perpendicular to the contour line. Theoretically, moving down each of these rays, one should reach either (a) a point at which $P = 0.5$ or (b) the state border.

   Assuming the former, one can consider the space defined by the two rays and a line connecting them at the points along each where $P = 0.5$—roughly a triangle—a safe district of maximum area. If the population of this district is either too large or too small for legislative purposes, then the boundaries can be adjusted inward on one side and outward on another until the correct population is circumscribed, ensuring, of course, that at all times $P > 0.5$ within the district.

   Assuming that one reaches the state border before $P = 0.5$, one need only move in the other direction, uphill and down another side, to reach a point at which $P = 0.5$ and to form a safe district of maximum area. The idea is simply to spread excess voter strength into adjoining areas of relative weakness. Again, the population can be adjusted by yielding space at the margins.
3. *Complete the gerrymander.* Moving continuously to the next peak and repeating the process will produce the maximum number of districts that the favored party can carry. Space yielded at the margin by one district can be recouped in subsequently formed districts to produce the optimal allocation of voter strength. The resulting districts, safe and unsafe, will all be contiguous and equally populated.

See id. at 8-21. Computer programs designed for gerrymandering can be understood in theory as extrapolations of this technique.

62. *See id.* at 7.

63. *See id.*

fect in elections where they complain of its presence. A gerrymander, Musgrove demonstrates, may be measured not only for its effect but also for its "severity," the extent to which it approaches the mathematically perfect gerrymander for the particular circumstances.[64] Once one determines what the perfect gerrymander would be, one can gauge any existing plan against that ideal.[65] Thus, although there is no "neutral" arrangement of districts, there is a continuum to consider; gerrymandering is a matter of degree, and some gerrymanders are more extreme—some redistricting plans, more acutely gerrymandered—than others.

If a certain level of gerrymandering could be accepted as an a priori ceiling of tolerability, then any redistricting plan that exceeds that ceiling could be struck down as unacceptable per se—*without regard to actual or demonstrable effect.* In fact, the results of elections that occur after challenged gerrymanders are in place would be wholly irrelevant; the determinative consideration would be the severity of gerrymandering as measured by reasonable *expectations* of voter conduct, whether or not those expectations are actually fulfilled.

Obviously, this is easier than attempting to measure the actual effect of a gerrymander. The factor to be analyzed, severity, can be isolated and independently evaluated,[66] and there is likely to be at least some degree of consensus on reasonable projections of voter behavior. If the latter were not true, how would minority legislators know when to challenge redistricting bills? Using severity rather than effect as the litmus test, however, is not just more manageable; it is also more precise. What critics of gerrymandering decry is the initial stacking of the deck; the fact that dealing the cards may not always work to as great an advantage as the favored party had hoped does not excuse the offense.

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64. *See id.* at 7, 26-28.

65. *See id.* at 26-28. After demonstrating a mathematical proof for the "perfect gerrymander," Musgrove articulates the formula for a "gerrymander index," by which to measure the severity of a given gerrymander. The index gauges the redistricting plan in question along a continuum from proportional representation (0) to perfect gerrymandering (1). In Musgrove's view, a value of zero suggests "the districting is harmless, either because the potential for gerrymandering is not used or because even when used it could not give the [favored] party more districts than it is entitled to." *Id.* at 27. A positive value suggests "a gerrymander exists, and the party employing it is controlling more districts than it should." *Id.*

66. *See id.* at 26-28, 56-59; *supra* note 65.

The essential point to bear in mind is that it is not enough to point to the difficulty of measuring the effects of gerrymandering to rebut claims that gerrymandering is harmful. It is both possible and logical to condemn the practice without demonstrating its actual effect in relevant elections. If one defines the harm in terms of the severity of gerrymandering, one can even condemn gerrymandering where its actual effects are innocuous.

Those who downplay the impact of gerrymandering, however, do not just argue about its practical effects; they also point to theory. They maintain that as a matter of theory "complaints about partisan redistricting may be overdrawn."[67] First, they insist, gerrymandering would be pointless in a great many situations: "In approximately one-half of the states, the dominance of one party is so great that 'partisan' redistricting would be superfluous."[68] Second, they claim, even where gerrymandering could be a boon to the controlling party, it is unlikely to have a long-term impact because gerrymandering is a self-correcting phenomenon: "Partisan gerrymanders put majority-party leaders to a severe test, for such redistricting plans typically require some incumbents of the majority party to accept a reduction in their electoral 'margins of safety' in order to build up majorities in neighboring districts."[69]

Both claims lack merit. With respect to the first, it is naive to suggest that gerrymandering could ever be "superfluous" to the controlling party. Even if the controlling party does have a firm lock on the electorate, a gerrymander will always provide additional assurance. As Professor Musgrove's work demonstrates, even where one cannot attribute actual results to a gerrymander, a gerrymander nevertheless impacts the process.[70] This observation is borne out by the fact that legislatures in

67. REAPPORTIONMENT POLITICS, *supra* note 43, at 23.

68. *Id*; *see also* Cain, *Simple vs. Complex Criteria for Partisan Gerrymandering: a Comment on Niemi and Grofman*, 33 UCLA L. REV. 213, 225 (1985) ("Partisan plans are relatively infrequent occurrences because they require that certain conditions obtain: The state must have competitive parties (i.e., no one-party domination) . . . and there must be one-party control of the districting process."). *See generally* B. CAIN, THE REAPPORTIONMENT PUZZLE (1984).

69. REAPPORTIONMENT POLITICS, *supra* note 43, at 22; *see also* Lowenstein & Steinberg, *supra* note 26, at 65 ("Pending research by scholars with better command of the skills necessary to performing empirical research than we can claim, we offer several reasons for believing that partisan gerrymandering is unlikely to be self-perpetuating"); *id.* at 64-69.

70. *See supra* notes 60-65 and accompanying text.

supposed one-party states rarely pass up the opportunity to gerrymander.[71] More importantly, it is impossible to deny that gerrymandering promotes the majority party without knowing how the majority party achieved majority status in the first place. One cannot simply stop the clock at the present time, assume the relative strengths of the competing parties as a natural baseline, and then restart the clock; gerrymandering is an ingrained force the full contribution of which to the current state of affairs is not evidenced in one or even a few elections.

Even where the majority party consistently polls as high as the number of seats it retains, it would be naive to say that gerrymandering is not a factor in the party's success. Would-be candidates in the minority party may not even bother to run in light of the poor odds of victory. The gerrymander may be—or at least appear to be—too much to overcome. Alternatively, the electorate may be accustomed to and even support one-party rule today that largely derives from gerrymandering in years past.

Even if one could assume that the majority party always receives one hundred percent of the vote and that no would-be candidates are discouraged from running, one could not conclude that gerrymandering is superfluous or that a laissez-faire attitude toward the practice is appropriate. Although perhaps unlikely, a dramatic shift in the electorate's outlook is always possible, and the more severe the gerrymandering, the less responsive future election returns would be to such a shift. By definition, gerrymandering institutionalizes a bias, and so long as gerrymandering occurs, the sensitivity of political offices to changes in popular attitudes will be reduced.[72]

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71. Massachusetts provides the classic example. The state has traditionally been very Democratic and very liberal. Currently, the Governor, both Senators, and ten of the state's eleven Representatives are members of the Democratic Party. The Democrats also control both houses of the state legislature by very large majorities. These proportions have remained fairly constant for more than a decade and are not the result of recent electoral victories. Nonetheless, the Democratic leadership has consistently gerrymandered the state at all levels, as any political map of the state clearly reveals.

72. Again, Massachusetts is illustrative. Recent polls and trends indicate that while the Massachusetts electorate has grown more conservative in recent years, the state's elected representatives have remained staunchly liberal. The Massachusetts delegation to Congress "voted the liberal viewpoint 89 percent of the time on 20 key votes last year, giving [it] the nation's highest [liberal] rating from Americans for Democratic Action [ADA]." Frisby, *New England in Washington*, Boston Globe, Feb. 13, 1990, at 3. Rankings for the thirteen men ranged between 75% and 100% on the ADA scale, with three members of the delegation achieving the perfect 100% score. *See id.* Thus, while the Democrats may not have needed gerrymandering to maintain their favored position

The claim that gerrymandering is a self-correcting phenomenon is equally meritless.[73] The claim apparently rests on the observation that "[p]artisan gerrymanders . . . typically require some incumbents to accept a reduction in their electoral 'margins of safety' in order to build up majorities in neighboring districts."[74] In the effort to preserve and extend majority power, the controlling party ultimately stretches itself too thin, thus yielding seats to the opposition.

To say that gerrymandering is self-correcting on the basis of this observation, however, is to say that it is self-correcting only in the sense that greed can be considered self-correcting: if you are too insistent in the pursuit of more, you may lose what you already have. Flawed applications of the principles of gerrymandering say more about those doing the applying than about the theory itself. Either the controlling party has attempted to monopolize more seats than it has the power to carry, or else it has relied on demographics and voting projections that, in retrospect, are not so reliable. In short, even if an observation of self-correction is accurate *empirically*, it hardly proves that gerrymandering is self-correcting by *definition*. It suggests rather that most attempts to gerrymander are misconceived or misapplied.

Concededly, gerrymanders are not unalterable, and their effects are not irreversible. If the minority party acquires power or if a new faction in the majority party displaces the old, the current system of districts may be abolished overnight and its particular biases eliminated. Gerrymanders are never fail-safe. The theoretically "perfect" gerrymander is perfect only as a matter of mathematic potential;[75] it is not indefinitely self-perpetuating. Denial of self-perpetuation, however, is not proof of self-correction.

In fact, gerrymandering is demonstrably *not* self-correcting as

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as a *party*, individual Democratic *officeholders* may have needed gerrymandering to insulate themselves from changes in the electorate's views. *See* A. Nelson, *WEEI-AM Editorial* (radio broadcast, Mar. 19, 1990) (noting and lamenting a divergence in political outlook between the Massachusetts electorate and their federal representatives).

73. Theoretically, the claim that gerrymandering is self-correcting is somewhat more far-reaching than the claim that it is superfluous. In the latter case, one is advised to adopt a laissez-faire attitude because the evil complained of has no significant adverse impact. In the former case, one is advised to adopt a laissez-faire attitude because the evil complained of is not, in fact, an affirmative evil at all.

74. REAPPORTIONMENT POLITICS, *supra* note 43, at 22.

75. *See supra* notes 60-65 and accompanying text.

a matter of theory. The suggestion that the controlling party will stretch itself too thin in some districts "in order to build up majorities in neighboring districts"[76] fatally overlooks two aspects of gerrymandering. First, it overlooks the "bipartisan gerrymander," in which incumbents of all stripes conspire to ensure re-election for as many of them as seek it. In a bipartisan gerrymander, there is no incentive to stretch the majority party's voting strength to its limit. The idea is simply to preserve the status quo, which may favor one party over the other by a lot, by a little, or not at all. A bipartisan gerrymander may be ineffective, but it does not self-correct by definition.

Second, the self-correction hypothesis overlooks the potential for hedging one's bets through "packing."[77] The controlling party always has the option of pursuing a cautious plan of action that willingly sacrifices a few districts in order to ensure overwhelming victory in the remaining majority. Nothing compels the controlling party to exploit its strength to its maximum potential; indeed, even plans based primarily on "splitting" the opposition may be drafted conservatively to minimize the risk of overextension.[78] Gerrymandering need not be ambitious to be successful, and where it is not, it will not likely self-correct.

Not only is gerrymandering not self-correcting in theory, but also it is likely to be increasingly less self-correcting in practice. As information technology advances and projected election results become more accurate, fewer misjudgments will occur, and redistricting lines will be increasingly precise. In short, the impact of gerrymandering on election outcomes is undeniable and expanding. Laissez-faire arguments which claim that the phenomenon is immeasurable, insubstantial, and self-correcting are flawed and unpersuasive. At the same time, however, because there is no neutral or natural way to draw district boundaries, some degree of gerrymandering is inherent in the political process. The two conclusions go hand-in-hand: gerrymandering biases election results, but it is a legitimate political practice.

76. REAPPORTIONMENT POLITICS, *supra* note 43, at 22.
77. *See supra* note 31 (describing the two gerrymandering techniques of "splitting" and "packing").
78. *See id.*

C. *The Evanescence of the Harm*

Although ultimately unconvincing in their denial of gerrymandering's impact, the laissez-faireists and skeptics do have one unanswerable argument. They claim quite correctly that "[t]he drawing of district boundaries cannot but involve political judgments and political results."[79] There is no a priori standard to follow, no politically neutral definition of "fair and effective representation:"[80]

> [T]he desire of some reformers to try to sterilize the redistricting process from all partisan input and measures is a hopeless, if not misguided, effort. . . . Give a chimp in a zoo a crayon and a map, and the resulting plan will have differential effects on people.[81]

In the words of the late Robert Dixon, "[t]he key concept to grasp is that there are no neutral lines for legislative districts."[82]

If the ramifications of this observation were simply that redistricting is a political task, there would be nothing novel to the point. That much is already clear.[83] The ramifications, however, are much more significant. It is not only the *act* of redistricting that is political, but also the very principles that are meant to guide the process. They too are contestable. They are not fixed constellations in our political and constitutional traditions but are essentially a matter for political debate themselves. It is one thing to appreciate that the fairness of a given redistricting plan is forever disputable; it is quite another to appreciate that the concept of fairness itself is in dispute. The observation that no configuration of districts is neutral is important, but it is modest relative to the latter realization—that no single, overarching concept of fair representation can claim legitimacy as a rule of law.

