COMMENTS

POLITICS AND PURPOSE: HIDE AND SEEK IN THE GERRYMANDERING THICKET AFTER *DAVIS V. BANDEMER*

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One hundred seventy-five years ago, the *Boston Gazette* coined the term "gerrymander" to describe a Massachusetts state senatorial redistricting¹ scheme that included a salamander-shaped district drawn to benefit Governor Elbridge Gerry's political party.² The United States Supreme Court has since addressed the constitutionality of redistricting plans based on racial discrimination³ and equal population.⁴ But not until 1986, in *Davis v. Bandemer*,⁵ did the Court hold that political

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¹ "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." *Davis v. Bandemer*, 106 S. Ct. 2797, 2825 n.1 (1986) (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)); see also Dixon, *The Warren Court Crusade for the Holy Grail of "One Man-One Vote"*, 1969 SUP. CT. REV. 219, 219 n.4 (noting that state legislators redistrict, not reapportion, state and federal legislative districts); Comment, *Baker v. Carr and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968, 972 n.24 (1963) (same).

² See E. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 16-19 (reprint ed. 1974) (asserting that "quite likely" Gerry did not offer the egregious 1812 plan to the state legislature but was blamed when he signed it); see also 2 J. AUSTIN, *THE LIFE OF ELBRIDGE GERRY* 347-48 (DaCapo Press ed. 1970) (1st ed. 1829) (defending Gerry for signing the redistricting act because he could find no constitutional grounds for vetoing it); G. BILLIAS, *ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN* 316-17 (1976) (noting that the purpose of the plan was to preserve new gains for Gerry's political party).

³ See, e.g., *White v. Regester*, 412 U.S. 755, 765-67 (1973) (holding that racial discrimination is inconsistent with redistricting).

⁴ See, e.g., *Baker v. Carr*, 369 U.S. 186, 209 (1962) (holding that legislative redistricting is not a nonjusticiable "political question").

⁵ 106 S. Ct. 2797 (1986). See generally Alfange, *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175 (regarding *Davis* as a potentially major decision if it establishes the proposition that representational equality means more than equipopulous districts); Hess, *Beyond Justiciability:*

gerrymandering—described by Justice Fortas in an earlier case as “the deliberate and arbitrary distortion of district boundaries . . . for partisan . . . political purposes”⁶—was a justiciable question.⁷

Not surprisingly, political response to *Davis* was swift.⁸ While the

Political Gerrymandering after Davis v. Bandemer, 9 CAMPBELL L. REV. 207 (1987) (advocating a “totality of the circumstances” for reviewing partisan gerrymandering); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 153-63 (1986) [hereinafter *Leading Cases*] (reviewing the *Davis* decision); Comment, *The Court Confronts the Gerrymander*, 15 FLA. ST. U.L. REV. 351 (1987) (arguing that courts should judge apportionment plans under a rational relationship test; Note, *Political Gerrymandering: Judicial Scrutiny Under the Equal Protection Clause*, *Davis v. Bandemer*, 10 HAMLINE L. REV. 313 (1987) (analyzing *Davis* in light of past precedent); Note, *Political Gerrymandering: Entangled in the Political Thicket*, 16 STEVENSON L. REV. 777 (1987) (analyzing *Davis* with particular attention to parallels to racial gerrymandering); D. Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection* (paper presented to the American Political Science Association, Sept. 4, 1987) (arguing that *Davis* is a “suspect classification” as opposed to a “fundamental right” case).

⁶ Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring), quoted in *Davis*, 106 S. Ct. at 2827 (Powell, J., concurring and dissenting). As defined in this Comment, gerrymandering is intent-driven; it “results from a deliberate effort by the districting party to give itself an advantage in future elections.” P. MUSGROVE, *THE GENERAL THEORY OF GERRYMANDERING* 6 (1977). This intent-driven definition is distinguishable from a results-driven meaning, by which the existence of gerrymandering is determined by observing the “‘relations of votes cast to seats won in a state by the party responsible for drawing the district lines.’” *Id.* (quoting Sickels, *Dragons, Bacon Strips and Dumbbells—Who's Afraid of Reapportionment?*, 75 YALE L.J. 1300, 1300 (1966)). Under the results-driven definition, all districting becomes gerrymandering since the drawing of any particular boundary line has some political effect. See *id.*; cf. *Davis*, 106 S. Ct. at 2802 (describing gerrymandering in Indiana in 1981 as “‘stacking’ Democrats into districts with large Democratic majorities and ‘splitting’ them in other districts so as to give Republicans safe but not excessive majorities in those districts”); 2 J. AUSTIN, *supra* note 2, at 345-46 (describing the same process in Massachusetts in 1812).

⁷ See *Davis*, 106 S. Ct. at 2800 (holding that gerrymandering was a justiciable question but sustaining plan involving redistricting of the Indiana state legislature); cf. *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (sustaining a bipartisan gerrymander drawn to protect incumbents of both political parties).

As the Court has stated, justiciability may be determined by inquiring “whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right can be judicially molded.” *Baker*, 369 U.S. at 198.

⁸ See, e.g., Gurwitt, *Parties Dispute Justices' Intent: Redistricting Waters Muddied by Court's Decision on Indiana*, 44 CONG. Q. WEEKLY REP. 1641, 1641-42 (1986) (reporting interviews with attorneys for the Republican and Democratic parties); *Court Disallows Gerrymandering*, L.A. Times, July 1, 1986, at 12, col. 1 (quoting Republican National Committee Chairman Frank Fahrenkopf and Democratic counterpart Paul Kirk); *G.O.P. Plans to Cite Ruling in California*, N.Y. Times, July 1, 1986, at A17, col. 2 [hereinafter *G.O.P. Plans*] (quoting Fahrenkopf and Kirk). But see Lowenstein, *supra* note 5, at 1 (calling public reaction to *Davis* “a bust” in comparison to the redistricting decisions of the 1960's).

