POLITICAL GERRYMANDERING AND THE CONSTITUTION

by Roger Allan Moore

In the May 4, 1965, edition of *National Review*, William F. Buckley, Jr. published a symposium by five authors who analyzed the consequences of Vatican II, trumpeted on the front cover under the general title, "What in the Name of God is Going on in the Catholic Church?"

The reaction of some of our conservative friends was no less intense, and no less plaintive, when they discovered, mostly in the fall of 1985, what the legal staff of the Republican National Committee had been doing in the area of reapportionment and redistricting for more than five years.

The Indianapolis Star,[1] *The Washington Times*,[2] *Human Events*,[3] the public affairs officer of the Department of Justice,[4] James Jackson Kilpatrick,[5] George F. Will,[6] and *National Review*,[7] among others, commented on our by no means clandestine activities in terms ranging from scarcely controlled outrage to avuncular admonitions. The sadness we have felt at this (more or less unanticipated) public airing of a dispute among those who should be ideological soulmates and philosophical friends has been assuaged only by the obstreperous incoherence of Democrats and liberals, generally, and the academics who built the rickety foundation upon which, until recently, the intellectual infrastructure of their constitutional defense of existing redistricting practices was based.

What, then, is the cause of this raucous rhetoric? What is "political gerrymandering" and what does the Constitution say about it?

"Reapportionment" refers to the process, mandated by the Constitution, pursuant to which "Representatives...shall be apportioned among the several States

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1. June 19, 21, 23, 1985; September 25, 1985.
2. September 3, 1985; December 7, 19, 1985.
3. September 14, 1985.
4. Terry Eastland, quoted in *The New Republic*, October 14, 1985.
5. *The Washington Post*, September 12, 1985; February 5, 1986.
6. *The Washington Post*, July 6, 1986.
7. August 1, 1986.

which may be included within this Union, according to their respective Numbers...."[8] This process takes place after every decennial census when the total population is divided by the total number of congressmen, now 435.[9]

The current method used to apportion congressional seats, the "method of equal proportions," was adopted by Congress in 1941. The actual apportionment is conducted by computing a "priority" list of state claims to each seat in the House of Representatives.

Equal Proportions Method. Under the Constitution, each state is entitled to at least one seat in the House, thus accounting for the first 50 seats. In dividing the remaining 385 seats, there is no way to assign a fractional seat to a state (that is, at least theoretically, it is impossible to have less than a complete congressman) or to give a representative a fractional vote; nor may two states share a representative. While the formula under the method of equal proportions was developed by a Harvard mathematician, and is difficult except in mathematical terms, the Congressional Research Service has developed the following example of the method's operation:

> Setting aside the mathematics, an apportionment computed based on equal proportions results in a House where the average sizes of all the States' congressional districts are expressed as a proportion. For example, in 1980, New Mexico's average size congressional district with three seats will be 433,323. Indiana's average size district is 27% larger than New Mexico's. If New Mexico's third seat is given to Indiana, then New Mexico's average size district becomes 649,984 and Indiana's 499,107. New Mexico's average size district then would be 30% larger than Indiana's.
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> Based on this comparison, the method of equal proportions gives New Mexico 3 seats and Indiana 10 because the proportional difference is greater (30% v. 27%) than if New Mexico gets 2 and Indiana 11.[10]

Many constitutional scholars believe that the apportionment provisions of Article I, Section 2, as repeated in the Fourteenth Amendment,[11] relate only to the number of congressmen to which each state is entitled.[12] However persuasive that interpretation of original intent may be, Justice Black, in his dissent in *Colegrove v.*

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8. U.S. Constitution, Article I, Section 2.

9. 2 U.S.C. Section 2.

10. D. C. Huckabee, "The Apportionment Formula Question," Congressional Research Service, January 27, 1981, pp. 4-5.

11. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of person in each State, excluding Indians not taxed." U.S. Constitution, Amendment XIV, Section 2.

12. See Bruce Fein, "Constitutional Restraints on Political Gerrymandering: A Partial Corrective of One-Person, One-Vote Jurisprudence," *Commonsense*, Vol. 7, No. 1, [in the press], 1987.