Reformers and skeptics alike have failed to appreciate this essential point. For their part, skeptics usually content themselves with the claim that redistricting is unavoidably political

79. *See* REAPPORTIONMENT POLITICS, *supra* note 43, at 24.

80. Reynolds v. Sims, 377 U.S. 533, 565-66 (1964) ("fair and effective representation for all citizens is concededly the basic aim of legislative apportionment"); *see supra* note 24.

81. Backstrom, *Problems of Implementing Redistricting*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 28, at 46.

82. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 28, at 7.

83. *See supra* pp. 13-19.

in practice; they rarely explore the broader claim that any substantive theory of fair representation is also controversial.[84] They simply derive from their initial observation some vague, majoritarian "right" to gerrymander.[85]

Opponents of gerrymandering denounce the practice more broadly as the antithesis of fair and effective representation. They criticize it for "diluting the voting strength"[86] of groups, for "excessive manipulation"[87] of the shapes of districts, for "discriminating against"[88] the vulnerable, and for according an "unjustifiable advantage"[89] to the controlling party. They perceive the "problem" of gerrymandering "as basically one of political legitimacy posed by the gap between theory and practice."[90] Even Professor Dixon, who clearly understood the inherently political nature of redistricting,[91] concluded that gerrymandering violates basic principles of fair representation. As he put it, "The core problem can be stated somewhat simply: Our *ideals* about political representation and our implementing *election system* do not fit together neatly."[92]

Such criticism assumes too much. One cannot consider gerrymandering the antithesis of fair representation unless one adopts some definition of fair representation in the first place. In order to criticize the practice for "diluting," "manipulating," and "discriminating," one must have some a priori notion

84. *See, e.g.*, Lowenstein & Steinberg, *supra* note 26; Cain, *supra* note 68. At times, Lowenstein and Steinberg seem to appreciate the broader point, but they neither explicitly embrace it nor explore it. *See supra* note 26 (quoting Lowenstein & Steinberg); Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 235-36 (1985) (criticizing "Lowenstein and Steinberg's failure to deal explicitly with the political theory dimension" of the gerrymandering problem).

85. *See, e.g.*, Lowenstein & Steinberg, *supra* note 26, at 65 ("[D]istricting by the legislature is acceptable precisely because by winning the postcensus election the incumbents and the majority party win the right to devise the next districting plan.").

86. Engstrom, *Post-Census Representational Districting: The Supreme Court, "One Person, One Vote," and the Gerrymandering Issue*, 7 S.U.L. REV. 173, 207 (1986), *quoted in* Lowenstein & Steinberg, *supra* note 26, at 10.

87. Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121, 1122 n.7 (1978), *quoted in* Lowenstein & Steinberg, *supra* note 26, at 10.

88. Grofman & Scarrow, *Current Issues in Reapportionment*, 4 LAW & POL'Y Q. 435, 454 (1982), *quoted in* Lowenstein & Steinberg, *supra* note 26, at 10.

89. Backstrom, Robins & Eller, *supra* note 82, at 1129, *quoted in* Lowenstein & Steinberg, *supra* note 26, at 10.

90. Baker, *supra* note 53, at 259.

91. *See generally* Dixon, *supra* note 82. Professor Dixon once noted that "all districting is gerrymandering." R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968), *quoted in* REDISTRICTING ISSUES, *supra* note 28, at 31.

92. Dixon, *supra* note 82, at 8-9 (emphasis in original).

of non-dilution, non-manipulation, and non-discrimination. In the vast majority of scholarship on the subject, that notion has remained implicit and unexplored.[93] Commentators typically assume that gerrymandering contravenes an established principle of democratic government as if it were an undeniable first premise.[94] Without articulating this principle, they proceed headlong into elaborate descriptions of the standards they propose for policing the redistricting process.[95]

Opponents of gerrymandering have not defined the "ideals about political representation" that they believe gerrymandering violates because they have assumed that the harm is self-evident. What they have done is to confuse impact with harm. Gerrymandering has an *impact*,[96] but statistical impact is not harm without a normative definition of fair representation. To prove that gerrymandering institutionalizes a bias in the electoral system does not prove, ipso facto, that it violates a constitutional or political rule. That rule must be independently defined. The problem is that no such pre-ordained rule exists. What critics denounce as "unfair representation" is what they perceive as the controlling party's ability to win more seats than

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93. *See, e.g.*, sources cited *supra* notes 86-90; Grofman, *supra* note 34; Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185 (1985) [hereinafter Niemi, The Ultimate Question]; Note, *supra* note 21; Note, *Reapportionment: A Call for a Consistent Quantitative Standard*, 70 IOWA L. REV. 663 (1985).

94. *See, e.g.*, Note, *supra* note 21, at 1068 ("Without clear judicial standards aimed at curbing legislative misconduct, the possibility of unfair representation from gerrymandering will again threaten the integrity of the political process."); other sources cited *supra* notes 86-90 & 93.

95. *See, e.g.*, sources cited *supra* notes 86-90 & 93. An article by Richard Niemi is typical in its failure to confront and define the concept of fair representation:

> My purpose in this Article is not to argue for or against the appropriateness of Court involvement in this area. I take it as a given that the Court eventually will address the question of political discrimination even if it sidesteps the issue at the present time. . . . Rather, I examine the criteria that the Court can use to determine whether an unconstitutional gerrymander exists.

Niemi, *The Ultimate Question*, *supra* note 93, at 186. How can one discuss and propose criteria by which to determine the existence of an unconstitutional gerrymander unless one first decides whether it is appropriate to view gerrymandering as a constitutional offense? Without first articulating the constitutional principle that is offended and how it is offended, any attempt to specify judicial "criteria" is fruitless.

To single out Professor Niemi as a target for this criticism is somewhat unfair. His work ranks among the most sophisticated in the field, and he is unusually aware of the theoretical problems posed by most reformers' attempts to deal with gerrymandering. *See generally* Niemi, *The Ultimate Question*, *supra* note 93; Niemi, *The Effects of Districting on Trade-Offs among Party Competition, Electoral Responsiveness, and Seats-Votes Relationships*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 28, at 35-42 [hereinafter Niemi, *The Effects of Districting*].

96. *See supra* pages 19-34.

it "deserves." But how many seats *does* a party deserve? Just as no configuration of boundary lines can claim to be natural or inherently just, so too no seat-to-vote ratio can claim to be natural or inherently just.[97] Certainly no such ratio is constitutionally mandated.

Intuitively, one might think that a party's representation should be proportional to the percentage of votes it receives. That intuition is apparently at the heart of the implicit definition of fair representation that dominates so much of the current literature. Some scholars have even embraced proportionality explicitly, urging its adoption as a principle of constitutional law;[98] others, while not necessarily approving of the fact, have suggested that it is the logical extension of the justiciability of gerrymandering claims.[99] Proportional representation, however, has no legitimate claim to recognition as a constitutional principle, as the Supreme Court itself has "frequently declared."[100] In the words of Justice Stewart, "The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."[101]

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97. *See generally* Niemi, *The Ultimate Question*, *supra* note 91.

98. *See, e.g.*, Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984); G. HALLETT, PROPORTIONAL REPRESENTATION—THE KEY TO DEMOCRACY (1940). Low-Beer argues that the constitutional requirement of equal representation entails not only equally sized districts but also equally weighted votes—that is, proportional representation. The argument is both ahistorical and fallacious. What the Constitution guarantees is the right to vote, not the right to an equally weighted vote. It is impossible to guarantee the latter right within the framework of dual sovereignty: the weight of a Californian's vote in a gubernatorial or United States Senate election can never equal the weight of a Rhode Islander's vote in either of those same contests, and the Constitution does not require otherwise. Indeed, pure proportional representation is not constitutionally mandated but constitutionally outlawed.

99. *See, e.g.*, Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. LAW REV. 1325 (1987).

100. Niemi, *The Ultimate Question*, *supra* note 93, at 194 (citing cases quoted *infra* note 101).

> Why proportional representation has gotten a black eye in the Supreme Court is not altogether clear. Political scientists agree that the only way to assure every voter an equally effective voice is to adopt one of the proportional representation electoral forms. . . . But the Court has never hesitated to repudiate suggestions that the Constitution demands proportional representation in state elections, nor has it thought this pronouncement warranted much explanation.

Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 51 n.320 (1982) (citations omitted).

101. City of Mobile v. Bolden, 446 U.S. 55, 79 (1980) (plurality opinion), *quoted in* Niemi, *The Ultimate Question*, *supra* note 93, at 194 n.32; *see also id.* at 75-76 (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not re-

A rule of proportionality would be unacceptable for the simple fact that the impulse behind it represents only one half of the American political tradition. Its obvious intuitive appeal is attributable to what one might call the "democratic" element in our theory of government. Democratic principles bend us to the view that all citizens are created equal and that all must have equal rights and privileges under the law. No vote can weigh more heavily than any other, and each voter must have an equally likely chance to have his preferred candidate elected. "Fair representation" is equal representation, and a fair election is one that produces an assembly which reflects the composition of the electorate. Without democratic safeguards, the theory holds, power will infect those elected, and government will tend toward tyranny.

The United States, however, is not only a democracy; it is also a republic, and the "republican" element in American political theory suggests that the popular vote is not the sole consideration worthy of attention in forming a representative body. Geography is also a factor.[102] If it were not, there would be no basis for respecting state borders when apportioning seats to Congress and no basis for providing that each state have at least one Representative, regardless of population. Similarly, if popular vote were the only consideration, there would be no basis for the United States Senate. American government is based on the notion that a vote divorced of place is like a quotation out of context; representation must have some connection to community to be meaningful.[103]

Proportional representation contravenes this republican emphasis on community. Whereas republican theory favors the use of legislative districts, which localize political representa-

quire proportional representation as an imperative of political organization."); *Bandemer*, 478 U.S. at 130 (plurality opinion) ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation"); Rogers v. Lodge, 458 U.S. 613, 640 (1982) (Stevens, J., dissenting) ("No group has a right to proportional representation."); *id.* at 630 (Powell, J., dissenting and joined by Justice Rehnquist) ("any such system, of course, would be antithetical to the principles of our democracy"), *quoted in* Niemi, *The Ultimate Question*, *supra* note 93, at 194 n.32.

102. *See* R. MORRILL, *supra* note 44, at 1-6 (describing redistricting as both a "political" and a "territorial" issue).

103. *See id.* at 1-4. Morrill points out (1) that the development of communities and markets is an organically uneven process of "regionalization;" (2) that political issues are therefore regional by nature; and (3) that Anglo-American notions of representation have historically taken these facts into account. *See also* Baker v. Carr, 369 U.S. 186, 300-18 (1962) (Frankfurter, J., dissenting) (recounting the long Anglo-American history of geographically based representation).

tion, proportionality favors at-large elections, in which all the seats are lumped together and filled through proportional voting. In its purest form, proportional representation implies that a district-based electoral system is structurally unfair: even without gerrymandering, a party that receives fifty-one percent of the vote in each district will win one hundred percent of the seats. American political theory and the federal Constitution, however, do not deplore this outcome, and they do not require at-large elections.[104] Rather, they recognize the possibility of extreme disproportionality over broad spans of territory as an acceptable cost of ensuring representation on a community basis.[105]

Proportional representation thus relies on two assumptions that contradict republican theory. First, it assumes that votes are fungible across space and that they are tied more to political parties than to local candidates and issues. To allot seats proportionally by vote share fallaciously suggests that a vote for Party A's candidate is a vote for Party A generally. It may not be. Moreover, an individual voter may prefer to have the opposition candidate win in his district than to have his vote contribute to proportional representation statewide; at least then he might feel a firmer connection to the candidate and the campaign issues. Second, proportional representation assumes that minority interests are not adequately protected in a community-based electoral system. Republican theory, however, assumes that the winner of an election can and will adequately represent *all* of her constituents, including those who may have

104. Notice that the Guaranty Clause of Article IV guarantees a "*Republican* Form of Government" to every state and that grossly disproportionate representation resulting from the use of legislative districts or the redistricting process is not "unrepublican." U.S. CONST. art. IV, § 4 (emphasis added); *see supra* note 40 (explaining nonjusticiability of Guaranty Clause claims).

105. The perfect compromise between democratic and republican ideals would be a system of multi-member legislative districts within each of which numerous candidates would be elected on the basis of proportional voting. The districts in such a system would be fewer in number and larger in population than those in the typical winner-take-all system, yet they would still be smaller and more responsive to community concerns than a single at-large district. There would likely be more minority representatives and less (but still some) disproportionality between total votes received and total seats won by each party.

Such a system is not inherently more "fair" than either pure democracy (that is, proportional representation) or strict republicanism (that is, winner-take-all districting). It simply represents a precise compromise between two conflicting principles of representation. The important point to recognize is that there is no "principled" middle ground and that it would be inappropriate and ahistorical to suggest that the Constitution requires any such compromise system or, for that matter, either extreme.

voted for the opposition.[106] Such assimilation of interests is one of republicanism's chief goals and chief virtues: by co-opting minority views, majorities "break and control the violence of faction."[107]

American political theory and practice, therefore, have never recognized proportionality as essential to fair representation. On the contrary, the American experience has been that some measure of disproportionality may be necessary—first, to give adequate weight to the inherently regional nature of many political concerns and second, to encourage the assimilation of diverse interests into broader coalitions. Thus, at the same time that one recognizes the potential for "misrepresentation" as a statistical matter, one cannot argue that disproportionality—whether attributable to gerrymandering or not—constitutes "unfair representation" as a matter of *constitutional principle.*

Representation is a function of both people and places, and any definition of "fair representation" must accommodate both democratic and republican elements.[108] The Constitution does not hold either tradition in higher regard but rather assumes a

106. *See generally* THE FEDERALIST No. 10 (J. Madison) (C. Rossiter ed. 1961) (demonstrating the virtues of a republican government over pure democracy).