Davis also may have ramifications that implicate groups other than the two major political parties. For example, a homeowners' group tried to intervene last fall in a federal suit over the districting of the Los Angeles City Council. See *United States v. City of Los Angeles*, No. CV 85-7739 JMI (JR), slip op. at 2 (C.D. Cal. Sept. 10,

plaintiffs in *Davis* were Indiana Democrats,⁹ Republicans nationally hailed the justiciability of gerrymandering: they believed that Democrats, who control most state legislatures,¹⁰ have drawn state and congressional district lines to Democratic advantage.¹¹ National Democrats, however, have minimized the impact of the decision, taking the view that the high equal protection threshold in *Davis* would prevent drastic restructuring.¹²

1986) (refusing to allow homeowners to intervene in redistricting suit). While intervention was denied, one commentator has suggested that the proposed extension to homeowners was not so farfetched after *Davis*. See *Republicans Test High Court Ruling on House Districts*, L.A. Daily J., Dec. 5, 1986, at 1, col. 2, 18, col. 4 [hereinafter *Republicans Test*] (statement by Professor Lowenstein); see also *Cousins v. City Council*, 466 F.2d 830, 850, 852-53 (7th Cir. 1972) [hereinafter *Cousins I*] (Stevens, J., dissenting) (recognizing as a principle that any sort of gerrymandering, be it racial, religious, ethnic, or political, is indefensible), *cert. denied*, 409 U.S. 893 (1972); *Gomillion v. Lightfoot*, 270 F.2d 594, 612 (5th Cir. 1959) (Wisdom, J., concurring) ("I can see no difference between partially disfranchising [sic] negroes and partially disfranchising [sic] Republicans, Democrats, Italians, Poles, Mexican-Americans, Catholics, blue-stocking voters, industrial workers, urban citizens, or other groups . . ."), *rev'd on other grounds*, 364 U.S. 339 (1960); *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 236 (D. Haw. 1956) ("Any distinction between racial and geographic discrimination is artificial and unrealistic."); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 348 (1986) (calling for judicial scrutiny of ethnic gerrymandering); Comment, *supra* note 1, at 972 (condemning discrimination, whether based on race, religion, or geography).

⁹ See *Davis*, 106 S. Ct. at 2801; see also *2 Parties Crossing Lines in Gerrymandering Suits: Partisan Cartography Creates Odd Alliances*, Wash. Post, Oct. 5, 1985, at A4, col. 4 (commenting on the irony of the Republican National Committee aligning with the plaintiff Indiana Democrats and the Democratic National Committee aligning with the defendant Indiana Republicans); *Scorecards Might Be Needed for Gerrymandering Case*, N.Y. Times, Sept. 13, 1985, at A20, col. 4 (noting that the NAACP, the ACLU, and Common Cause were aligned with the Democratic plaintiffs but that the Mexican-American Legal Defense Fund and the California Democratic congressional delegation were aligned with the Republican defendants).

¹⁰ *GOP Gains in State Elections*, STATE GOV'T NEWS, Dec. 1986, at 28, 28 (noting that Democrats control both chambers in 27 state legislatures whereas Republicans control both chambers in only 9 states). In addition, despite recent losses, the Democratic party holds a 26 to 24 majority of governorships. See *G.O.P. Hails Governorships 'Where There Never Have Been Republicans'*, N.Y. Times, Nov. 6, 1986, at A31, col. 1.

The Constitution requires the decennial reapportionment of seats in Congress among the states. See U.S. CONST. art. I, § 2, cl. 3. Congress, however, defers to the states to do the actual redistricting within each state. See 2 U.S.C. § 2c (1982). See generally Backstrom, Robins & Eller, *supra* note 1, at 1121 n.2 (explaining the constitutional role of Congress in reapportionment and redistricting); Note, *Constitutional Implications of a Population Undercount: Making Sense of the Census Clause*, 69 GEO. L.J. 1427, 1433 n.41 (1981) (arguing that states are required to use federal census figures but noting contrary case law); *infra* note 320 (examining the historical role of Congress).

¹¹ See *supra* note 8.

¹² See *Court Disallows Gerrymandering*, *supra* note 8, at 12, col. 1 ("Democratic National Committee Chairman . . . Kirk . . . said the decision was not 'a quick fix' for Republicans who have failed 'to win control of more legislatures.' The decision sets

Despite their different interpretations of *Davis*, both Republicans and Democrats recognize the decision's impact on future redistricting litigation.¹³ But the inability of the parties to agree on the decision's ramifications foreshadows a litigious future. In the short run, *Davis* could play a major role in the *Badham* litigation,¹⁴ the last major redistricting case of the 1980-90 decennial cycle still unresolved.¹⁵ *Badham* is a challenge to the 1983 California congressional redistricting plan, a plan under which the Democrats registered a net gain of five seats.¹⁶ The stakes loom even higher in the long run. In 1990, all fifty states will redistrict again and adopt state legislative and congressional districting plans that will remain in effect until 2000.¹⁷

'some very tough standards of proof that any discrimination has occurred against a political group,' he noted."); cf. *G.O.P. Optimistic on Apportioning*, N.Y. Times, Feb. 18, 1964, at 31, col. 8 (noting similarly confident Democratic reaction to *Reynolds v. Sims*, 377 U.S. 533 (1964) (applying the standard of one person-one vote to state legislature redistricting)).