Green,[13] in 1946, derived the constitutional imperative of one-person, one-vote from the right of a qualified voter to have his vote counted and the Fourteenth Amendment's repetition of the apportionment language of Article II, Section 2.[14] His conclusion and much of its rationale became the position of the majority of the Supreme Court 16 years later in *Baker v. Carr*.[15]

"Redistricting" means the process by which a state legislature draws the congressional district boundary lines after, on the basis of the decennial census, the clerk of the U.S. House of Representatives certifies to the governor of each state the number of representatives to which each state is entitled.[16]

Districts Not Required. The Constitution imposes no requirements, and no decision of the Supreme Court seriously suggests that there is any such requirement, that the states have congressional districts at all. Indeed, federal statutory law currently provides that, until a state redistricts after a congressional reapportionment, a state shall follow the following procedures for conducting congressional elections:

> If there is no change in the number of congressional representatives, they are elected from the districts then in effect;
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> If there is an increase in the number of representatives, the new seats are filled by an at large statewide election and the old seats continue to be filled by elections in the old districts;
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> If there is a decrease in the number of seats, and the number of districts exceeds the decreased number of seats, all the representatives are elected at large.[17]

Because of the availability of judicial remedies, these statutory provisions have rarely been invoked or litigated in recent years. The United States Supreme Court has held, however, that former congressional districts no longer exist after

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13. 328 U.S. 549 (1946)

14. "Black maintained that the purpose of the requirement was 'to make the votes of the citizens of the several states equally effective in the selection of Members of Congress.' [328 U.S. 549, 570] and that policy is offended unless '[a]ll groups, classes, and individuals shall, to the extent that it is practically feasible, be given equal representation in the House of Representatives." [*Id.*, pp. 570-571]...."Justice Black further erred by extrapolating a one-person, one-vote rule from the obligation to apportion Representatives among the State according to population. The latter explicit constitutional imperative, like the mandate of Article V guaranteeing States equal suffrage in the Senate, safeguards States qua States from exclusion or depreciation of their voices in the House of Representatives. The provision does not address electoral districting within States. Additionally, equal representation of the States in the Senate, irrespective of population, disproves Black's suggestion of a constitutional ethos favoring a one-person, one-vote rule." Fein, *op. cit.*, p. 6.

15. 369 U.S. 186 (1962).

16. 2 U.S.C. Section 2b; See Michael A. Hess, *The Law of Reapportionment and Redistricting*, Republican National Committee (1982), p. III.A.1.

17. 2 U.S.C. Section 2 c.

reapportionment decreases, the number of representatives for the state, requiring that representatives be elected at large.[18]

Until 1842, Congress did not require districting for selecting members of the House of Representatives. While Congress required that states divide themselves up into discrete congressional districts in that year, it dropped the requirement in 1850. In 1862, Congress required both districting and contiguity. In 1872, it required substantial population equality among districts. In 1911, it repeated that requirement. In 1929, the congressional mandate for contiguity and population equality was eliminated, and neither of them exists as a congressionally imposed requirement today.[19]

Pejorative Connotations. "Political gerrymandering," "partisan gerrymandering," or simply "gerrymandering," since the term was conceived to have, and continues to carry, ample pejorative connotations, refer to that more or less invidious perversion of the redistricting process for the purpose of seeking partisan political advantage, usually to draw districts designed to produce more U.S. representatives loyal to the party that controls the state legislature than the number of voters those candidates attract would justify. For example, in our six-year battle against the California legislature and state supreme court, we are seeking to overturn a redistricting plan that in three election cycles has produced a 60 percent Democratic congressional delegation, even though all Republican candidates have received an almost equal or greater number of votes in the aggregate than all Democratic candidates in those elections.