107. *Id.* at 77.

> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice.
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> . . . .
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> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.

Id. at 77, 80.

108. Another student has discerned a dichotomy similar to the democratic-republican dichotomy between what he calls "pluralism" on the one hand and "republicanism" on the other. *See* Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After Davis v. Bandemer*, 136 U. PA. L. REV. 183, 207-15 (1987). Pluralism conceives of " 'the political system as, ideally, designed to serve the self-defined private interests of individuals or groups, fairly represented in political forums, where they compete under fair rules for fair shares of the outputs of public policy.' " *Id.* at 207 (quoting Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 21 (1986)). The pluralist views politics as a marketplace of ideas and policy preferences; the efficiency of the market apparently depends upon the adequate (proportional?) representation of all relevant interests. *See id.* at 209. Republicanism, meanwhile, conceives of politics as a deliberative process predicated on civic virtue.

This commentator concludes that "a constitutional requirement of . . . proportional representation . . . cannot be placed on the spectrum" between pluralism and republicanism. *Id.* at 213 (referring to spectrum of "deliberative democracy" developed in Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-49 (1985)).

government respectful of both—a government that in practice necessarily constitutes a compromise between the conflicting implications of the two.[109] There is, therefore, no unitary "ideal" or "principle" of fair representation and thus, no principled way to determine where along the continuum from total exclusion of minority interests to proportionality the right of a political group to be represented has been violated. Assuming it has any rights in the first place, a political party simply has no right to any level of representation.

II. Judicial Intervention: Precedents Without Principle

A. *From* Colegrove *to* Karcher

The Supreme Court's entrance into the thicket of gerrymandering disputes has been marred by a failure to appreciate the essential nature of the problem. The Court has declined to recognize that the American conception of political representation rests upon an irreconcilable tension between democratic and republican principles. Because the Constitution embraces this tension, it is definitional that constitutional adjudication cannot resolve it. Thus, although gerrymandering has a significant and perhaps pernicious effect on the nature and quality of political representation, there is no constitutionally mandated (or constitutionally available) solution to the problem.

In addressing gerrymandering and reapportionment disputes, the Court has tacitly leaned toward the democratic pole, assuming with most scholars that the wrong is self-evident and that the remedy, while difficult to formulate, will somehow emerge over time.[110] Relying primarily on the Fourteenth and

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109. *See supra* note 105.

110. *See supra* notes 93-95 and accompanying text. In addressing the justiciability of gerrymandering claims, Professor Martin Shapiro has offered the following jurisprudentially questionable observation:

> [J]udges, and indeed all those called upon to make ethical decisions, are often in a position to identify *a* wrong without being able to define *the* right. Finding themselves in this position, they are ethically entitled to, and in fact do, intervene against the wrong. . . . Individual and organizational 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.

Shapiro, *supra* note 84, at 227-28. Professor Shapiro notwithstanding, constitutional adjudication is not analogous to ethical interpretation. Without first identifying a constitutional right, a judge has no basis for perceiving a constitutional offense. This in a nutshell explains the Court's current dilemma. With logic akin to Professor Shapiro's apparently in mind, the Court decided in *Bandemer* that partisan gerrymandering claims are justiciable, but it failed and did not even try to articulate precisely what constitu-

Fifteenth Amendments,[111] the Court has confronted with rights-based arguments what is in essence an uneasy but nonetheless ingrained structural compromise between conflicting notions of representation. It has searched in vain for a limiting principle[112] that does not exist, and in the process it has developed a jurisprudence unstable in its theoretical foundation.

The Court has not always stood on such infirm footing. Forty years ago, the Court appeared to appreciate the structural nature of the issue somewhat better. In *Colegrove v. Green*,[113] the Court rebuffed the claim of three Chicago plaintiffs whose congressional votes were effectively worth one eighth as much as the votes of some rural Illinoisans.[114] Writing for a plurality of the Court,[115] Justice Frankfurter explained:

> The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity. . . . It is hostile to a democratic system to involve the judiciary in the politics of the people. . . . [D]ue regard for the Constitution as a viable system precludes judicial correction [of the alleged offense]. . . .
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> . . . The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. [The provisions relied on in this case are among those commands].[116]

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tional right or ideal is violated by such gerrymandering. *See generally* Davis v. Bandemer, 478 U.S. 109 (1986); *see also infra* pp. 64-76.

Interestingly, Professor Shapiro himself has concluded that partisan gerrymandering claims should not be justiciable. *See* Shapiro, *supra* note 84, at 252-56.

111. U.S. CONST. amend. XIV, § 1 ("[No State shall] deny to any person within its jurisdiction the equal protection of the laws."); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *see supra* notes 11 (discussing *Gomillion* and *Regester* cases) & 40 (explaining nonjusticiability of Guaranty Clause claims).

112. *Cf.* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 (1982) (plurality opinion) ("The flaw in appellants' analysis [that Congress can create Article I courts whenever expediency requires] is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art[icle] III tribunals . . . .").

113. 328 U.S. 549 (1946).

114. "At the time of *Colegrove v. Green* the population disparity between the largest and smallest congressional districts in Illinois was the most extreme in the nation." Dixon, *supra* note 82, at 12. The population of one of the challenged Chicago districts was more than 914,000, whereas the population of the smallest, rural district was only 112,000. *See id.*

115. Justice Frankfurter wrote for himself and Justices Reed and Burton.

116. *Colegrove*, 328 U.S. at 552-54, 556 (plurality opinion). The constitutional provisions that Justice Frankfurter felt the case relied upon were Article I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Mem-

The Court thus held apportionment claims nonjusticiable on the ground that redistricting is a "political question" better left (and arguably committed by the Constitution) to the legislative branch.[117] Again, as Justice Frankfurter opined:

> To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.[118]

The Court did not deny that the plaintiffs had been harmed; it just denied that their harm was constitutionally cognizable and remediable.

Colegrove, however, did not last. Without overruling the case, the Supreme Court performed an about-face in the 1962 landmark decision of *Baker v. Carr*.[119] Like *Colegrove*, *Baker* involved a claim of egregious malapportionment, although the districts at issue were state legislative districts.[120] Unlike *Colegrove*, however, *Baker* addressed the issue from a rights-based, as opposed to a structuralist, perspective: the complaint alleged that the plaintiffs were " 'denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes.' "[121] Over lengthy dissents by Justices Frankfurter

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bers . . .") and Article I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."). *See* 328 U.S. at 553-54 (plurality opinion) (citing these provisions).

117. *See id.* at 552-56 (plurality opinion). "The nonjusticiability of a political question is primarily a function of the separation of powers." Baker v. Carr, 369 U.S. 186, 210 (1962). The political question doctrine apparently derives from the "case or controversy" requirement of Article III. *See* U.S. CONST. art. III, § 2; Coleman v. Miller, 307 U.S. 433, 454-55 (1939).

118. *Colegrove*, 328 U.S. at 556 (plurality opinion).

119. 369 U.S. 186 (1962).

120. Plaintiffs in *Baker* challenged the legitimacy of districts for the Tennessee General Assembly. *See Baker*, 369 U.S. at 187-88. At the time, there was a population disparity of eighteen-to-one for lower house districts. *See* Dixon, *supra* note 82, at 12.

121. *Baker*, 369 U.S. at 194 (quoting plaintiffs' complaint). Plaintiffs in *Baker* pled violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and violations of the Tennessee Constitution. *See id.* at 194-95 n.15. By contrast, Justice Frankfurter's plurality opinion in *Colegrove* never mentioned the Fourteenth Amendment; instead, it relied on two "institutional" provisions of Article I for its holding that apportionment claims are nonjusticiable. *See Colegrove*, 328 U.S. at 553-54 (plurality opinion) (citing U.S. CONST. art. I, § 5, cl. 1 and U.S. CONST. art. I, § 4, cl. 1); *see also supra* note 116 (setting forth the text of these provisions).

Interestingly, the three-judge district court in *Colegrove* had ruled the plaintiffs' claims justiciable and had done so under the Fourteenth Amendment. *See* Colegrove v. Green,

and Harlan,[122] the Court held that such claims are indeed justiciable under the Equal Protection Clause.[123]

Writing for the Court, Justice Brennan attempted to give greater content to the political question doctrine in order to show its inapplicability. He articulated six "formulations" of the basic rule.[124] A court may regard an issue as a nonjusticiable political question if it finds:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[125]

Justice Brennan then insisted that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence."[126] Finding none of the six formulations controlling, he concluded that apportionment claims must be justiciable.

Like many students of the issue,[127] Justice Brennan posed the question in judicial-activist terms: rather than look for a rubric under which to adjudicate apportionment claims, he looked for rubrics under which to *exclude* them, assuming that if none applied the claims had to be justiciable. The *Baker* Court therefore held that apportionment claims could be heard without articulating precisely how or under what standard courts in

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64 F. Supp. 632, 634 (N.D. Ill. 1946) (The Illinois Reapportionment Act "abridges plaintiffs' privileges and rights within the meaning of the Fourteenth Amendment. It denies to plaintiffs their right to liberty and property without due process of law.").

122. *See Baker*, 369 U.S. at 266-330 (Frankfurter, J., dissenting); *id.* at 330-49 (Harlan, J., dissenting).

123. *See id.* at 209 ("We hold that this challenge to an apportionment presents no nonjusticiable 'political question.' . . . Appellants' claim that they are being denied equal protection is justiciable . . . .").

124. *Id.* at 217.

125. *Id.*

126. *Id.*

127. *See supra* note 110 (discussing statement by Professor Martin Shapiro); *see also supra* notes 93-95.

the future should hear them.[128] Succeeding cases followed Justice Brennan's democratic instinct that malapportionment is fundamentally "unfair," but they too failed to define the principle that was driving them. They failed, of course, because no definable constitutional principle *was* driving them. Within a political framework based on both democratic and republican ideals, there simply is no principled way to adjudicate a generalized claim for "debasement" of votes.[129]

The first case to apply *Baker* to the merits of a claim was *Gray v. Sanders*,[130] which reached the Supreme Court one year after *Baker*. In *Gray*, the Court struck down Georgia's county-based primary system for statewide offices, announcing in the process the now famous rule of "one person, one vote."[131] Extreme population disparities among the counties, the Court found, unfairly diluted votes. One year later, in *Wesberry v. Sanders*,[132] the Court struck down Georgia's congressional apportionment plan, insisting that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[133] Finally, in *Reynolds v. Sims*,[134] the Court completed the circle, holding that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[135] In the words of Chief Justice Warren, "fair and effective representation for all citizens is concededly the basic aim of legislative apportionment,"[136] and adherence to the ideals of population-based representation is necessary to achieve that end: "people, not land or trees or pastures, vote."[137]

Having first decided that nothing *barred* the adjudication of apportionment claims, the Supreme Court thus led itself backward into the pronouncement of a new constitutional rule: Legislative and congressional districts must be equally

128. After finding the issue justiciable, the Court remanded without reaching the merits of the claim. *See Baker*, 369 U.S. at 237.

129. *Id.* at 194 (quoting plaintiffs' complaint).

130. 372 U.S. 368 (1963).

131. *Id.* at 381 ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing—one person, one vote.").

132. 376 U.S. 1 (1964).

133. *Id.* at 7-8.

134. 377 U.S. 533 (1964).

135. *Id.* at 568.

136. *Id.* at 565-66; *see supra* note 24.

137. *Reynolds*, 377 U.S. at 580.

populated.[138] As stated by the Court in *Wesberry*, the rule has undeniable intuitive appeal: "To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government."[139] Our government, however, has both a democratic and a republican element, and fundamental ideas of republicanism contradict the notion that the Constitution requires equally weighted votes. Adjudication on the basis of intuitive appeal, it seems, is theoretically suspect.

This might be a moot point if *Gray*, *Wesberry*, and *Reynolds* were faits accomplis, and in one sense they are: the equal population rule is still good law. The Supreme Court, however, cannot change the fundamental nature of American government simply by denying it. The amalgamated character of political representation persists, and its resistance to adjudication under unitary principles is none the weaker. In short, as the Court has proceeded deeper into this thicket, it has never overcome the basic problem that its jurisprudence lacks a legitimating (and a limiting) principle.

Study of the *Reynolds* progeny confirms this. Looking at the state of the law immediately after *Reynolds*, Professor Paul Freund remarked that it reminded him of the little boy who had just learned how to spell the word "banana"—*ba-na-na-na-na*—but did not know when to stop.[140] The Court, however, did not even stop at *Reynolds*; there was nothing there to stop it. Instead, the Court continued down the democratic road to absurd limits. First, in *Maryland Committee for Fair Representation v. Tawes*,[141] the Court held unconstitutional a "little federal plan," in which each county had been awarded at least one seat in the state senate. The Court apparently concluded that republicanism is an unacceptable theory of representation at the state level. A series of cases following *Tawes* then extended the one person, one vote rule downward to govern elections for county boards of supervisors, city and town councils, and even

138. REAPPORTIONMENT POLITICS, *supra* note 43, at 18:

> The Supreme Court cases that held equal population to be the basis for allocating state legislative and congressional seats mark a watershed in the theory and practice of representative government in the United States. Prior to these decisions, population had been one basis for apportionment, but land units . . . had served as another.

139. *Wesberry*, 376 U.S. at 7-8.

140. *See* Dixon, *supra* note 82, at 13 (quoting statement of Paul Freund).