¹³ See *supra* note 8; see also Brace & Katosh, *Redistricting Lawsuits Will be a New Growth Industry*, Wall St. J., Aug. 29, 1986, at 16, col. 2 (editorial) ("If you think political campaigns are already too long and costly, just wait until you see the 'campaigns' to change the redistricting lines drawn after the next census . . ."); cf. *Davis*, 106 S. Ct. at 2818 (O'Connor, J., concurring in the judgment) ("Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment . . .").

¹⁴ *Badham v. United States Dist. Court*, 721 F.2d 1170, 1172 (9th Cir. 1983) (abstaining from ruling on the constitutionality of an alleged congressional gerrymander in California until state law issues resolved by state court). See generally Hess, *supra* note 5, at 211-13, 244-48 (reviewing the *Badham* litigation); Lowell & Craigie, *California's Reapportionment Struggle: A Classic Clash Between Law and Politics*, 2 J.L. & POL. 245 (1985) (recounting redistricting in California between the 1980 census and *Badham*); *Political Gerrymandering: Badham v. Eu*, *Political Science Goes to Court*, 18 PS 537 (1985) (symposium on the role of social science in redistricting litigation).

¹⁵ Since *Baker v. Carr*, 369 U.S. 186 (1962), redistricting litigation has run in decennial cycles tied to the U.S. Census. See U.S. CONST. art I, § 2, cl. 3; see also Note, *supra* note 10, at 1433 n.41 (arguing that states are required to use federal census figures in redistricting).

¹⁶ See Gurwitt, *supra* note 8, at 1642. Georgetown University Law Professor Roy Schotland has described *Davis* as "'literally inviting' an appeal by California Republicans . . ." *Justices Uphold GOP Gerrymandering, Say Suits Can Challenge Such Practice*, Wall St. J., July 1, 1986, at 4, col. 2; see also *Gerrymander Test Looms: California GOP Will Base Suit to Invalidate Democrat-Drawn Districts on New Court Ruling*, Christian Sci. Monitor, July 2, 1986, at 3, col. 3 (reporting statement by Frank Fahrenkopf, Republican national chairman, that *Davis* had opened the way to California challenge); *Decision by High Court Likely to Refuel Debate on California Districting*, L.A. Times, July 1, 1986, at 3, col. 5 (statement by Rep. William Thomas (R-California) that California redistricting suit would now proceed); *G.O.P. Plans*, *supra* note 8, at A17, col. 2 (reporting that Republican Party plans to use *Davis* in an attempt to overturn California plan). Needless to say, California Republicans have accepted the invitation to proceed. See Hess, *supra* note 5, at 248 (examining the impact of the *Davis* decision on the *Badham* litigation); *Republicans Test*, *supra* note 8, at 1, col. 2 (discussing the re-opening of *Badham* in United States District Court).

¹⁷ See *Court's Ruling Spurs Party Fight for Legislatures*, N.Y. Times, July 2, 1986, at B6, col. 4 (analyzing legal and political strategies of parties in light of *Davis*).

In view of past precedent, *Davis* is the latest step in a progression toward proportional representation.¹⁸ This progression runs from *Colegrove v. Green*¹⁹ in 1946 through *Baker v. Carr*²⁰ in 1962 and *Reynolds v. Sims*²¹ in 1964. A constitutional requirement of proportional representation, however, is inconsistent with republicanism and pluralism.²² Cognizant of this tension, yet propelled by the logic of the equally effective vote, the *Davis* Court held that political gerrymandering was justiciable.²³ The majority of six, however, failed to reach a consensus on how to apply the equal protection standards of discriminatory intent and effects as brakes to prevent a complete slide to proportional representation.²⁴ Justice White, for three other members of the Court, offered a "nebulous" concept of "consistent degradation" and hinted that courts should presume a legislative intent to gerrymander. Justice Powell, for himself and Justice Stevens, argued for a contextual approach that relies on an objective standard for reviewing legislative purpose. Both opinions, however, refer to the subjective motivations of legislators.²⁵ Yet this motivational analysis is unnecessary because the objective context in which legislation is adopted, not the subjective motivations of particular legislators, is determinative.²⁶ Moreover, a subjective approach raises troublesome questions of proof. In particular, legislators will legitimately exercise any speech or debate

and in anticipation of the 1990 census); *Battle Lines Drawn for 1991: Outcome of Redistricting Fight May Determine Control of House*, Wash. Post, Oct. 13, 1985, at A4, col. 1 (same). Notwithstanding the potential impact of *Davis*, a recent study suggests that a redistricting dispute in a given state is a function of single-party control of the process, the voting rule for adopting the redistricting plan, and the degree of political competitiveness within the state legislature. See Cain & Campagna, *Predicting Partisan Redistricting Disputes*, 12 LEGIS. STUD. Q. 265, 266-67 (1987).

¹⁸ See Comment, *The Supreme Court and Congressional Apportionment: Slippery Slope to Equal Representation Gerrymandering*, 38 RUTGERS L. REV. 109, 110 (1985).

¹⁹ 328 U.S. 549 (1946).

²⁰ 369 U.S. 186 (1962).

²¹ 377 U.S. 533 (1964).

²² See *infra* notes 153-71 and accompanying text.

²³ See *Davis*, 106 S. Ct. at 2806 (Brennan, White, Marshall, Blackmun, Powell & Stevens, JJ.).

²⁴ Cf. Lowenstein, *supra* note 5, at 4-5 (arguing that the six-judge *Davis* holding on justiciability "implied nothing about whether allegations of partisan gerrymandering ever would give rise to a substantively valid constitutional claim").

²⁵ Compare *Davis*, 106 S. Ct. at 2807-12 (Brennan, White, Marshall & Blackmun, JJ.) (stressing that a lack of proportional representation does not prove unconstitutional discrimination and evidence of intent must be shown) with *id.* at 2832 (Powell & Stevens, JJ., concurring and dissenting) (calling for application of an objective standard that examines the purposes for which the apportionment law was adopted).