Justice White, writing for the majority in *Davis v. Bandemer*,[20] in an opinion issued on June 30, 1986, gave what now must be considered the official definition of a gerrymander. Speaking for the court, he indicted that a cause of action against a redistricting plan would exist where an "electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole...."[21]

Beginning with *Colegrove v. Green*,[22] when the Supreme Court held that the remedy for unfairness in redistricting is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress, and that courts should not enter into the political thicket of redistricting, there have been ten significant decisions of the United States Supreme Court relating to redistricting of

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18. *Carroll v. Becker*, 385 U.S. 380 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932); Hess, *op. cit.*, p. III.A.3 at footnote 4.

19. Fein, *op. cit.*, p. 5; *Fifteenth Census and Apportionment of Representatives*, Pub.L.No. 71-13, Ch. 28, Section 22, 46 Stat. 21, 26 (1929) (Amending *Act of August 8, 1911*), Pub.L.No. 62-5, Ch. 5, Section 3, 37 Stat. 13, 14); Originally enacted as *Apportionment of Representatives Among the Several States*, Ch. 47, 5 Stat. 491 (1842) (Amended by *Act of May 23, 1850*, Ch. 11, Section 24, 9 Stat. 428, 432, *Act of July 14, 1862*, Ch. 170, 12 Stat. 572, and *Act of February 12, 1872*, Ch. 11, Section 2, 17 Stat. 28).

20. 106 S.Ct. 2797 (1986).

21. 106 S.Ct. 2810.

22. 328 U.S. 549 (1946).

state legislative districts; five significant cases relating to congressional redistricting; eight significant cases relating to racial gerrymandering; and five cases, ending with *Davis v. Bandemer*[23] relating to political gerrymandering. Currently undergoing the travails of puberty is the child and heir of those 25 ancestors (three appear on the list twice), *Badham v. Eu*.[24] He is running the obstacle course, euphemistically referred to as the system of justice in California, on his way to claim his legacy from the Supreme Court of the United States.[25] The question presented in *Badham* is quite simple: Does California's congressional districting scheme constitute an unconstitutional gerrymandering in violation of Article I, Section, 2, the Equal Protection Clause, the Guarantee Clause, and the First Amendment of the Constitution?

Republicans Supporting Democrats. The questions raised by the persons and publications to which I referred at the opening of these remarks require answers: Why has the Republican Party of the United States spent so much of its time, energy, and substance participating in the litigation involved in *Karcher v. Daggett*,[26] in which, for the first time, five justices of the Supreme Court of the United States indicated their willingness to consider the issue of political (as distinguished from racial) gerrymandering in the right case; in *Thornburg v. Gingles*,[27] where we were incorrectly characterized as supporting proportional representation by race; in *Davis v. Bandemer*,[28] in which we filed an *amicus curiae* brief supporting the position of the Democratic Party of Indiana against the Republican governor and legislature of the state, thereby appearing in company with, and on the same side as, Common Cause and the Mexican-American Legal Defense and Education Fund? (The Indiana Republicans received *amicus* support from the California Democratic congressional delegation,[29] the California Assembly (representing its Democrats), and the NAACP.) The *Bandemer* court held that egregious political gerrymandering was justiciable, but that what the Republicans had done to the Democrats in Indiana was not egregious. Why has the Republican Party of the United States spent so much of its human and financial resources litigating *Badham v. Eu*? Do these positions not violate the rubrics of our kind and our times, that is, favor "strict construction," oppose "judicial activism," sanctify the "original intent" of the Framers, keep the courts out of the "political thickets?"

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23. 106 S.Ct. 2797 (1986).

24. 568 F.Supp. 156 (N.D.Cal. 1983).

25. On November 7, 1986, the Democratic defendants moved to dismiss the case on several grounds. A hearing on these motions was held on December 5, 1986, but the U.S. District Court has yet to rule on the motions.

26. 462 U.S. 725 (1983), which rejected a New Jersey congressional districting plan on the ground of population disparity.

27. 106 S.Ct. 2752 (1986).

28. 106 S.Ct. 2797 (1986).

29. The Democratic congressional delegation from California assessed each of its 27 members $15,000 to support the position of the Republican Party of Indiana in defending the lawsuit. *The Sacramento Bee*, March 22, 1985.