141. 377 U.S. 656 (1964).

school committees.[142] Ultimately, the rule was held to apply to "virtually all levels [of government] from the federal House of Representatives down to the smallest school district."[143]

Then, in *Kirkpatrick v. Preisler*,[144] the Court invalidated a Missouri plan in which the largest and smallest congressional districts diverged from each other by only six percent and from the statistical mean by only three percent.[145] Here the Court appeared to abandon the practicability standard of *Wesberry* as well as any attempt to formulate a principled definition of "fair and effective representation." Instead, the Court monomaniacally insisted on population equality as if it were a principle itself and not a remedy. Writing for the Court, Justice Brennan interpreted the Constitution as demanding "that the State make a good-faith effort to achieve *precise mathematical equality*. . . . [and] justify each variance, *no matter how small*."[146] Even more extreme than *Kirkpatrick* was the Court's 1983 decision in *Karcher v. Daggett*.[147] In a five-to-four decision, the Court invalidated a New Jersey plan despite a disparity between the largest and smallest district of only 0.7%. Absent a sufficient justification for the disparity, the Court reasoned, it was proper to infer a lack of good faith.[148]

Karcher appears to mark the end of the road, the final *reductio ad absurdum* decision on apportionment. In reality, however, the case pointed the Court toward new vistas. What turned out to have troubled the majority, after all, was not the dilution of votes through population inequality; it was dilution through gerrymandering. As Justice White noted in dissent, the level of inequality was not even statistically significant:[149] "One must

142. *See, e.g.*, Avery v. Midland County, 390 U.S. 474 (1968) (county comissioners); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (college trustees); Board of Estimate v. Morris, 109 S. Ct. 1433 (1989) (city board of estimate).

143. Baker, *supra* note 53, at 257.

144. 394 U.S. 526 (1969).

145. *See id.* at 528-29.

146. *Id.* at 530-31 (emphasis added).

147. 462 U.S. 725 (1983).

148. *See id.* at 728.

149. Not only is the actual effect of the deviation in *Karcher* inconsequential, but any insistence on "precise mathematical equality" is wholly unrealistic. First of all, census-based apportionment makes no distinction between adults and minors, citizens and aliens, or voter registrants and non-registrants. *See* R. MORRILL, *supra* note 44, at 18. Thus, depending on which heads matter for purposes of representation, even a perfectly accurate census would result in some malapportionment. Secondly, the census is far from perfect. By the Census Bureau's own admission, the 1970 census had a margin of error of 2.5%, which represented an undercount of 5.3 million including an esti-

suspend credulity to believe that the Court's draconian response to a trifling 0.6984% maximum deviation promotes 'fair and effective representation' for the people of New Jersey."[150] The true menace was what Justice Stevens recognized as a " 'four-star gerrymander that boast[ed] some of the most bizarrely shaped districts to be found in the nation.' "[151] Justice Stevens, at least, was prepared to address that menace head-on.[152] Justice Powell apparently agreed: "gerrymandering presents 'a far greater potential threat to equality of representation' than a state's failure to achieve 'precise adherence to admittedly inexact census figures.' "[153]

These observations are obviously correct. One can "debase" votes far more effectively and accurately through the strategic drawing of district boundaries than through the marginal manipulation of district sizes. Moreover, if one finds malapportionment justiciable on the grounds that a "vote [should not be] worth more in one district than in another,"[154] one should also find gerrymandering justiciable. Put another way, once one has entered the political thicket to address apportionment claims, there is no limiting principle by which to refrain from addressing gerrymandering claims. Indeed, if the democratic principle of equally weighted votes is truly a constitutional requirement, then the Supreme Court should invalidate district-based electoral systems altogether: votes will never be "equal" so long as there is a land-based component to political representation. This is true not just as a matter of logic but also as a matter of practical reality. What state legislatures had accomplished through malapportionment (sometimes subconsciously) in the days before *Baker* and *Reynolds*, they learned to accomplish through gerrymandering in the days after *Baker* and *Reynolds*. *Karcher* itself is a stunning demonstration.

In short, given a new rule that districts be equally populated, all that legislatures have to do to achieve the same built-in bias that they enjoyed before announcement of the rule is to gerry-

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mated 7.7% of all African-Americans. *See* Backstrom, *supra* note 81, at 46. By definition, insistence on anything less than a 2.5% deviation is unreasonable.

150. *Karcher*, 462 U.S. at 766 (White, J., dissenting).

151. *Id.* at 762 n.30 (Stevens, J., concurring) (quoting 40 CONG. Q. WEEKLY REP. 1190 (1982)), *quoted in* Note, *supra* note 21, at 1077.

152. *See Karcher*, 462 U.S. at 744-45 (Stevens, J., concurring).

153. *Id.* at 787 (Powell, J., dissenting) (quoting Wells v. Rockefeller, 394 U.S. 542, 555 (1969) (White, J., dissenting)), *quoted in*, Note, *supra* note 21, at 1077 n.82.

154. *Wesberry*, 376 U.S. at 7-8.

mander. The legislative map might require more creative and irregular shapes than before, but there is no reason, statistically speaking, why the controlling party should not be able to achieve the same disproportion of votes to seats as prevailed before institution of the rule.[155] The same degree of vote dilution is still possible, and the "perfect" gerrymander is still attainable.[156] Moreover, the technology available for the job is certainly equal to the task: "at any level of equal population stringency . . . a computer can churn out not one but hundreds of equally 'equal' districting plans."[157]

In and of itself, equal population is no guarantee of equal representation. In fact, while the Supreme Court attempted to prevent vote dilution with ever-increasing demands for equality, it actually had the opposite effect:

> Legislative majorities used the judicial emphasis on exact equality as a justificaiton for drawing bizarrely shaped districts that cut across county and other subdivision boundaries. . . . Gradually, the courts were forced to realize that equality was not a check on but a stimulus to gerrymandering.[158]

Indeed, as Professor Musgrove has observed:

> [S]o long as districts could be very unequal in size, there was relatively little reason to gerrymander them as well. Once the [Supreme C]ourt ruled that district populations had to be equal, it became much more important to obtain the maximum advantage from the [area and] shape of the districts, 'to compensate for the loss of one too . . . . by the sharpening of others.' "[159]

Scholars have marveled at the speed with which courts have brought state legislatures into compliance with the one person,

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155. *See supra* note 61 (describing Professor Musgrove's technique of gerrymandering as applied to equally populated districts).

156. *See id.*; *see generally* P. MUSGROVE, *supra* note 60.

157. Dixon, *supra* note 82, at 8; *see* R. MORRILL, *supra* note 44, at 33-44. "The techniques of gerrymandering have kept well abreast of the courts' twists and turns, and with each successive redistricting experience the political process has become more sophisticated and complex." REAPPORTIONMENT POLITICS, *supra* note 43, at 21.

158. REAPPORTIONMENT POLITICS, *supra* note 43, at 20.

159. P. MUSGROVE, *supra* note 60, at 52 (quoting Sickels, *Dragons, Bacon Strips, and Dumbbells: Who's Afraid of Reapportionment?*, 75 YALE L.J. 1300, 1308 (1966)). Indeed, the post-census reapportionment of 1970 was the first ever to require a wholesale redrawing of district boundaries. Before equality was a requirement, a state rarely undertook to redraft its entire legislative map. With respect to congressional districts, boundaries typically remained intact unless the state gained or lost seats. *See* Baker, *supra* note 53, at 270-71.

one vote rule,[160] but instant compliance is hardly impressive where the effect of the rule is evanescent. Scholars have also applauded the "reapportionment revolution" for having made representation more "fair,"[161] and for having broken the historical grip of rural conservatism over more popular, urban interests.[162] For the same reason, however, these commendations are suspect. Given the potential for circumventing the impact of equal apportionment through gerrymandering, it is difficult to attribute any appreciable effects to the rule.[163] Even if the rule did have more bite, one still could not credit it with these

160. *See, e.g.*, Baker, *supra* note 53, at 259 (Equal population was achieved "in a remarkably short time after judicial intervention."); R. MORRILL, *supra* note 44, at 10 (demonstrating same); ABA SPECIAL COMM., *supra* note 30, at 3 (noting that after the 1970 reapportionment, 402 of the nation's 435 congressional districts were within one percent of the population average for districts in their respective states).

161. *See e.g.*, R. MORRILL, *supra* note 44, at 10 ("In the United States, inequality of population among electoral districts was a severe and continuing problem up to the mid-1960's. However, since the 'reapportionment revolution' ushered in by *Baker v. Carr*, . . . malapportionment is no longer a constitutional and social problem."); A. HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 133 (1964), *quoted in* P. MUSGROVE, *supra* note 60, at 51 ("It is only when there are significant variations in the size of districts that gerrymandering can produce serious cases of minority rule. With equal districts, the victor may get more than his share of the spoils—but not much more."); Baker, *supra* note 53, at 258 (observing that before *Baker v. Carr*, one party could have captured a majority of the seats in both houses of all but six state legislatures with only forty percent of the vote).

Earl Warren has said that " 'the most important Supreme Court rulings of [his] sixteen years as Chief Justice of the United States were those declaring that one man's vote should mean as much as any other man's.' " REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 28, at 1 (preface) (quoting Chief Justice Earl Warren).

162. *See, e.g.*, Baker, *supra* note 53, at 258 (observing that on the eve of *Baker v. Carr*, counties with populations under 25,000 had more than twice the representative strength of counties with populations over 100,000).

Professor Baker has also observed four important developments following on the heels of post-*Baker* reapportionment. First, there was a substantial shift in power from rural localities to urban centers and suburbia. Second, there was considerable turnover as incumbents yielded to an "unprecedented influx of new legislators." *Id.* at 262. Between 1964, when *Reynolds* was decided, and 1968, eighty percent of the Maryland legislature and fifty percent of the California and Connecticut legislatures changed hands. Third, there was a dramatic rise in the number of African-American legislators. In 1964, there were 94 African-American lawmakers nationally and five in Congress; by 1973, there were 238 nationally and sixteen in Congress. Finally, there was a dramatic increase in legislation to benefit urban and minority interests: more aid for cities and schools, stronger civil rights laws, more substantial welfare programs, increased social legislation, infrastructure and service improvements, pollution control laws, and the like. Baker sees the "reapportionment revolution" as a leading cause of these developments. *See id.* at 262-64.

See also L. SCHWAB, THE IMPACT OF CONGRESSIONAL REAPPORTIONMENT AND REDISTRICTING 193 (1988) (perceiving a steady rise in the proportion of urban and suburban legislators from the mid-1960s through the 1980s, with suburbia being the major winner).

163. *See* Sickels, *supra* note 159, at 1308 ("A close look . . . proves that variations in size have been of narrower significance than is generally supposed and that other kinds of gerrymander have had far more to do with the outcome of congressional elec-

grand achievements for many of the same reasons that one cannot gauge the actual effects of gerrymandering.[164]

In all three respects—as a matter of statistical logic, practical effect, and political theory—commendations for the reapportionment revolution have been overdrawn. Without a similar revolution directed toward gerrymandering, the democratic achievement of that first revolution will remain largely ephemeral. In the words of one observer, "Perhaps the most reasonable conclusion to be reached from the first two decades of major redistricting litigation is that the central problems of redistricting for the most part remain unsolved."[165] Unless the Supreme Court is willing to follow the democratic ideal of political representation to its logical conclusion, its foray into this thicket will remain essentially unprincipled and incomplete. The Court, however, would be well advised not to accept any such invitation. Rather, it should recognize what it has thusfar neglected—that the American conception of political representation is a loose balance of democratic *and republican*

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tions."); T. O'ROURKE, THE IMPACT OF REAPPORTIONMENT 51 (1980) ("[T]he overall influence of reapportionment on policy has been rather limited and immeasureable.").

164. *See supra* p. 23. A multitude of scholars have attempted to study the impact of post-*Baker* reapportionment on the composition and conduct of state legislatures. Many have concluded that its impact has been significant. *See* authors cited *supra* notes 160-61; L. SCHWAB, *supra* note 162, at 8-9 (citing studies by Robeck (1978), Hanson and Crew (1973), Firestine (1973), Erikson (1971), Frederickson and Cho (1971), Todd (1971), Sharkansky (1970), and Bryan (1968)). Others have reached the opposite conclusion. *See* L. SCHWAB, *supra* note 162, at 9 (citing studies by Hardy and Newcomer (1981), Bushnell (1970), Heath and Melrose (1969), and Hawkins and Whelchel (1968)). Either way, these studies pursue a non-issue and are fundamentally misconceived for the two basic reasons being discussed here: (1) the effect of equal population can be practically nullified through gerrymandering, and (2) even if it could not be, one still could not prove a causal relationship between equal apportionment and legislative composition or behavior. *See generally* Bicker, *The Effects of Malapportionment in the States: A Mistrial*, in REAPPORTIONMENT IN THE 1970's 151-201 (N. Polsby ed. 1971) (concluding that studies of the effects of reapportionment are methodologically flawed); T. O'ROURKE, *supra* note 163 (1980) (concluding that studies of the effects of reapportionment fail to prove cause and effect).

For example, to say that the "reapportionment revolution" produced laws favorable to racial minorities, one would have to show (a) that equal apportionment produced districts with larger populations of those groups—a logical nonsequitur; (b) that those populations voted for advocates of their interests in sufficient numbers to make a difference; (c) that those newly elected representatives voted for the laws in question in sufficient numbers to pass them; *and* (d) that those representatives would not otherwise have been elected *and those laws, not otherwise passed.* This is a tall, if not an impossible, order in light of the many other forces contributing to the civil rights movement and the Great Society.