²⁶ See *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971) (discussing the pitfalls of a subjective approach to equal protection analysis); see also *infra* notes 306-07 and accompanying text (arguing that the subjective motives of legislators are irrelevant).

privilege based on separation of powers to avoid testifying as to their motives. Consequently, the Court should treat references to subjective motivation in *Davis* as dicta and instead attempt to establish an objective standard against which to measure legislative purpose.

This Comment is divided into four parts. Part I reviews pre-*Davis* redistricting litigation. This historical discussion illustrates that *Davis* continues on the path toward proportional representation that was set out in early redistricting litigation. Part II reconciles *Davis*, proportional representation, and constitutional theory. The concept of the equally effective vote strongly influenced the outcome in *Davis*, yet the Constitution does not mandate proportional representation. The Court in *Davis* thus used equal protection standards to paper over this gap. Part III examines the speech or debate clause strategy state legislators will likely use to try to avoid the subjective considerations in *Davis*. The purpose behind the speech or debate clause is to prevent the other two branches of government from interfering in legislative functions. Finally, Part IV argues that the Court should abandon references to subjective motivation of legislators in *Davis* and instead focus on an objective approach to legislative purpose.

I. PRE-DAVIS REDISTRICTING LITIGATION

An understanding of pre-*Davis* redistricting litigation is necessary to understand the rationales supporting the three groupings in *Davis v. Bandemer*.²⁷ the plurality opinion, written by Justice White and joined by Justices Brennan, Marshall, and Blackmun; Justice Powell's opinion, in which Justice Stevens joined; and Justice O'Connor's opinion, joined by Chief Justice Burger and Justice Rehnquist. This Comment divides the pre-*Davis* litigation into four categories: first, the "early" litigation from *Colegrove v. Green*²⁸ to *Baker v. Carr*;²⁹ second, redistricting litigation based on racial gerrymandering; third, redistricting litigation based on one person-one vote "numerical gerrymandering"; and fourth, redistricting litigation based on political gerrymandering. These categories parallel the analysis in *Davis* itself; the first addresses the justiciability issue³⁰ and the remaining three address the equal protection issue.³¹

²⁷ 106 S. Ct. 2797 (1986).

²⁸ 328 U.S. 549 (1946).

²⁹ 369 U.S. 186 (1962).

³⁰ See *infra* notes 143-84 and accompanying text.

³¹ See *infra* notes 185-224 and accompanying text.

A. *From Colegrove v. Green to Baker v. Carr*

Although the Court had considered redistricting questions in statutory contexts,³² the first claim that a congressional districting plan violated the equal protection clause did not come until 1946. In *Colegrove*, a badly divided Court³³ rejected the claim of a Northwestern University political scientist that a forty-year-old Illinois congressional scheme in which the population of the plaintiff's district was eight times that of another district was unconstitutional.³⁴

Justice Frankfurter, writing for himself and Justices Reed and Burton, held that redistricting was a political question: "[c]ourts 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."³⁵ In particular, Justice Frankfurter noted the "want of equity"³⁶ and postulated that the plaintiff's claim was a guarantee clause³⁷ claim rather than an equal protection

³² See, e.g., *Wood v. Broom*, 287 U.S. 1, 8 (1932) (holding that the provisions of the Reapportionment Act of 1911, ch. 5, 37 Stat. 13, were not reenacted by the Reapportionment Act of 1929, ch. 28, 46 Stat. 21); *Carroll v. Becker*, 285 U.S. 380, 381-82 (1932) (holding that if the number of representatives from a state in Congress was reduced by the Reapportionment Act of 1929 and the state never redistricted, then the state had to conduct at-large elections); *Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (sustaining the right of a governor to veto a redistricting scheme if the governor has veto power generally); *Smiley v. Holm*, 285 U.S. 355, 373-74 (1932) (deciding applicability of 1911 Reapportionment Act). See generally R. HANSON, *THE POLITICAL THICKET* 44 (1966) (offering background on early redistricting litigation); Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 666 n.2 (1972) (same).

³³ Justice Frankfurter wrote for himself and Justices Reed and Burton. See *Colegrove*, 328 U.S. at 550. Justice Rutledge concurred. See *id.* at 564. Justice Black wrote in dissent for himself and Justices Douglas and Murphy. See *id.* at 566. Chief Justice Stone heard argument and participated in the conference but died before the decision was announced. Justice Jackson was prosecuting war criminals at Nuremberg. See R. HANSON, *supra* note 32, at 43-44; Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism*, 29 U. CHI. L. REV. 673, 677 (1962).

³⁴ See *Colegrove v. Green*, 64 F. Supp. 632, 634 (N.D. Ill. 1945), *aff'd*, 328 U.S. 549, 556 (1946); R. HANSON, *supra* note 32, at 43. See generally Baker, *Judicial Determination of Political Gerrymandering: A "Totality of Circumstances" Approach*, 3 J.L. & POL. 1, 2 (1986) (analyzing "status quo" gerrymanders that result from the failure to reapportion after population shifts).

³⁵ *Colegrove*, 328 U.S. at 556. Hanson notes that six of the seven *Colegrove* justices, including "the high court's high priest of judicial self-restraint," Justice Frankfurter, had been appointed by President Roosevelt, hardly an enthusiast of judicial intervention. See R. HANSON, *supra* note 32, at 45; cf. *Davis*, 106 S. Ct. at 2818-22 (O'Connor, J., concurring in the judgment) (maintaining that partisan gerrymandering is a nonjusticiable political question).

³⁶ *Colegrove*, 328 U.S. at 551; see also Rogowski, *Representation in Political Theory and in Law*, 91 ETHICS 395, 415 (1981) (analyzing Frankfurter's decision).