Political Questions. Callous partisan redistricting plans, like ideas, have consequences. The most striking example in modern times is the parliamentary elections in South Africa in 1948. The National Party, notwithstanding it received 40 percent to the United Party's 60 percent of the one million votes cast, through gerrymandering achieved a 79 to 71 majority in the parliament, and were able to organize the government, and control the country ever since. It does not help the Afrikaners (or us) to say (or even believe) that Daniel Malan and his successors were inspired and instructed by God in a language that, to this day, nobody else can understand. Nor does it advance the analysis or chart a course for future action to say that in 1787 James Madison and his colleagues were imbued with an afflatus not unlike that which affected Moses on the mountain and afflicted St. Paul on the road to Damascus. (After all, if either of those instructions had been all that clear, we should have no need for the Talmud or the Epistle to the Colossians.) Are we, therefore, as vigorous and loyal heirs of the Framers, forestalled from engaging in judicial contests involving gerrymandering because the stone tablets we received from Philadelphia make no mention of partisan redistricting? Are we to urge the courts to eschew righting wrongs committed by state legislatures on congressional district boundary maps because they involve "political questions?" Obviously, these are political questions, just as whether man is ascended from the apes or descended from the angels is a political question, the selected response to which influences virtually every piece of legislation passed every day in every deliberative assembly everywhere in the world.

It can be argued that *Baker v. Carr*,[30] instead of distinguishing *Colegrove v. Green*,[31] should have reaffirmed it. *Baker v. Carr* held that a claim that the gross malapportionment of Tennessee's general assembly denied equal protection presented a justiciable issue and, if discrimination is sufficiently shown, the right to relief under the Equal Protection Clause of the Constitution is not diminished by the fact that the discrimination is related to political rights. The developing jurisprudence found its most familiar articulation in *Gray v. Sanders*: "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing--one person, one vote."[32] One year later, in 1964, the Supreme Court of the United States held in *Wesberry v. Sanders*,[33] that Article I, Section 2 of the Constitution commands that as nearly as practicable one person's vote in a congressional election is to be worth as much as another's.

And, finally, and most recently, in *Davis v. Bandemer*,[34] the highest court in the land has told us that political gerrymandering is properly justiciable under the Equal Protection Clause.

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30. 369 U.S. 186 (1962).

31. 328 U.S. 549 (1946).

32. 372 U.S. 368, 381 (1963).

33. 376 U.S. 1 (1964).

34. 106 S.Ct. 2797 (1986).

Wrong Decision. Bruce Fein has made the argument, with great erudication and cogency, in an article soon to be published in *Commonsense*,[35] that *Baker v. Carr* and its subsequent extrapolations are wrong and that Justice Frankfurter's plurality opinion in *Colegrove* should never have been abandoned.

Are our activities in this area justified and justifiable on the grounds that we are merely playing the hand that is dealt us? Given that the Supreme Court in *Baker v. Carr* and thereafter invited the python to the picnic, are we merely trying to put the snake back in the sack? Notwithstanding we agree with the injunction of the Attorney General of the United States that the Constitution is not merely a pot into which to pour the passions of the present, are not we keeping that pot boiling in the hope of obtaining some gratification in the courts for our present political passions that we are unable to obtain at the ballot box?

I should not have accepted the invitation to deliver this paper were it not my conviction that the response to those questions was a resounding "No" or, perhaps more appropriately, an academic "Not entirely."

Safeguards Against Tyranny. Our Founding Fathers feared legislative tyranny; they denigrated those "[t]heoretic politicians, who...have erroneously supposed that by reducing mankind to a perfect equality in their political right, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions"; and they erected safeguards against majoritarian domination.[36]

Bruce Fein concludes his long and learned paper, to which I have referred earlier, as follows:

> Unless *Baker v. Carr* and its progeny are overruled, the federal judiciary is destined to play a pivotal role in the election fortunes of political parties and the constellation of community interests that are heard in legislative chambers. Federal courts should be encouraged to interpret *Davis v. Bandemer* in ways that will add, not subtract, from the ability of minority political factions to be represented in legislative bodies. Such jurisprudence would vindicate the hopes of the Founding Fathers to avoid majoritarianism in legislative halls.[37]

I profoundly believe that no rational person can seriously argue that the Constitution of the United States encourages, sanctions, or protects the grotesqueries that Congressman Phil Burton engrafted onto the map of California. If you have followed me thus far, you will understand why I also believe that the debate--the only debate worthy of intellectual attention--is how one defines a gerrymander and, once identified, what does one do about it? I prefer a slightly modified version of

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35. See footnote 12, *supra.*

36. *Federalist* 10; See also *Federalist* 51.