165. REAPPORTIONMENT POLITICS, *supra* note 43, at 21; *see* Baker, *supra* note 53, at 269 ("The most troublesome question not only remained unsettled but loomed ever large[r] in significance. The [political] gerrymander . . . comprised the heart of the political thicket that the judiciary skirted most gingerly.").

ideals that is not amenable to judicial fine-tuning. There is no pedigree blend of population- and land-based representation, no pure system with an exclusive claim to validity under principles of constitutional law.

B. *Davis v. Bandemer*

For a time, the Supreme Court appeared to appreciate the dire ramifications of stepping farther into this gnarly thicket to address political gerrymandering claims. To hold these claims justiciable would launch the Court on another long, incremental trek toward the democratic pole. The absence of a limiting principle would force the Court either (a) to reach that pole and to declare all land-based representation essentially unconstitutional or (b) to pick some artificial and arbitrary stopping point based on essentially unprincipled criteria. Neither of these options appears acceptable.

Thus, although a gerrymander was implicitly at issue in *Karcher*, the Court declined to address it.[166] Similarly, in *Wells v. Rockefeller*,[167] decided fourteen years before *Karcher*, the Court refused to address a political gerrymandering claim that was very much explicit;[168] the Court held for the plaintiff-appellant on equal apportionment grounds.[169] Perhaps even more telling, though, the Court began to relax its insistence on strict equality in cases challenging state legislative plans.[170] If the goal of equal population had to be sacrificed to prevent the splitting of cities, towns, and other obvious communities of like interest among two or more legislative districts, then, the Court held, that sacrifice may be permissible.[171] In plain terms, the Court admitted both the value and the constitutional legitimacy of keeping political subdivisions intact; the Justices finally con-

166. *See supra* note 151 and accompanying text.

167. 394 U.S. 542 (1969).

168. *See id.* at 544 ("Appellant . . . [claims] that the statute represents a systematic and intentional partisan gerrymander violating Art[icle] I, § 2, of the Constitution and the Fourteenth Amendment. We do not reach, and intimate no view upon the merits of, the attack upon the statute as a constitutionally impermissible gerrymander.").

169. *See id. Wells* was a companion case to Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and was decided on the same stringent equality grounds. *See supra* notes 144-46 and accompanying text (discussing *Kirkpatrick*).

170. *See* Mahan v. Howell, 410 U.S. 315 (1973) (strict population equality may be sacrificed to preserve the integrity of political subdivisions); Gaffney v. Cummings, 412 U.S. 735 (1973).

171. *See id.*

fessed to recognize a tradeoff between land-based and population-based notions of representation.

Nonetheless, in 1986, the Supreme Court took the fateful step. In *Davis v. Bandemer*,[172] the Court held for the first time that purely partisan gerrymandering presents a justiciable controversy. At the same time, a plurality of the Court held that the particular redistricting plan at issue was not egregious enough to constitute invidious discrimination under the Equal Protection Clause.[173] In dismissing the claim, the Court similarly dismissed the need to elaborate on its holding of justiciability. *Bandemer* thus threatens to be political gerrymandering's analogue to *Baker v. Carr*.[174] Without precisely defining the principle that gerrymandering violates, the harm that it causes, or the standard to be applied in response to it, the Court opened its doors to a potential flood of litigation and committed itself to the task of finding answers to these questions as the need arises.

The problem with this "inverse adjudication" is that it assumes that such answers exist in the first place. As demonstrated above, however, there is no unitary constitutional principle under which to decide gerrymandering claims.[175] While the same may be said of apportionment claims, at least the equal population rule has the benefit of being essentially ineffectual; whatever rule the Court might ultimately adopt to govern gerrymandering is not likely to be so benign. Although theoretically infirm, the reapportionment revolution is a tolerable and entrenched component of our jurisprudence; the prospective gerrymandering revolution is neither.

Specifically, *Bandemer* involved a claim by the Democratic Party of Indiana. The Democrats alleged that they had been the victims of unconstitutional discrimination at the hands of the Republican-controlled General Assembly, which had gerrymandered districts for the state legislature after the 1980 census to the Republicans' own advantage. The legislative committee that had drafted the redistricting plan had been comprised entirely of Republicans.[176] Four Democratic "advisers" had been appointed to assist the committee, "but they had

172. 478 U.S. 109 (1986).
173. *See id.* at 127-43 (plurality opinion).
174. *See supra* note 22 (quoting D. Saffell); pages 50-52 (discussing Baker v. Carr).
175. *See supra* pages 34-46.
176. *See Bandemer*, 478 U.S. at 114 n.2.

no voting powers . . . [and] they were excluded from the substantive work of the Committee."[177] They were also denied access to the computer that drafted the actual legislative map and to the results of demographic studies produced in the process.[178] When the final bill was introduced, it passed both houses "with voting along party lines," and it was endorsed by the Republican governor.[179]

In the ensuing state election of 1982, the Democrats won 52% of the popular vote for the lower house but captured only 43% of the 100 contestable seats.[180] In two counties that had been divided into multi-member, winner-take-all districts, their results were especially poor. There they gathered 46% of the vote but only three of the twenty-one available seats.[181] In upper-house contests, the Democrats fared better. There they drew 53% of the popular vote and thirteen (or 52%) of the twenty-five contestable seats.[182] Although these latter results are proportional and presumably "fair," the Democrats claimed that 1982 was a "safe" year for them in light of the particular seats that were up for election.[183] Their assertion was apparently corroborated by their performance two years later: in the lower house, 44% of the vote translated into 39% of the seats, and in the senate, 42% of the vote translated into only 28% of the seats.[184]

Looking at *Bandemer* lends one overwhelming impression: the dispute sharply divided the Court. The case produced four opinions and essentially three points of view. First, a majority of six Justices led by Justice White held that political gerrymandering is justiciable.[185] Second, a plurality of four Justices, still led by Justice White, concluded that the Indiana gerrymander itself did not violate the Equal Protection Clause.[186] The two Justices who broke from the majority on this point, Justices

177. *Id.*

178. *See id.* The Republicans hired a sophisticated outside consulting firm to perform this work.

179. *Id.*

180. *See id.* at 115.

181. *See id.*

182. *See id.*

183. *See id.* at 182 (Powell, J., concurring and dissenting).

184. *See id.* at 182 & n.22, 183 (Powell, J., concurring and dissenting).

185. *See id.* at 118-27. The majority included Justices White, Brennan, Blackmun, Marshall, Powell, and Stevens. Justice White authored the opinion.

186. *See id.* at 113-18, 127-43 (plurality opinion). The plurality included Justices White, Brennan, Blackmun, and Marshall. Again, Justice White authored the opinion.

Powell and Stevens, dissented on the grounds that the Indiana plan should be held unconstitutional.[187] Finally, a minority of three insisted that political gerrymandering should not be justiciable at all.[188]

Unlike *Karcher* and *Wells*, *Bandemer* was not a case that the Court could decide on equal apportionment grounds. The level of population deviation was insignificant: 1.05% for lower-house districts and 1.15% for upper-house districts.[189] After concluding that no prior case decided the issue, the majority directly confronted and answered the question of a political gerrymander's justiciability.[190] Writing for the Court, Justice White approvingly quoted *Baker*'s six formulations of the political question doctrine[191] and rather facilely concluded that none of the six pertained:

> Th[e *Baker*] analysis applies equally to the question now before us. Disposition of this question does not involve us in a matter more properly decided by a co-equal branch of our Government. There is no risk of foreign or domestic disturbance, and in light of our cases since *Baker* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided.
>
> It is true that the type of claim that was presented in *Baker v. Carr* was subsequently resolved in this Court by the formulation of the "one person, one vote" rule. The mere fact, however, that we may not now similarly perceive a likely arithmetic presumption in the instant context does not compel a conclusion that the claims presented here are nonjusticiable. The one person, one vote principle had not yet been developed when *Baker* was decided. At that time, the Court did not rely on the potential for such a rule in finding justiciability.[192]

The reasoning here is ominous. Justice White seems to suggest that the Court is every bit as willing to announce constitutional offenses without defining them as it was at the time of

187. *See id.* at 161-85 (Powell, J., concurring in part and dissenting in part). Justice Stevens joined Justice Powell's opinion.

188. *See id.* at 143-44 (Burger, C.J., concurring in judgment); 144-61 (O'Connor, J., concurring in judgment). Justice O'Connor wrote the principal concurrence, in which Chief Justice Burger and Justice Rehnquist joined. The Chief Justice also wrote separately.

189. *See id.* at 114 (plurality opinion).

190. *See id.* 118-21.

191. *See supra* note 125 and accompanying text.

192. *Bandemer*, 478 U.S. at 123 (citations omitted).

Baker. He seems to say that even though the Court cannot articulate a remedial rule for gerrymandering, it is nonetheless willing to inveigh against the practice now and assume that a suitable rule will present itself later. He thus repeats the mistake that Justice Brennan made in *Baker* of defining justiciability as the absence of *non*justiciability. He also repeats the mistake of confusing remedial rules with the constitutional rights that generate the need for them. It is one thing to hold a claim justiciable while postponing on faith the development of an adequate remedy, but it is quite another to hold a claim justiciable while postponing on faith a principled definition of the right being violated. Justice White here does the latter. Nowhere in his opinion does he undertake to define the substance of the right that political gerrymandering offends.

Moreover, in rejecting the suggestion that any of the *Baker* formulations apply to the case, Justice White offers conclusive statements without demonstrating his reasoning. Properly understood, however, political gerrymandering resists adjudication even under the very standards that the Court purports to adopt. Arguably, all six formulations apply. First, "a textually demonstrable constitutional commitment of the issue to a coordinate political department"[193] can conceivably be found in Article I. As Justice Frankfurter suggested in *Colegrove*, Article I appoints Congress "the Judge of the Elections, Returns and Qualifications of its own Members."[194] It gives an analogous power to the States, albeit subject to congressional preemption.[195] Moreover, given the absence of an express constitutional provision stating that these claims *are* justiciable, one could even cite the Tenth Amendment[196] as "committing" legislative redistricting to the States.

Second, because the determination of a redistricting plan's acceptability or unacceptability is necessarily a matter of policy preference and not one of principle, courts facing gerrymandering claims are confronted with another *Baker* factor: "the impossibility of deciding [the issue] without an initial policy de-

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

194. U.S. CONST. art. I, § 5, cl. 1, *cited in Colegrove*, 328 U.S. at 553 (plurality opinion); *see supra* note 116.

195. *See* U.S. CONST. art. I, § 4, cl. 1; *supra* note 116.

196. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, *nor prohibited by it to the States*, are reserved to the States respectively, or to the people.") (emphasis added).

termination of a kind clearly for nonjudicial discretion."[197] What configuration of district boundaries is unfair and by what definition of "fairness?" What does the representational "ideal" look like? How else might district boundaries be drawn, and on what basis should a court prefer one plan over another? What can a court rely on for authority? Without some externally provided normative guidelines, courts cannot begin to justify whatever answers they may give to these questions. Under our current political system, there are no readily discernible principles for them to follow. In the words of Chief Justice Burger, if our representational system is flawed, "the Framers of the Constitution . . . placed responsibility for correction of such flaws in the people, relying on them to influence their elected representatives."[198]

Third, if one looks at redistricting and reapportionment legislation not as a problem but as the legislative branch's attempt to improve the structure of representation, then judicial pronouncements in this area pose yet another *Baker* problem: "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[199]

Fourth, if one understands gerrymandering for what it is—a natural byproduct of our dualistic conception of political representation—then the effort to correct it judicially seems really an effort to transform the nature of political representation. Such institutional change lies beyond the scope of judicial competence. For courts to undertake this effort would potentially undermine the legitimacy of not only the courts, but also of the whole political order. This suggests a fourth *Baker* factor: "the impossibility of a court's undertaking independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government."[200] Indeed, given the very real potential for destabilizing the political system, judicial involvement here could also invoke a fifth factor: "an unusual need for unquestioning adherence to a political decision already made."[201]

Most importantly, however, the adjudication of political gerrymandering claims ignores the fundamental fact that there is

197. *Baker*, 369 U.S. at 217.
198. *Bandemer*, 478 U.S. at 144 (Burger, C.J., concurring in judgment).
199. *Baker*, 369 U.S. at 217.
200. *Id.*
201. *Id.*

no unitary constitutional principle of fair representation. Where there is no generally accepted principle, there can be no rule of law. By definition, jurisprudence in this area cannot but suffer from "a lack of judicially discoverable and manageable standards."[202] Even as he denied this fact, Justice White admitted it—through his confessed inability to articulate a meaningful and manageable standard for the case at hand.[203]

Turning to the facts of the case, the Court did not find invidious discrimination. A plurality of the Court agreed that discriminatory intent was inferable from the gerrymander itself,[204] but the Justices found insufficient proof of discriminatory effect, and here they reversed the district court's holding for the plaintiffs.[205] Writing for the plurality, Justice White first reaffirmed the Court's reluctance to embrace the democratic ideal that it has flirted with in so much of its jurisprudence: "a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause."[206] He then proceeded to explain when a violation does arise:

> [U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or group of voters' influence on the political process as a whole. . . . [T]he question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. . . . [A]n equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of voters or effective denial to a minority of voters of a fair chance to influence the political process.[207]

None of this language, however, helps one to define the principle being adumbrated or even to "know it when one sees it." On one hand, the plurality insists that proportionality is not required, but on the other hand, some rough approximation of proportionality must be if one is ever to be able to identify the

202. *Id.*
203. *See Bandemer*, 478 U.S. at 123.
204. *See id.* at 127-29 (plurality opinion).
205. *See id.* at 129 (plurality opinion).
206. *Id.* at 132 (plurality opinion); *see supra* note 101.
207. *Id.* at 132-33 (plurality opinion).

offense that the Court is here announcing. Only through evidence of disproportionality can a group demonstrate that its voting power has been "degraded," "denied," or "frustrated." Even then, though, it is difficult to relate evidence of disproportionality to gerrymandering in a causal fashion. It is even more difficult, as a matter of constitutional and political theory, to determine at what point "frustration" of a minority interest becomes unacceptable. In short, while the plurality might best be described as supporting a "participatory"—as opposed to a "proportional"—standard of representative fairness, the engine behind that standard is ultimately an intuitive notion of rough proportionality.[208]

In dissent, Justices Powell and Stevens followed the intimations they had made in *Karcher*; they argued in favor of adjudicating the political gerrymandering claim on its merits. Writing for both men, Justice Powell embraced proportional representation more willingly than his brethren. As the plurality chided, the dissent's conclusion, stripped of its verbiage, was "that disproportionate election results alone are a sufficient effect to support a finding of a constitutional violation."[209]

Concurring only in the decision to dismiss the complaint, Justice O'Connor displayed the most enlightened understanding: "[T]his enterprise is flawed from its inception. The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment."[210] Although falsely predisposed to the idea that "political gerrymandering [may be] a self-limiting principle,"[211] Justice O'Connor saw what the majority and dissent both missed—that there is no legitimating or limiting principle to guide the adjudication of political gerrymandering claims.