³⁷ The guarantee clause promise of a republican government, see U.S. CONST. art.

claim.³⁸

Justices Black, Douglas, and Murphy strongly disagreed. Justice Black found for the plaintiffs both on equal protection and article I grounds. Noting the gross disparity among the populations of congressional districts and the failure of Illinois to reapportion in forty years, Justice Black viewed equal protection as protecting the right to an *equally effective vote* in the election of Congress.³⁹ Justice Black buttressed the right to an equally effective vote by referring to article I, which provides that congressmen are chosen by the people: "It thus gives those qualified a right to vote and a right to have their vote counted."⁴⁰

Justice Rutledge's concurrence provided the deciding vote in *Colegrove*. Justice Rutledge felt that *Smiley v. Holm*⁴¹ required the Court to hold that redistricting was justiciable, thus disagreeing with Justice Frankfurter on the political question issue.⁴² Because he was concerned, however, with the practical impact of holding for the plaintiffs with congressional elections approaching, Justice Rutledge held for the

I, § 4, is nonjusticiable and enforceable only by Congress. See *Coleman v. Miller*, 307 U.S. 433, 445-46 (1939); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 77 (1867); *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-47 (1849). But see J. ELY, *DEMOCRACY AND DISTRUST* 118-23 (1980) (concluding that the equal protection and guarantee clauses together justify active judicial review of apportionment); Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 263 (1963) (arguing that the guarantee clause, not the equal protection clause, should have been the basis of redistricting litigation); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 18-19 (1971) (arguing that only the value-neutral requirements of democratic process, embodied in the guarantee clause, could make a legislative apportionment unconstitutional); Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125, 1144 (1987) (criticizing the *Luther* Court for "politicizing the republican conception of a universal right to political participation"); Comment, *The Guarantee of Republican Government, Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 226-32 (1987) (arguing that the Framers understood republican government as a structural remedy for both factionalism and authoritarianism); Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561, 579-80 (1984) [hereinafter *Rule of Law*] (advocating the reinvigoration of the guarantee clause).

³⁸ *Colegrove*, 328 U.S. at 556 (citing *Pacific States Tel. & Tel. v. Oregon*, 223 U.S. 118 (1912)).

³⁹ *Id.* at 574 (Black, J., dissenting); cf. *Davis*, 106 S. Ct. at 2805-07 (quoting favorably the "effectiveness" language in *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)).

⁴⁰ *Colegrove*, 328 U.S. at 570 (Black, J., dissenting); see also Rogowski, *supra* note 36, at 414-16 (analyzing Justice Black's use of the ballot fraud cases, *United States v. Mosley*, 238 U.S. 383 (1915), and *United States v. Saylor*, 322 U.S. 385 (1944), to sustain the justiciability of the redistricting issue).

⁴¹ 285 U.S. 355 (1932) (deciding the applicability of the Reapportionment Act of 1911, ch. 5, 37 Stat. 13, which required congressional districts to be compact and contiguous).

⁴² See *Colegrove*, 328 U.S. at 564-65 (Rutledge, J., concurring).

defendants on equitable, but not constitutional, grounds.⁴³

Despite the support of only three justices in *Colegrove*, the new postwar mobility in American society as reflected in the 1950 census,⁴⁴ and a series of critical law review articles,⁴⁵ Justice Frankfurter's view seemed ascendant in the late 1940's and the 1950's. Between 1946 and 1962, the Court summarily refused to consider eleven redistricting cases, usually citing *Colegrove*.⁴⁶

Nevertheless, pressure built. In *Gomillion v. Lightfoot*,⁴⁷ a unani-

⁴³ See *id.* at 565-66 (Rutledge, J., concurring).

⁴⁴ See Baker, *Whatever Happened to the Reapportionment Revolution in the United States?*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 257, 259 (B. Grofman & A. Lijphart eds. 1986) [hereinafter ELECTORAL LAWS]. See generally G. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT 23-98 (1966) (detailing the degree of malapportionment at both the state and local levels prior to *Baker*); Tyler, *Court Versus Legislature*, 27 LAW & CONTEMP. PROBS. 390, 402-03 (1962) (same).

⁴⁵ E.g., Celler, *Congressional Apportionment—Past, Present, and Future*, 17 LAW & CONTEMP. PROBS. 268, 273-74 (1952) (endorsing a proposed congressional bill that would require that the population of any congressional district not vary more than 15% above or below the average population for each district within the state); Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1095-98 (1958) (concluding that the courts should provide moral leadership to resolve the effects of malapportionment); Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 MD. L. REV. 277, 302 (1956) (attributing failed attempts to secure effective judicial relief against gerrymandering to the reluctance of courts to intervene). See generally R. HANSON, *supra* note 32, at 47 (collecting law review articles critical of Frankfurter's decision in *Colegrove*).