37. Fein, *op. cit.,* p. 24.

Professor Bernard Grofman's definition:[38] "If it was conceived as a gerrymander, if it looks like a gerrymander, if it acts like a gerrymander, it is a gerrymander."

Once you have spotted one in the thicket, what do you do about it? We say, "Shoot It." Others can say, "Leave it alone. Going into thickets is dangerous." That is a respectable argument. It has a pharisaical ring about it, however, when advanced by people who also say that the Constitution compels us to go into the thicket to shoot black gerrymanders[39] and brown gerrymanders,[40] but not yellow[41] or white[42] or suntanned[43] or Jewish[44] gerrymanders.

Moreover, two important points are either often lost sight of or deliberately obfuscated.

Old Standards Abolished. First, the "one-person, one-vote" principle enunciated by the Supreme Court a quarter of a century ago did not merely add a new (and, it can be argued, fair) standard for map makers. It effectively abolished all the old ones that had been recognized since, at least, 1780 when John Adams wrote the Constitution of Massachusetts--create compact, contiguous districts; do not split towns or wards in cities; protect incumbents if desired; and otherwise preserve communities of interest. Moreover, if our only criterion for the validity of a congressional or state legislative district is population equality, we have all rendered ourselves totally subservient to the mysteries and the marvels of the computer cartographers who, in the decade between the last and the next national census, have developed, and are perfecting, techniques the results of which, in the argot of the jurisdiction that consumes most of our efforts on this topic, can only be described as "awesome."

Second, holding gerrymandering justiciable will not set off an avalanche of redistricting litigation. The fact is that there is not much more snow left on that mountain. We know of no fact pattern following the 1980 decennial census amenable to a gerrymandering cause of action that did not result in redistricting legislation. The 1990 census will bring new storms, regardless of recent developments in the law. What, more than anything, lower federal courts need are guidelines for disposing of these cases.

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38. "A plan that looked like a gerrymander, was intended to be a gerrymander, and has the effects of a gerrymander, is a gerrymander." Bernard N. Grofman, Professor, University of California (Irvine), in his Second Declaration in *Badham v. Eu.*

39. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

40. *White v. Regester*, 412 U.S. 755 (1973).

41. "Asian Groups Rally for Woo in Districts Fight," *The Los Angeles Times*, Part II, p. 1, col. 1, July 22, 1986; "Los Angeles Council Wrestles With Redistricting," *The New York Times*, July 24, 1986, p. A10.

42. Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 *UCLA Law Review* 227 (1985).

43. Lowenstein and Steinberg, *The Quest for Legislative Districting in the Public Interest*, 33 *UCLA Law Review* 1 (1985).

44. *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977).

As to remedies, our position is: Once a gerrymander has been identified, the burden of proof shifts to the state and the redistricting should be sustained if it meets any rational, objective standard.

Identifiable Groups. I prefer redistricting based on the theory that indentifiable groups are entitled to representation if their numbers justify it--urban blacks and Hispanics, suburbanites, farmers, coal miners, textile workers, fishermen, whatever.[45] This position is, as I have attempted to show, grounded in Madison and more fully developed and concisely articulated by John C. Calhoun. I quote from his *Disquisition on Government*:

> There are two different modes in which the sense of the community may be taken: one, simply by the right of suffrage, unaided; the other, by the right through a proper organism. Each collects the sense of the majority. But one regards numbers only and considers the whole community as a unit having but one common interest throughout, and collects the sense of the greater number of the whole as that of the community. The other, on the contrary, regards interests as well as numbers--considering the community as made up of different and conflicting interests, as far as the action of the government is concerned--and takes the sense of each through its majority or appropriate organ, and the united sense of all as the sense of the entire community. The former of these I shall call the numerical or absolute majority and the latter, the concurrent or constitutional majority.