C. *Badham v. Eu*

Bandemer is thus a theoretically unstable precedent, but it is not the last word on the subject. *Badham v. Eu*,[212] decided by a

208. *See id.* at 145 (O'Connor, J., concurring in judgment and criticizing plurality for adopting a view that will lead toward proportional representation).
209. *Id.* at 142 (plurality opinion).
210. *Id.* at 147 (O'Connor, J., concurring in judgment).
211. *Id.* at 152 (O'Connor, J., concurring in judgment).
212. 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989).

three-judge district court in 1988 and by the Supreme Court last year, addressed the constitutionality of a redistricting plan for California's congressional districts. Here the roles of the political parties were reversed, with the Republicans on the offensive. Interpreting the *Bandemer* plurality's "participatory" standard strictly, the district court held two-to-one that in order to prevail the plaintiffs would have to have shown that " 'they had essentially been shut out of the political process' "[213] altogether—facts the court found the plaintiffs "ha[d] not alleged, and on th[e] record cannot allege."[214] As members of one of the two major political parties, the plaintiffs could hardly claim to have been excluded from participation. The district court thus dismissed the suit for failure to state an actionable claim.

Whether *Bandemer* actually announced so stringent a standard can be fairly debated, and *Badham* seemed to pose the perfect opportunity for a clarification. After several bizarre procedural twists,[215] however, a divided Supreme Court affirmed the decision without opinion and without even hearing oral argument.[216] One can speculate over why the Supreme Court treated the case so peculiarly. Because the dissenting judge had not filed his opinion by the time the Republicans appealed, the appeal may have been premature. Once that flaw was corrected, the Court may have felt obligated to entertain the case but unmoved to reach so momentous a question so late in the decade. Reversal of the decision below might have implied that California's congressional delegation has been illegitimate since the last reapportionment. Strictly interpreted, that would suggest the unconstitutionality of every federal law passed since 1982 in which the vote of a California Representative was essential to enactment. At the very least, reversal of the district court would have invalidated the elections of the current California congressmen and forced the state to endure the hardship of redrawing its district lines twice in only two years:

213. *Id.* at 670 (quoting *Bandemer*, 478 U.S. at 139). The district court's opinion was authored by Judge Cecil Poole of the Ninth Circuit Court of Appeals, sitting by designation.

214. *Id.* at 666.

215. On the first day of the October 1988 Term, the Supreme Court cryptically dismissed the *Badham* appeal "for want of jurisdiction." 488 U.S. 804 (1988). Justices White and Stevens noted dissent from that decision. The Court later granted rehearing. *See* 488 U.S. 953 (1988).

216. Badham v. Eu, 488 U.S. 1024 (1989).

once in 1989 to remedy the immediate wrong and a second time in 1990 to give effect to the new census. Given the divisiveness of *Bandemer*, however, the most likely explanation for the Court's curious handling of *Badham* may be a lack of consensus. With such diverging opinions on how to handle these claims, the Justices may simply have wanted to defer consideration until greater attention could be devoted to the issue in the academic literature.

Whatever the reason, *Badham* can and should be appreciated as a fortuitous case. It holds out the prospect that coherence may return to this area of constitutional law. By interpreting the *Bandemer* right narrowly, *Badham* effectively held 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. Claims brought by all other groups are essentially dismissible under Rule 12(b)(6).[217]

Badham thus brought *Bandemer* in line with the long tradition of racial gerrymandering cases. Even before the Supreme Court had decided *Baker v. Carr*, it had held in *Gomillion v. Lightfoot*[218] that the racially motivated alteration of political boundaries violates the Constitution. Subsequent cases, many premised on the Voting Rights Act of 1965 as well as on the Constitution, similarly denied the legitimacy of gerrymandering designed to dilute the voting strength of racial and ethnic minorities.[219] What markedly distinguishes these cases from the general reapportionment and redistricting cases is their adherence to an established and coherent constitutional principle. To tie *Bandemer* to this tradition is therefore to make it theoretically justifiable and to divorce it from *Baker* and the *reductio ad absurdum* logic that follows from "constitutionalizing" the democratic ideal through extensions of the one person, one vote rule.

There are at least five notable distinctions between racial

217. FED. R. CIV. P. 12(b)(6) ("failure to state a claim upon which relief can be granted").

218. 364 U.S. 339 (1960); *see supra* note 11.

219. *See, e.g.*, Fortson v. Dorsey, 379 U.S. 433 (1965); Burns v. Richardson, 384 U.S. 73 (1966); White v. Regester, 412 U.S. 755 (1973); Thornburg v. Gingles, 478 U.S. 30 (1986); *cf.* Richmond v. United States, 422 U.S. 358 (1975) (state must prove lack of racially discriminatory intent but need not "maximize Black representation").

gerrymandering claims and general political gerrymandering claims. First, 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.[220] Second, such exclusion is wholly different in *kind* from pure political exclusion. Racial gerrymandering is "unthinking;" it is a brand of bigotry and ethnocentrism, whereas discrimination against an opposing political interest is generally reasoned and policy-minded. Indeed, discrimination among contrary viewpoints is the very stuff of politics. Third, status as a political minority is less permanent and less stigmatizing than race or ethnicity, which is immutable and hardly susceptible to understatement. One may change or rephrase one's opinions and find them more popular;[221] indeed, one is not likely in the minority on *all* political issues. Fourth, ethnic and racial minorities are largely ghettoized; the organic development of their communities establishes those communities as natural units deserving of representation. Fifth, and most important, it was the particular need to protect racial minorities that led to the addition of the Reconstruction Amendments to the Constitution in the first place. The Amendments were adopted precisely because America's peculiar hybrid of democratic and republican notions of representation had proven inadequate to guarantee a fair hearing in the nation's legislatures to members of a racial group. To invoke these provisions in the context of racial or ethnic discrimination—as opposed to political discrimination—is thus to fulfill their intended purpose.

Appreciating these distinctions highlights the propriety of applying the Equal Protection Clause to combat racial gerrymandering. At the same time it explains why a minority in the broad, political sense has no special constitutional protections but rather is at the mercy of political institutions; indeed, a political minority is *defined* by those institutions. There is a difference between reducing someone's involvement in the political process and excluding him altogether. The Constitution recognizes this difference as a matter of principle. It *forbids* discriminatory exclusion: the principle of non-exclusion is the animus of the Fourteenth Amendment and the force behind racial

220. *See* Lowenstein & Steinberg, *supra* note 26, at 6 n.15.
221. *See id.*

gerrymandering decisions. The Constitution does not, however, *require* equal, proportional, or even roughly proportional representation. There is no equivalent constitutional principle or provision to that effect.

To align *Bandemer* with the *Gomillion* tradition rather than with the broader *Baker* tradition therefore lends it theoretical justification. In short, if *Badham* can be understood as a definitive interpretation of *Bandemer* and if the justiciability of political gerrymandering can be understood in the mold of racial gerrymandering, then a principled jurisprudence—consistent with common understandings of the Equal Protection Clause—is possible. The right of action announced by *Bandemer* will be narrowly confined; it will not threaten to undermine the republican element in American political theory.

III. The Inadequacy of Proposed Constitutional Standards

Few have undertaken to analyze *Bandemer* as a matter of constitutional and political theory. Fewer still have argued for such a narrow interpretation of the case. Far more common are elaborate suggestions for how the Supreme Court might now prescribe constitutional criteria for redistricting.[222] Just as scholars have overlooked the absence of a guiding constitutional principle for political gerrymandering, they also have failed to justify or even to make explicit the presupposed definitions of "fair and effective representation" that underlie and motivate the criteria they propose.[223] They have highlighted the statistical distortion that gerrymandering causes, and they have undertaken to develop remedies for the problem, but they have skipped an all-important middle step. They have not demonstrated that the "ideals" their standards strive toward are required as a matter of constitutional law.

What scholars have not done they cannot do. Their shortcoming is a necessary result of the fact that the Constitution neither exalts nor decries any particular blend of population- and land-based representation. By definition, therefore, an innate inability to justify their underlying premises plagues virtually all the proposed constitutional criteria.

222. *See id.* at 11 (providing a "taxonomy" of the ten principal criteria that scholars have proposed).

223. *See supra* notes 93-95 and accompanying text.

A. *Three Who Have Tried: Musgrove, Niemi, and Grofman*

Three scholars in particular have contributed significantly to the call for constitutional criteria: Philip Musgrove, Richard Niemi, and Bernard Grofman. All three have suggested that acceptable judicial standards for the adjudication of political gerrymandering claims are attainable, and all three have attempted to articulate such standards. Although the proposals of all three are well considered and deserving of legislative consideration, none can claim to be the embodiment of a *constitutional* principle of fair representation.

1. *Philip Musgrove*

Professor Musgrove has demonstrated the mathematical reality of the "perfect" gerrymander.[224] He has further illustrated the possibility of formulating a "gerrymander index," by which one may gauge the severity of the bias in a given redistricting plan.[225] Through the adoption and application of this index, he has argued, courts may develop a sound jurisprudence for political gerrymandering claims.[226] Under Musgrove's proposal, a court would first calculate the perfect gerrymander—the most seats that the controlling party could obtain from its distribution of voting strength—and then calculate how close to that outcome the party actually came or could be projected to come. Through this technique, "uniform and comprehensible standards" are attainable.[227]

The flaw in Professor Musgrove's analysis, from the perspective of constitutional law, is its implicit suggestion that some degree of severity transgresses a pre-established constitutional norm in the first place. Even assuming that courts might rationally agree on what that level of severity is, the suggestion is insupportable. Although Professor Musgrove never explicitly admits the fact, severity in his model is defined along a continuum from "proportionality" to "perfection:" a proportional re-

224. *See* P. MUSGROVE, *supra* note 60, at 6-21; *see also supra* note 61 and accompanying text.

225. *See* P. MUSGROVE, *supra* note 60, at 26-28; note 65 (describing "gerrymander index").

226. *See* P. MUSGROVE, *supra* note 60, at 59 ("The calculating problem involved is not particularly difficult; what is hard is analyzing past voting results and extrapolating them so as to arrive at some fairly reliable notion of what the perfect gerrymander would look like. . . . Given the standard, it would remain only to decide at what level of the index of severity a set of districts becomes an intolerable gerrymander.").

227. *Id.*

lation of seats to votes represents minimum severity while the perfect gerrymander, the maximum attainable disproportionality of seats to votes, represents maximum severity.[228] Thus, the "gerrymander index" Musgrove proposes measures a redistricting plan's legitimacy as a function of its deviation from the democratic ideal of proportional representation. Implicitly, Professor Musgrove has ascribed to the flawed notion that the Constitution embodies that representational ideal.

Professor Musgrove's approach suffers from one other typical defect: the "ideal" it would have the courts adopt is not a principled ideal but an essentially arbitrary compromise. As Musgrove himself admits, although there is a statistically perfect gerrymander, there is no statistically perfect "*non*-gerrymander." There is no way to invert the calculus.[229] Why this is so Musgrove does not clearly explain. The answer, however, is implicit in his work. The perfect "non-gerrymander," statistically speaking, would be the point of minimum severity on his index's continuum. That pole is defined by proportional representation. To insist upon the principle of perfect non-gerrymandering, therefore, would be to insist upon proportional representation.

Professor Musgrove implicitly recognizes that such insistence would be politically untenable. He recognizes that legislative districts are an integral part of the American political system and that so long as such land units are the building blocks of legislatures, perfect non-gerrymandering will not be achievable. He therefore does not suggest that the courts pursue the principle of non-gerrymandering—proportional representation—but rather suggests that they find some range of severity, some compromise position along his continuum, to enforce under the aegis of constitutional law. The Constitution, however, embraces no such compromise any more than it embraces the democratic ideal of proportionality.

2. *Richard Niemi*

Richard Niemi's highly sophisticated work suffers from similar faults. He has identified four criteria by which to measure the acceptability of a redistricting plan: (1) its responsiveness,

228. *See supra* note 65.
229. *See* P. MUSGROVE, *supra* note 60, at 54-55.