⁴⁶ See *Matthews v. Handley*, 361 U.S. 127 (1959) (mem.), *aff'g* 179 F. Supp. 470 (D. Ind. 1959) (sustaining motion to dismiss); *Hartsfield v. Sloan*, 357 U.S. 916 (1958) (mem.) (denying writ of mandamus to the United States District Court for the Northern District of Georgia); *Radford v. Gary*, 352 U.S. 991 (1956) (mem.), *aff'g* 145 F. Supp. 541 (W.D. Okla. 1956) (sustaining motion to dismiss); *Kidd v. McCanless*, 352 U.S. 920 (1956) (mem.), *dismissing appeal from* 200 Tenn. 273, 292 S.W.2d 40 (1956) (refusing to declare redistricting act unconstitutional); *Anderson v. Jordan*, 343 U.S. 912 (1952) (mem.) (dismissing appeal from the California Supreme Court); *Cox v. Peters*, 342 U.S. 936 (1952) (mem.), *dismissing appeal from* 208 Ga. 498, 67 S.E.2d 579 (1951) (refusing to consider constitutionality of county-unit system); *Tedesco v. Board of Supervisors of Elections*, 339 U.S. 940 (1950) (mem.), *dismissing appeal from* 43 So. 2d 514 (La. Ct. App. 1949) (refusing to upset districting of city council seats); *MacDougall v. Green*, 335 U.S. 281 (1948) (per curiam) (affirming the denial of an injunction for want of jurisdiction); *Colegrove v. Barrett*, 330 U.S. 804 (1947) (mem.) (dismissing appeal from the United States District Court for the Northern District of Illinois); *Turman v. Duckworth*, 329 U.S. 675 (1946) (mem.), *aff'g* 68 F. Supp. 744 (N.D. Ga. 1946) (upholding county-unit system); *Cook v. Fortson*, 329 U.S. 675 (1946) (mem.), *dismissing appeal from* 68 F. Supp. 624 (N.D. Ga. 1946) (upholding county-unit system); see also R. HANSON, *supra* note 32, at 46 (analyzing pre-*Baker* judicial interpretations of *Colegrove*); Carpeneti, *supra* note 32, at 666 n.1 (same); Friedelbaum, *supra* note 33, at 680-84 (same); Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 717-41 (same). But see *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that racial gerrymandering violates the fifteenth amendment); *infra* text accompanying note 73 (discussing *Gomillion*).

⁴⁷ 364 U.S. 339 (1960).

mous Court held that the fifteenth amendment prohibited racial gerrymandering. While Justice Frankfurter took pains to distinguish the fifteenth amendment analysis in *Gomillion* from *Colegrove*,⁴⁸ the fact remained that the *Gomillion* Court had treated redistricting as justiciable.⁴⁹ Moreover, the composition of the Court had changed dramatically since *Colegrove*. Justice Frankfurter's allies, Justices Burton and Reed, had retired and Chief Justice Stone and Justice Jackson were dead. Taking their seats were Chief Justice Warren and Justices Brennan, Clark, and Stewart.⁵⁰

The Warren Court's decision to reconsider the justiciability question was made even easier by the intervention of the Eisenhower and Kennedy Solicitors General on the plaintiffs' behalf.⁵¹ Thus when the Court agreed to review *Baker v. Carr*,⁵² the Court had a case in which the plaintiffs had exhausted state legal remedies, were supported by the weight of legal and political commentary, and had the assistance of the executive branch.⁵³

Justice Brennan wrote the majority opinion in *Baker*, joined by Chief Justice Warren and Justices Stewart, Douglas, Black, and Clark.⁵⁴ Justice Brennan's opinion began by reinterpreting *Colegrove* as conferring subject matter jurisdiction based on Justice Black's dissent and Justice Rutledge's concurrence.⁵⁵ As Justice Brennan noted, subject matter jurisdiction and justiciability are different concepts. Subject mat-

⁴⁸ See *id.* at 346-47; see also R. HANSON, *supra* note 32, at 51 (noting Frankfurter's efforts to distinguish the fourteenth and fifteenth amendment issues); Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194, 232-34 (arguing that the fourteenth-fifteenth amendment distinction goes to the scope of equal protection, not justiciability); cf. Davis, 106 S. Ct. at 2820 (O'Connor, J., concurring in the judgment) (distinguishing between partisan and racial gerrymandering). But cf. *id.* at 2806-07 (rejecting Justice O'Connor's distinctions); *Leading Cases*, *supra* note 5, at 159 (calling Justice O'Connor's distinctions "untenable").

⁴⁹ Justice Whitaker, concurring, stated that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), not *Colegrove*, was dispositive. See *Gomillion*, 364 U.S. at 349 (Whitaker, J., concurring). Justice Douglas joined the decision but explicitly adhered to his dissent in *Colegrove*. See *id.* at 348 (Douglas, J., concurring).

⁵⁰ Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 257 (noting the change of personnel on the Court).

⁵¹ See R. HANSON, *supra* note 32, at 52-54 (suggesting that Vice President Nixon played a critical role in allowing President Eisenhower's Solicitor General to file a brief as amicus curiae); Lewis, *supra* note 45, at 1078 (criticizing the way in which *Colegrove* was litigated).

⁵² 364 U.S. 898 (1960), *noting prob. juris. over* 179 F. Supp. 824 (M.D. Tenn. 1959).

⁵³ See R. HANSON, *supra* note 32, at 52-54 (explaining how *Baker* was readied for the Court); Friedelbaum, *supra* note 33, at 688-89 (same).

⁵⁴ Justice Whitaker did not participate, making the decision 6-2. See *Baker*, 369 U.S. at 237.

⁵⁵ See *id.* at 202-04; cf. Lucas, *supra* note 48, at 716-17 (criticizing Justice Brennan's manipulation of the *Colegrove* dissent and concurrence).

ter jurisdiction exists if "the matter set forth in the complaint does arise under the Constitution and is within 28 U.S.C. § 1343."⁵⁶ The plaintiffs had standing,⁵⁷ and the guarantee clause did not shield redistricting from judicial review.⁵⁸ Most importantly, redistricting presented a justiciable question because it did not implicate concerns such as separation of powers or lack of "judicially discoverable and manageable standards" inherent in other political question cases.⁵⁹

But Justice Brennan, citing the familiarity of the lower courts with equal protection analysis,⁶⁰ articulated no standards for lower courts to follow. Justices Clark⁶¹ and Douglas⁶² were not satisfied with this result, however, and consequently articulated their own standards.⁶³ Treading the narrow ground, in contrast, Justice Stewart in a separate concurrence tried to limit the scope of Justice Brennan's opinion to justiciability.⁶⁴

⁵⁶ *Baker*, 369 at 199.