Society of Societies. Concurrent majority, in other words, not only recognizes that the political community is by nature a plurality, a society of societies as Aristotle put it, but it is also bigger and better than mere numerical majority when it comes to taking "the sense of the community."

Another respectable alternative theory of redistricting might be called, "make the stew in the states." Instead of sending Congress, for example, potatoes from Maine, onions from Georgia, carrots from California, beef from Iowa, and garlic from Massachusetts, each district would theoretically be a marginal district and the great national issues would be debated and moderated, not in the great national forum, but in state primaries and elections. States would then, I fear, send to Congress bunches of ideological eunuchs, who vote the polls back home. But in any event, no part of our position, consistent with our belief in, and defense of, the principle of federalism, would mandate (or require the courts to mandate) which objective redistricting standard a state legislature chose to adopt.

It is clear that the *Bandemer* decision is but the first in a line of cases that will develop before and during the reapportionment of 1991. While the case was decided on a Fourteenth Amendment Equal Protection claim, there may be additional consitutional bases for litigating gerrymandering claims. Because there is

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45. "The Supreme Court ruled yesterday that Jews and Arabs, though 'Caucasian,' are separate races for purposes of bring civil rights cases. The post-Civil War amendments were to protect blacks, but the court says Scandinavians, Hispanics and any others ever referred to in the 19th century as a race are entitled to sue for the same rights 'enjoyed by white citizens.' Women have their own protections. What's left are mostly WASPish males, few in number but a threat in the mind of the Court." "Asides - The 3% Majority," *The Wall Street Journal*, May 19, 1987.

not yet a clear majority on the Supreme Court for any particular theory of gerrymandering, and because a congressional gerrymandering has yet to be put squarely before the Court, my colleague Michael Hess, Deputy Chief Counsel of the Republican National Committee, has, drawing from sources[46] as well as from his own mature and brilliant analyses, collected all of the alternative constitutional theories.[47]

He also provides a compelling response to the complaint most frequently heard from *Bandemer*'s critics.

> *Bandemer* thus leaves unanswered a perplexing question: What are the applicable criteria for measuring and adjudicating a political gerrymander?
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> V. Standards: A Totality of the Circumstances Approach
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> In redistricting legislation, justiciability is a function of manageability. While the *Bandemer* Court expressed supreme confidence in the ability of federal district courts to determine manageable standards for gerrymandering cases, the Court gave little guidance to the lower courts on where to look for such standards. The one thing that the decision makes clear is that the Supreme Court will not accept Justice Stewart's classic definition of obscenity--"I know it when I see it"[48]--as the determinative standard in judging the constitutionality of a gerrymander....
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> The political science literature has already devoted substantial attention to various measures to identify gerrymanders and litigate claims of discriminatory districting. Two different, but complementary approaches to this problem have arisen in the literature, and are worthy of particular attention. One approach uses some objective measure to weigh the impact of a plan before an election is conducted....The second approach, while theoretically applicable before an election, often relies, at least in part, on election results for its analysis. This second approach is addressed in this section.
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> In his classic work on the law of reapportionment, Robert Dixon suggested: "Gerrymandering is discriminatory districting. It equally covers squiggles, multi-member districting, or simple non-action, when the result is racial or political malrepresentation."[49] In other words, gerrymandering exists when votes are not accorded the same weight on the basis of party affiliation. To determine the relative weight of the votes of a political group, the

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46. The first important summary of the law after *Karcher*, coupled with a review of the options available to the courts in future gerrymandering litigation, was written by Harris Weinstein in an influential article that appeared in the spring of 1984: "Partisan Gerrymandering: The Next Hurdle in the Political Thicket?" 1 J.L. & Pol. 357 (1984).