(2) its neutrality, (3) its swing ratio, and (4) its competitiveness.[230] First, he argues, a plan should be responsive to the will of the electorate. Ideally, the minimum vote required for either party to win one seat in the legislature should be as low as possible, and the minimum vote required for either party to win all of the seats should be as high as possible.[231] Second, a plan should be "neutral" (or symmetrical) in the sense that it should treat all parties alike. If Party A can carry the relevant space with only 35% of the vote, then Party B should likewise be able to carry the space with 35% of the vote.[232] Third, a plan should provide a "constant swing ratio:" the rate at which a party gains seats per increment of votes won should remain constant over the range of responsiveness.[233] Finally, the plan should be competitive: in as many districts as possible, the vote totals should be expected to fall within some competitive range, say 45-55%.[234]

The performance of any redistricting plan, as measured by these four criteria, may be demonstrated graphically as a function of the relationship it produces between seats and votes. If one plots the votes a party receives along the X-axis and the seats it acquires for those votes along the Y-axis, the line defined by the interrelation of Niemi's four criteria will reveal a qualitative fingerprint for the particular plan. The length of the line will be determined by the plan's range of responsiveness; the line's symmetry, by the plan's neutrality; the slope, by the plan's swing ratio; and the plan's competitiveness, by the range of seats along the Y-axis—the length of the segment—that falls within the 45-55% range on the X-axis.[235] What Professor Niemi's model visually demonstrates is the interdependence of these four criteria. For example, to maximize a plan's responsiveness may require sacrificing some of its competitiveness; to maximize competitiveness may forfeit the constancy of the swing ratio.

230. *See* Niemi, *The Effects of Districting*, *supra* note 95, at 35-38; *see* Niemi, *The Ultimate Question*, *supra* note 93, at 191-210.

231. *See* Niemi, *The Effects of Districting*, *supra* note 95, at 36-37. The broader the "range of responsiveness," the better. Thus, a range of 20-80%, in which either party can conceivably win one seat with 20% of the total vote and all seats with 80%, is preferable to a range of 40-60%.

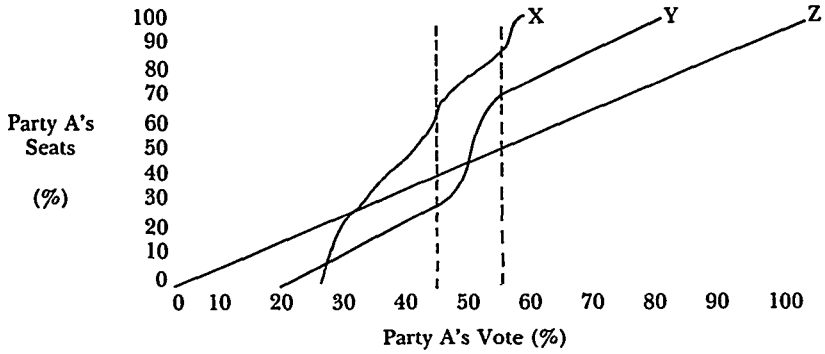
232. *See id.*

233. *See id.* at 36-37.

234. *See id.*

235. The following graph demonstrates seat-vote relationships under three hypothetical combinations of Niemi's four criteria:

Niemi's analysis is descriptively illuminating, but it suggests no principle of constitutional law. Even a creative reading of the Constitution cannot support the conclusion that it requires a redistricting plan to optimize these four values. Moreover, given the interdependence of these criteria, any legal rule that incorporates them will necessarily be a compromise rule rather than a principled solution. Professor Niemi himself has acknowledged that there is a "tradeoff problem" in figuring out "how to balance conflicting goals."[236] He has further acknowledged the problem of figuring out "how to establish and justify standards for districting with respect to any of the criteria."[237] In fact, rather than propose a specific legal rule, he simply maintains that agreement on a rule is conceivable. If that is so, it is not an argument for justiciability; it is an argument for legislation.



Plan X is both less responsive and less competitive than Plan Y. Plan X, however, has a higher swing ratio (steeper slope) than Plan Y over most of the range, which means that a smaller increment of votes translates into a larger number of seats for either party at the margin. Plan X also favors Party A in its asymmetry, whereas Plan Y is neutral. From the standpoint of evenhandedness, Plan Y is preferable to Plan X, and it would be the plan of choice under Niemi's model.

Meanwhile, Plan Z represents the ideal in three out of four categories. It achieves neutrality, maximum responsiveness, and a constant swing ratio throughout the responsive range. It also produces proportional representation. Few seats, however, are competitive. The plan may be made more competitive—without sacrificing neutrality or responsiveness—by making it more like Plan Y, but only at the cost of relinquishing the constant swing ratio. Alternatively, one could make the plan more competitive and keep the constant swing ratio by reducing responsiveness. The give-and-take in these adjustments demonstrates the interdependence of the four criteria. *See id.* at 38-39 (similar graphs).

236. Niemi, *The Ultimate Question*, *supra* note 93, at 209-10.

237. *Id.* at 209.

3. *Bernard Grofman*

Professor Grofman has likewise concluded that "intentional political gerrymandering ought to be justiciable,"[238] but he too fails to identify a coherent constitutional principle to support that view. He advances four arguments in favor of justiciability.[239] First, he claims, redistricting that "invidiously discriminate[s] against the candidates of a political party . . . effectively disenfranchise[s] the voters who support the positions espoused by that party's candidates [and] dilute[s] the importance of their views in the halls of the legislature."[240] Second, "it is a fundamental tenet of American democracy that a representative government be responsive to the changing will of the electorate."[241] Third, "the central purpose advanced by the Supreme Court in justifying its interventions into the reapportionment process in the 1960's—the need to insure 'fair and effective representation'—has not been achieved, and cannot be achieved, by reliance on the one-person-one-vote standard."[242] Finally, "access to sophisticated computerized districting data bases . . . makes it possible for mapmakers to carry out the most sophisticated forms of gerrymandering while at the same time *perfectly* satisfying any equal population constraints."[243]

None of these arguments identifies a constitutional offense. The first argument, that gerrymandering disenfranchises voters, is specious unless one equates the constitutional right to vote with the right to an *equally weighted* vote. The Supreme Court has never endorsed this radically democratic notion, and to do so would fly in the face of over two centuries of Anglo-American political theory.[244] If the complaint is that some vot-

238. Grofman, *supra* note 34, at 111. "Compared with Lowenstein, Steinberg, and Niemi, Grofman is by far the most rabid supporter of court involvement in political gerrymandering, urging the courts to act in instances of 'invidious partisan lust.' " Cain, *supra* note 68, at 220.

239. Grofman also discusses, separately, what he views as the "five basic arguments against treating political gerrymandering as justiciable," one of which arguments is that gerrymandering is "inherently political." Grofman, *supra* note 34, at 153. In criticizing this and the other arguments he perceives, Grofman notably does not discuss questions of political theory, nor does he address the lack of a unitary constitutional principle under which to adjudicate political gerrymandering. *See id.* at 153-59.

240. *Id.* at 112.

241. *Id.* (citation omitted).

242. *Id.* (citation omitted).

243. *Id.* at 112-13 (citations omitted) (emphasis in original).

244. *See Baker*, 369 U.S. at 300-18 (Frankfurter, J., dissenting) (recounting the long Anglo-American history of geographically based representation).

ers are denied their opportunity to affect the outcome of the election, that too is a specious claim. As Lowenstein and Steinberg have pointed out, "all voters, or at least all who vote for the winning candidate, affect the result whatever the margin of victory," and certainly no individual voter has a right to make the difference between a candidate's victory and defeat.[245] Republican theory, moreover, assumes that election winners are fairly representative of all their constituents.[246]

The second argument begs its own question. Although it is a "fundamental tenet of American democracy" that government be responsive to changes in the will of the electorate, it is presumed that such responsiveness is already built in to the structure of the political system. There is no definable, constitutional norm of responsiveness and no mechanism for judicial fine-tuning if the current degree of responsiveness is considered inadequate. Even if courts could find an affirmative requirement of responsiveness articulated in the Constitution, they would still face Professor Niemi's dilemma of determining what degree of responsiveness is demanded and at what cost.

The third and fourth arguments, which are substantially identical to one another, are similarly unpersuasive. Grofman essentially argues that the work begun by the Court in *Baker* will remain unfinished unless political gerrymandering is also pursued by the Court. Happily, he is correct. If the Court refrains from pursuing the *Baker* reasoning to its logical end, then the democratic ideal will not entirely supplant the republican element in American government. This, however, seems more an argument for nonjusticiability than for justiciability. Moreover, to argue that the snowball has started downhill hardly justifies its continued rolling. Certainly so long as Grofman, the Supreme Court, and others are unable to define in constitutional terms what they mean by "fair and effective representation," there can be no solid standard for the judicial review of general political gerrymandering claims.

Indeed, largely because he does not explicitly define the representational ideal that he would advocate, Professor Grofman's work suffers from the same shortcomings as

245. Lowenstein & Steinberg, *supra* note 26, at 14; *see id.* at 13-14 (explaining the speciousness of the claim that political gerrymandering violates an individual's right to vote).

246. *See supra* note 106 and accompanying text.

Niemi's. He provides a reasoned analysis for each of the many criteria that he believes deserves consideration, but he does not endeavor to develop those criteria into a coherent rule of law.[247] Like Niemi, he understands the dynamics of the problem but perceives no unitary principle under which to address it. Without such a principle, he cannot articulate a satisfying remedial standard.

B. *Objective Standards and Random Plans*

The various constitutional standards that scholars have proposed are divisible into two general types: purposive and objective.[248] Purposive standards strive toward some ideal, some preconceived notion of fair representation. Any legal rule based upon Musgrove's "gerrymander index" or Niemi's four criteria would be purposive in this sense. It would embody an implicit definition of optimality and would determine a redistricting plan's acceptability by its deviation from that optimal norm. The inability of scholars like Musgrove and Niemi to justify on constitutional grounds the ideals that are built into the standards they suggest explains the inadequacy of purposive standards. Indeed, once their ideals are made explicit, even the proponents of purposive standards often seem unwilling to embrace them as constitutional requirements.[249]

One might think that the shortcomings of a purposive approach are avoidable under objective standards. Objective standards are blind. They strive not to produce any particular representational ideal but rather to minimize the influence of intentional bias by throwing up hurdles to gerrymandering. The premise is that a redistricting plan will be "fair" if its results are relatively unintentional or unconscious. Objective standards, however, are equally flawed. First of all, there is as little basis for reading these standards into the text of the Constitution as there is for reading purposive standards into that text. Second, even if they were justifiable constitutionally, objective standards provide an ineffectual restraint on political

247. *See* Grofman, *supra* note 34, at 99-153, 170-73.

248. *See* Lowenstein & Steinberg, *supra* note 26, at 12 (similarly identifying two types of proposed districting criteria, the "formal" and the "result-oriented").

249. *See, e.g.*, *supra* notes 236-37 and accompanying text (describing Niemi's reluctance to articulate a legal rule); note 247 and accompanying text (similarly describing Grofman's reluctance).

gerrymandering. Third and most important, even able advocates of objective standards tacitly disapprove of them.

The ultimate objective rule would be a requirement that redistricting plans be randomly generated. By definition, randomness eliminates subjective bias. For several reasons, such a requirement would be unacceptable. Not only is there no basis in constitutional theory for inferring such a rule, but as a matter of policy, such a rule seems counterproductive. If districts are randomly drawn, then in all probability a given district will not be a consolidation of like interests. The whole rationale for having legislative districts will be defeated, and the effectiveness of representation will be severely reduced. Moreover, every ten years when the lines are redrawn, the districts will change dramatically. There will be no continuity and minimal opportunity for voters to identify with their districts and their elected officials.

To recognize these obvious shortcomings is to recognize the importance of taking community into account in the redistricting process. Put another way, it is to appreciate the republican element in the American conception of political representation. Theoretically, one can still advocate randomness and ensure that the importance of community is taken into account if one adopts a "qualified randomness" standard. For example, a computer could be programmed to spit out districts randomly but with the proviso that it not split cities, towns, and counties or that it group certain demographic and economic interests together. Still, though, there is the perennial problem of justifying such a standard as a constitutional requirement, and further, once one opens the door to the consideration of criteria beside randomness, the same problems that plague purposive standards creep back in.

Professor Grofman has identified another persuasive reason why randomness is unacceptable. As a matter of statistical dynamics, randomness marginalizes minorities.[250] When a given space is divided blindly into legislative districts, minority parties and interest groups are split apart. Chances are they will not appear in majority strength in a number of districts propor-

250. *See* Grofman, *For Single-Member Districts Random is Not Equal*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 28, at 55-58. This phenomenon has been described by Grofman and others before him as the "cube law of politics" because the relation of a minority party's votes to its seats under random redistricting is roughly cubic over time. *See id.* at 56.

tional to their percentage of the total vote. In fact, the smaller the minority is, the poorer its odds of capturing a proportional number of seats.

Grofman, like anyone who believes in ensuring some level of representation for minorities, decries this dynamic as fundamentally unfair.[251] In so doing, he discloses a profound irony: despite his protests, he actually advocates intentional gerrymandering. By criticizing random results as "unequal" and "unfair," he implies that result-oriented redistricting is preferable. Affirmative gerrymandering, albeit for limited and perhaps unselfish purposes, is to be encouraged to some vague degree. The substance of Grofman's critique, then, is not that gerrymandering is an unequivocal evil but rather that "some gerrymanders are more equal than others." This assertion moves the debate back into a discussion about purposive standards and their associated problems, not the least of which is defining and justifying whatever implicit ideal of fair representation Grofman and like-minded reformers have in mind.