⁵⁷ *Id.* at 204-08. The plaintiffs were residents of counties that were under-represented in the state legislature. *Id.*; cf. Neal, *supra* note 50, at 271-74 (raising the issue as to whether the Court reached the right conclusion vis-à-vis standing since plaintiffs in redistricting suits may not be representative of the electorate and defendants are clearly nominal). But cf. *supra* note 9 (demonstrating the intervention of a wide range of groups in *Davis*).

⁵⁸ See *Baker*, 369 U.S. at 228-29 (holding that the guarantee clause regulates the relationships among the branches of the federal government and not the relationship between the states and the federal judiciary).

⁵⁹ *Id.* at 217; cf. *Davis*, 106 S. Ct. at 2805-06 (citing *Reynolds v. Sims*, 377 U.S. 533, 557-61 (1964)).

⁶⁰ See *Baker*, 369 U.S. at 226. Compare G. BAKER, *supra* note 44, at 123-24 (calling Justice Brennan's move "calculated and perceptive" as it afforded the different state and lower federal courts the opportunity to experiment) and McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 650 (1963) (stating that "postponement [of the establishment of standards] was not only permissible, but born of the wisdom of judicial experience") with Dixon, *Legislative Apportionment and the Federal Constitution*, 27 LAW & CONTEMP. PROBS. 329, 355 (1962) (castigating Justice Brennan for not providing standards) and McCloskey, *The Supreme Court, 1966 Term—Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 63 (1962) (noting that Justice Brennan's decision rested on the premise that redistricting was a justiciable issue because manageable standards did exist, yet Justice Brennan failed to identify them).

Reaction to *Davis* has been similarly divided. Compare Lowenstein, *supra* note 5, at 3 (stating that the criticism that Justice White did not adequately set forth standards is "misplaced") with *Leading Cases*, *supra* note 5, at 154 (arguing that "the Court's failure to provide lower courts with clear standards . . . seriously undermines the decision's practical impact").

⁶¹ See *Baker*, 369 U.S. at 259-64 (Clark, J., concurring).

⁶² See *id.* at 250 n.5 (Douglas, J., concurring).

⁶³ See Rogowski, *supra* note 36, at 417-18 (viewing Douglas as demanding absolute equality in contrast to Clark's demanding no arbitrary inequality); cf. *Davis*, 106 S. Ct. at 2831 (Powell, J., concurring and dissenting) ("The final and most basic flaw in the plurality's opinion is its failure to enunciate any standard that affords guidance to legislatures and courts.").

⁶⁴ See *Baker*, 369 U.S. at 265-66 (Stewart, J., concurring).

Justice Frankfurter, on the other hand, attacked the majority in a bitter dissent for ignoring precedent,⁶⁵ entering a "mathematical quagmire,"⁶⁶ and inviting "legislatures to play ducks and drakes with the judiciary."⁶⁷ The case was "a Guarantee Clause claim masquerading under a different label."⁶⁸ Expressing concern over the public's perception of the Court's role in politics, Justice Harlan joined Justice Frankfurter.⁶⁹ He, too, feared that, the Court having once entered the thicket of redistricting by answering the justiciability question, every attempt to find a way out would only lead to deeper involvement.⁷⁰ It did.⁷¹ Critics say the same today about political gerrymandering such as that addressed in *Davis*.⁷² Consequently, an understanding of the equal pro-

⁶⁵ See *id.* at 277-80 (Frankfurter, J., dissenting); cf. *Davis*, 106 S. Ct. at 2818 (O'Connor, J., concurring in the judgment) (criticizing the plurality for ignoring precedent holding that political gerrymandering claims are nonjusticiable political questions).

⁶⁶ *Baker*, 369 U.S. at 268 (Frankfurter, J., dissenting); cf. *Davis*, 106 S. Ct. at 2818 (O'Connor, J., concurring in the judgment) (criticizing the plurality for not articulating manageable standards in its analysis of gerrymandering claims under the equal protection clause).

⁶⁷ *Baker*, 369 U.S. at 268 (Frankfurter, J., dissenting); cf. *Davis*, 106 S. Ct. at 2818 (O'Connor, J., concurring in the judgment) ("[T]he losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court.").

⁶⁸ *Baker*, 369 U.S. at 297 (Frankfurter, J., dissenting); see also *supra* notes 37-38 and accompanying text; cf. McKay, *supra* note 60, at 650 (maintaining that the jurisdiction, justiciability, and standing issues merely mask "the basic disagreement on whether courts can act profitably in the review of legislative arrangements").

⁶⁹ See *Baker*, 369 U.S. at 340 (Harlan, J., dissenting); see also McKay, *supra* note 60, at 651 ("There is considerable justification for reading . . . the . . . Harlan dissent[] for the proposition that *no* malapportionment, however severe, should be held to violate the equal protection clause."); Rogowski, *supra* note 36, at 426-27 (criticizing Harlan's jurisprudence on redistricting as denying any right to representation except to the extent created by Congress); cf. *Davis*, 106 S. Ct. at 2817 (O'Connor, J., concurring in the judgment) (criticizing the plurality for "inject[ing] the courts into the most heated partisan issues"); *id.* at 2822 (citing Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 253-54 (1985) (warning that the appearance of judicial partisanship will be far greater in districting decisions than in a *Baker*-like reapportionment analysis)). But cf. Dovenbarger, *Democracy and Distemper: An Examination of the Sources of Judicial Distress in State Legislative Apportionment Cases*, 18 IND. L. REV. 885, 885-86 (1985) (asserting that the Court's involvement in the redistricting process probably enhanced its standing in the public's eyes); McCloskey, *supra* note 60, at 59 (same); Comment, *supra* note 1, at 983 (same).