47. Michael A. Hess, "Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer," 9 *Campbell Law Review* 207 (1987).

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

49. R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 460 (1968).

cumulative effect of a number of factors provides a proper framework for analysis on a case-by-case basis.

Several commentators have identified a variety of factors may be used to identify a discriminatory gerrymander. The most comprehensive treatment of this subject yet conducted is by Professor Grofman in his article on objective criteria for identifying gerrymanders.[50] He identifies twelve prima facie indicators of gerrymandering along with three "flags" that "suggest the possibility of intentional partisan gerrymandering."[51]

In its brief amicus curiae in Bandemer, the Republican National Committee ("RNC") suggested that this analysis was analogous to the "totality of the circumstances" test of claims of racial vote dilution under amended Section 2 of the Voting Rights Act of 1965.[52] If such a test can be effectively used by plaintiffs, courts, and the Department of Justice in statutory and constitutional Voting Rights Act cases, why can it not be similarly adopted to the partisan gerrymandering context? In fact, this approach is the logical outgrowth of the concurring opinion of Justice Stevens in Karcher v. Daggett.[53] In Karcher, Justice Stevens, together with Justice Powell, indicated a willingness to allow the adjudication of gerrymandering claims. Stevens suggested an approach to the proof of a prima facie case which was related to the Voting Rights Act approach.

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50. Grofman, "Criteria for Districting: A Social Science Perspective, 33 *UCLA Law Review* 77 (1985).

51. *Id.* at 117-18.

52. Voting Rights Act Amendments of 1982, 42 U.S.C. Section 1973(b) (1982). These factors were derived from the analytical framework of *White v. Regester*, 412 U.S. 755 (1973), as expanded in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976). In approving the 1982 amendments to the Voting Rights Act, the Senate Judiciary Committee explicitly adopted the "result standard" articulated in *White*, concluding that it was unnecessary for purposes of section 2 of the Act to make a finding or require "proof as to the motivation or purpose behind the practice or structure in question." Senate Committee on the Judiciary, *Report on the Voting Rights Act Extension*, S. Rep. No. 417, 97th Congress, 2nd Session 28-29 (1982, reprinted in 1982 U.S. Code Cong & Ad. News 177.

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

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

Voting Rights Act Amendments of 1982. Subchapter IA. Section 1973(b). Congress suggested a variety of factors which, when viewed in totality, would be indicative of vote dilution. *S. Rep. No. 417*, 97th Congress, 2nd Session 28-29 (1982), reprinted in 1982 U.S. Code Cong & Ad. News 177. See Hunter, "Racial Gerrymandering and the Voting Rights Act in North Carolina," 9 *Campbell Law Review* 49 (1987).

53. 462 U.S. 725 (1983) (Stevens, J., concurring). See, for example, Weinstein "Partisan Gerrymandering: The Next Hurdle in the Political Thicket?" 1 J.L. & Pol., 357, 374 (1984).

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

A. Unnecessarily Disregarding Compactness Standards in Drawing District Lines

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

C. Unnecessarily Disregarding Communities of Interest in Drawing District Lines...

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

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

F. Creating Partisan Advantage in Open Seats...

G. Abusing the Process...[54]

I have tried to explain where we are, and how we got there. However flawed may be our logic and inadequate our intellects, I can assure you that we have drawn our inspiration from the Founding Fathers (with whom we may have little more in common than that we eat too much, drink too much, smoke too much, and work too much) and that, by our efforts in litigating political gerrymandering, we are attempting to construct a vessel in which can be preserved (which is not to say enshrined) their vision of a republic in which elected representatives can produce sane, sober, and rational legislation, in the national interest, notwithstanding that the electorate comprises passionate men and women with disparate roots and competitive ambitions. Next year, we will participate in the first election of the third century of the American experiment. We hope to persuade the courts to bequeath to that century some judicially sanctioned guidelines that will assist in assuring that the continuation of that experiment is consistent with its conception.

This is deadly serious business. The issue involved is, quite simply, whether the Supreme Court will require the United States House of Representatives to represent the United States.

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54. Hess, *op. cit.*, pp. 219-226 (reproduced with permission).