Putting randomness aside, numerous other objective standards are conceivable. As commonly proposed, these standards combine several "formal" criteria, the most common of which are (a) compactness, (b) contiguity, and (c) respect for the integrity of political subdivisions and communities of like interest. Many state statutes and constitutions already incorporate such criteria.[252] For example, twenty-two states require some form of compactness, and at least twenty-nine require some form of contiguity.[253] Such requirements, however, are largely ineffectual. As Professor Grofman has recognized, "[g]errymandering can readily occur even when formal reapportionment criteria are satisfied."[254]

The compactness of a legislative district may be geometrically defined as the ratio of its total area to the area of the smallest circumscribing circle. An alternative measure would be to compare the perimeter of the district to the circumference of

251. *See id.* at 55-58; McKay, *Affirmative Gerrymandering*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 28, at 91-94.

252. *See* Grofman, *supra* note 34, at 177-83 (table listing the constitutional and statutory redistricting requirements of the fifty States).

253. *See* R. MORRILL, *supra* note 44, at 45. Grofman, relying on contemporaneous sources, claims that "[t]hirty-seven states have a contiguity requirement for legislative districting." Grofman, *supra* note 34, at 84.

254. Grofman, *supra* note 34, at 171.

a circle of equivalent area.[255] In either case, the ideal ratio is 1:1, and "[t]he most compact possible district is . . . a circle."[256] Requiring districts to be compact is just a matter of requiring that they adhere to a certain maximum ratio.

A compactness requirement has intuitive appeal because it restrains the irregularity of a district's shape. Legislative maps under such a requirement will not display the bizarre squiggles for which gerrymanders are famous. The fallacy, however, lies in the fact that gerrymandering is not a function of shape, although it often exhibits itself that way. In and of itself, irregular shape is not harmful or distorting. There is no clear relation between compactness and "non-gerrymandering" or between non-compactness and gerrymandering.[257] In fact, a compactness requirement is just as likely to institutionalize an unfair bias as it is to thwart one. Far from being neutral, a compactness rule will systematically favor those political interests whose strength is dispersed and will hurt those whose strength is more concentrated.[258] If districts must be compact, then outlying areas will not be combined with the core; they will have districts of their own. Even Grofman, a would-be reformer, has concluded that "[c]ompactness is a much overrated criterion for evaluating districting plans."[259]

Contiguity is a "relatively trivial requirement" and perhaps for that reason "usually a noncontroversial one."[260] In the words of Professor Grofman, "A district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary ([that is], the district is not divided into two or more discrete pieces)."[261] The rule is a sort of minimal requirement that constituents be "connected" to one another. Aside from the slight definitional problems posed by rivers, islands, and the like, contiguity creates little trouble for anyone—including partisan mapmakers. In theory, the criterion provides no obstacle to the perfect ger-

255. *See* R. MORRILL, *supra* note 44, at 22.

256. P. MUSGROVE, *supra* note 60, at 65 n.35.

257. *See id.* at 53.

258. *See* Lowenstein & Steinberg, *supra* note 26, at 26-27.

259. Grofman, *supra* note 34, at 92; *see id.* at 89-93 (criticizing compactness requirements).

260. *Id.* at 84.

261. *Id.*

rymander;[262] in practice, states that have contiguity requirements are no more immune from gerrymandering complaints.

Requiring that municipalities, counties, and "communities of interest" not be split among legislative districts is a more substantive way to require some minimum of connectedness. It is another way to ensure that constituents are rationally related to one another and to their elected representatives. The criterion, however, is almost as ineffectual a restraint as contiguity; mapmakers can work around it. Moreover, if equal population is already a constitutional requirement, then the indivisibility of political subdivisions cannot be strictly insisted upon: a city with a population in excess of the statewide district mean has to be split in order to satisfy *Kirkpatrick* and *Karcher*.[263]

The value of this third criterion as a rule of law is thrown further into doubt if one understands a "community of interest" to be something other than a municipality:

> The problem is that "communities" can be defined for different types of "interests" . . . . For example, are adjacent black and white working[-]class neighborhoods one community defined by common economic interests, or two communities defined by their racial and, possibly, social differences? Is a wheat-growing area a separate community from an adjacent corn-growing area, or are they a single agricultural community?[264]

The inherent manipulability of the concept suggests its ineffectiveness as a check on political gerrymanders.

C. *Alternatives to Adjudication*

To conclude that there is no constitutional proscription against political gerrymandering is not to suggest that the phenomenon is entirely insulated from remedy. There are two obvious alternatives to adjudication: legislative action and constitutional amendment.[265] The former alternative is appro-

262. *See supra* note 61 (describing Musgrove's technique for producing the perfect gerrymander, assuming that districts must be both equally populated and contiguous).

263. In retrospect, one may well ask whether the indivisibility of political subdivisions, a "republican" rule, would not be a more rational goal to insist upon than equal population, a "democratic" rule. The former would seem a better protection for effective representation.

264. Lowenstein & Steinberg, *supra* note 26, at 32-33.

265. *See generally* B. CAIN, THE REAPPORTIONMENT PUZZLE (1984) (arguing that the only rational remedies for political gerrymandering, if necessary at all, are institutional).

priate if one believes—as Musgrove, Niemi, and Grofman suggest—that a sensible and effective compromise of the conflicting policy goals is attainable. The development of such compromise legal rules is a task uniquely suited to Congress and the state legislatures. Moreover, the more precise or mathematical the rule needs to be, the less appropriate and adept its judicial formulation would be. The latter alternative is appropriate if one ascribes to the more radical conclusion that our current bifurcated notion of political representation is unacceptable and that it is time to adopt a unitary principle of fair and effective representation. Only through an institutional change can such a new, guiding principle be legitimately enthroned.

Congress has tried to remedy the political gerrymandering problem through legislation several times already. In the most considered attempt, complementary bills were introduced in the House and the Senate in 1979.[266] Although they differed slightly, both bills embodied the three-pronged approach advocated by the public-interest lobby Common Cause.[267] First, they proposed the establishment of "independent" redistricting commissions to draft the actual legislative maps. Second, they proposed adherence to certain formal criteria: equal population, compactness, contiguity, and the indivisibility of political subdivisions. Third, they provided affected voters with a private right of action to ensure judicial enforcement.[268]

Neither proposal proved sophisticated enough to survive. Commenting on the Senate bill while it was still alive in committee, a journalist correctly perceived its principal flaws:

> The vagueness of [the formal] requirements alone may give critics a field day. But the authors included an additional provision that seems all but impossible to administer: "The boundaries of districts may not be drawn for the purpose of advantaging or disadvantaging any political party, incumbent legislator or other person or group."[269]

266. *See* H.R. 2653, 96th Cong., 1st Sess. (1979); S. 596, 96th Cong., 1st Sess. (1979). The Senate bill, co-sponsored by Senators Danforth (R-Mo.) and Hart (D-Colo.), would have become the Congressional Anti-Gerrymandering Act of 1979 if it had passed. For the terms of the bill, see 125 CONG. REC. 4419-20 (1979). *See also* Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket After Davis v. Bandemer*, 136 U. PA. L. REV. 186, 234 n.320 (1987) (citing sources that discuss the numerous congressional efforts to curb gerrymandering).

267. *See* ABA SPECIAL COMM., *supra* note 30, at 8.

268. *See id.*

269. Cohen, *Back to the Redrawing Board*, 11 NAT'L J. 486 (Mar. 24, 1979).

The failure of these legislative efforts reinforces the impropriety of adopting their substance, as constitutional standards, by judicial fiat. It also emphasizes the fact that a workable compromise is not possible without an initial agreement on the ideal of fair representation to be sought.

In their implicit endorsements of the ideal of proportional representation, however, what many scholars and some Supreme Court Justices actually suggest is that they do not accept the traditional American conception of political representation in the first place. There are alternative systems. In fact, outside the United States and the Commonwealth nations, proportional and semi-proportional systems are the norm.[270] In Italy and Belgium, for example, parliamentary representatives are elected in proportion to their party's total, national vote.[271] Such an electoral system, which uses multi-member districts, commonly "requires straight-ticket voting and allows voters a very limited role in the slating process," not to mention minimal flexibility at the polls.[272] West Germany, on the other hand, uses a mixed system: representatives are elected from single-member districts, but "extra seats" are filled from party lists by those parties whose seat gains turn out to be less than their vote share.[273] Ireland uses the most democratic system of all, the "single transferable vote."[274] In this system, voters rank individual candidates competing in multi-member districts; election is a function of both the number of votes a candidate receives and the weighted priority of those votes.[275]

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270. *See* Grofman, *supra* note 34, at 161.

271. *See* R. MORRILL, *supra* note 44, at 28.

272. Grofman, *supra*, note 34, at 162. For example, candidates for the *Camara dei Deputati*, Italy's lower house, are selected by their respective parties without primaries. Their election campaigns are state-funded, and voters vote by party in "districts" that have multiple seats. Telephone interview with Giuseppe Calabi, Laurea in Giur., LL.M. (Apr. 27, 1990).

273. *See id.*

274. *Id.*

275. In elections for the Irish *Dáil* (pronounced "doyle"), the system operates as follows. Voters first rank the candidates in order of preference. Officials then calculate the "quota," which is the number of voter preferences a candidate must receive to gain election. The quota is equal to the number of ballots cast in a district divided by one more than the number of seats available in that district, plus one. For example, if 40,000 ballots are cast in a district with three seats, the quota will be 10,001 (40,000/(3 + 1) + 1 = 10,001).

Regardless of the number of candidates, any candidate who receives 10,001 first-preference votes will be elected. Officials will then look at the voters' second preferences. Candidates whose sum of first- and second-preference votes equals or exceeds 10,001 will likewise be elected. The process will continue, factoring in lower and lower preferences, until all the seats are filled. *See* IR. CONST. § 16.2.5; Telephone interview

The States are presumably free to adopt any one of these alternatives. Arguably, Congress is similarly empowered, although a federal change might be so fundamental that it would require a constitutional amendment. To many would-be reformers, however, the drastic nature of any such transformation no doubt seems unpalatable. If it does, it is only because they have confronted the tacit assumption in their own faith and decided, upon further consideration, that the costs of the remedy are greater than the impact of the injury. In that case the appropriate conclusion is what, as a general matter, we should already know—that the benefits of a republic come at a price; that no system of representation is ideal on all fronts; and that the rule of law is, in the long run, preferable to vague arguments of intuitive fairness.

CONCLUSION

Political gerrymandering substantially distorts electoral outcomes. With continuing improvements in information technology, one can only expect the impact of gerrymandering to grow increasingly severe. Nonetheless, gerrymandering is not remediable, in any coherent fashion, under constitutional precepts. The Constitution embodies no unitary principle of "fair and effective representation" under which to adjudicate such claims. Rather, the conception of representation that is built into the American political system is a hybrid of two conflicting ideals: democracy, with its emphasis on equality of representation, and republicanism, with its emphasis on community-based representation. Because there is no principled way to reconcile these competing traditions, there is no principled way to decide at what point a certain group's voting strength has been unfairly diluted.

Thusfar, the Supreme Court has failed to appreciate the fundamental character of American political representation in its reapportionment and redistricting jurisprudence. Propelled by a democratic impulse, the Court has leaned toward the ideal of proportional representation without having a limiting principle to halt its slide. First, in *Baker v. Carr*, the Court held apportionment claims justiciable without identifying a coherent principle

with Rachel M. Hussey, LL.B., LL.M. (Apr. 29, 1990). Ireland redistricts for the *Dáil* every twelve years. *See* IR. CONST. § 16.2.4.

under which to decide them. Subsequent decisions have thus proven theoretically unstable. More recently, in *Davis v. Bandemer*, the Court held political gerrymandering claims justiciable again without identifying a coherent principle under which to decide them. The Court's jurisprudence in gerrymandering cases thus threatens to mimic the instability of its apportionment cases: there is no constitutional principle by which to explain or justify the Court's involvement.

In 1989, however, the Court silently affirmed a district court's holding in *Badham v. Eu*. That decision dismissed the gerrymandering complaint of a major political party for failure to state a justiciable claim. The district court had insisted that the *Bandemer* right is only available to groups that are wholly excluded from the political process by virtue of gerrymandering. *Badham* thus suggests that the proper way to adjudicate political gerrymandering is as an outgrowth of the well established jurisprudence of racial gerrymandering, which recognizes special constitutional protections for discrete and insular minorities. Because the Equal Protection Clause provides a clear constitutional principle for these sorts of invidious discrimination claims, adjudication on this basis is theoretically sound. The Supreme Court, therefore, should more explicitly embrace *Badham*'s interpretation of *Bandemer* when it revisits political gerrymandering in the 1990s.

Recommending such a narrow interpretation of *Bandemer* is not what most scholars seem to advise. Rather, they propose the formulation of a judicial standard that will police legislatures and minimize the general, statistical distortion that gerrymandering causes. Their proposals, however, are misconceived. To eliminate distortion one must have a preconceived ideal of non-distortion, a statistically viable definition of fair representation. The Constitution embodies no such ideal. By definition, therefore, the judicial standards that scholars propose are unjustifiable as a matter of constitutional law. Rather than promote constitutional principles, these standards would simply promote the ideals espoused, often only implicitly, by their draftsmen.

To redress the impact of political gerrymandering in a coherent fashion requires action outside the courts. The adoption of a statutory compromise, which strikes a balance between republican and democratic ideals, is one alternative. A more radi-

cal option would be to supplant America's current, bifurcated notion of political representation with a new system based on an alternative principle. This latter course would likely require a constitutional amendment. While that may seem too extreme a step, it nonetheless represents the logical conclusion of current complaints. Under the Constitution as it stands today, there is no principled approach to political gerrymandering cognizable in a court of law.