⁷⁰ See Moeller, *The Supreme Court's Quest for Fair Politics*, 1 CONST. COMMENTARY 203, 210-11 (1984) (pursuing fairness in its analysis of politics has "led the Court into a quagmire"); Rogowski, *supra* note 36, at 426-30 (analyzing the Court's slippery slope from no right to representation to the right to equally powerful (proportional) representation). But see *Davis*, 106 S. Ct. at 2809 (adamantly denying any constitutional right to proportional representation).

⁷¹ See R. HANSON *supra* note 32, at 57-58 (describing the reaction to *Baker* as "the legal blitz"); Baker, *supra* note 44, at 258 (noting the "flood-tide of litigation" after *Baker*); McCloskey, *supra* note 60, at 56 & n.14 (describing the immediate response as "nothing short of astonishing").

⁷² See, e.g., *Davis*, 106 S. Ct. at 2822 (O'Connor, J., concurring in the judgment)

tection standards developed in the post-*Baker*, pre-*Davis* era is necessary to understand both the plurality's attempt at promulgating standards in *Davis* and the outcome of future litigation.

B. Racial Gerrymandering

The seminal racial gerrymandering case, *Gomillion v. Lightfoot*, actually predated *Baker*. In *Gomillion*, the Court allowed a fifteenth amendment challenge to an attempt by the Alabama legislature to redraw the boundaries of the city of Tuskegee so as to exclude virtually all black voters from the city.⁷³ Since *Gomillion*, the Court has struck down multimember districting schemes that were intentionally designed to prevent minorities from holding office.⁷⁴ Multimember districts are not, however, unconstitutional per se because minorities also lose elections for reasons unrelated to unconstitutional discrimination.⁷⁵ To establish a successful claim that racial gerrymandering violates the equal protection clause, a member of an identifiable group must show both a racially discriminatory purpose and a racially discriminatory effect; a

(finding "intractable difficulties in deriving a judicially manageable standard from the Equal Protection Clause for adjudicating political gerrymandering claims"); Shapiro, *supra* note 69, at 253-54 (envisioning "a continuing stream of cases in which the Court suffers increasing losses to its reputation for reasoned, neutral decision making").

⁷³ See *Gomillion*, 364 U.S. at 340-42.

⁷⁴ See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) ("We are . . . unconvinced that we should disturb the District Court's finding that the at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population."); *White v. Regester*, 412 U.S. 755, 765-67 (1973) (sustaining the District Court's judgment that Dallas and Bexar County multimember districts excluded minorities from meaningful participation in the political process); cf. *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, 18-26 (1982) (criticizing the Court's approach to racial gerrymandering after *Reynolds*).

⁷⁵ See *City of Mobile v. Bolden*, 446 U.S. 55, 73 (1980) ("It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation."); *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971) ("The mere fact that one interest group . . . has found itself outvoted . . . provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system."); *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (Multimember districting constitutes invidious discrimination only where "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))); see also Engstrom & McDonald, *The Effect of At-Large Versus District Elections on Racial Representation in U.S. Municipalities*, in *ELECTORAL LAWS*, *supra* note 44, at 203 (suggesting that the original purpose of at-large elections was to promote a more republican, as opposed to pluralist, view of municipal government); Lineberry & Fowler, *Reformism and Public Policies in American Cities*, 61 AM. POL. SCI. REV. 701, 715 (1967) (suggesting that at-large, nonpartisan elections "decrease the salience of 'private regarding' demands by increasing the relative political power of 'public regarding' agencies like the local press").

mere showing of disparate impact is insufficient.⁷⁶ Something less than proof perfect of intent is sufficient, however, because the existence of "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."⁷⁷ Among the factors⁷⁸ the Court has found relevant in ascertaining racially invidious intent are the "impact of past discrimination on the ability of blacks to participate,"⁷⁹ "exclusion from the political process,"⁸⁰ "unresponsive[ness] and insensitiv[ity] to the needs of the black community,"⁸¹ and "the depressed socioeconomic status of . . . blacks."⁸² Finally, the plaintiffs still must show a racially discriminatory effect.⁸³

On the other hand, the Court has never struck down a single-member redistricting scheme on the basis of racial gerrymandering despite having had the opportunity.⁸⁴ In fact, the Court has stated that when a district court develops a redistricting plan as a remedy to state inaction, single-member districts are preferable.⁸⁵

After the Court reaffirmed in *City of Mobile v. Bolden*⁸⁶ that an

⁷⁶ See, e.g., *Rogers*, 458 U.S. at 617 ("[A] showing of discriminatory intent has long been required in all types of equal protection cases charging racial discrimination."); *City of Mobile*, 446 U.S. at 66-67 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment."); cf. *Davis*, 106 S. Ct. at 2808 ("[I]n order to succeed the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.").

⁷⁷ *Rogers*, 458 U.S. at 618 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

⁷⁸ Cf. *Davis*, 106 S. Ct. at 2831-32 (Powell, J., concurring and dissenting) (offering factors to consider in determining the existence of a partisan gerrymander).

⁷⁹ *Rogers*, 458 U.S. at 624.

⁸⁰ *Id.* at 625.

⁸¹ *Id.*

⁸² *Id.* at 626.

⁸³ See *City of Mobile v. Bolden*, 446 U.S. 55, 66-68 (1980); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

⁸⁴ See, e.g., *United Jewish Organizations v. Carey*, 430 U.S. 144, 167-68 (1977) (denying claim by Hasidic Jews whose community was politically divided to make a minority-dominated district); *Wright v. Rockefeller*, 376 U.S. 52, 58 (1964) (denying claim that New York legislature had racially segregated congressional districts in Manhattan); see also B. CAIN, *THE REAPPORTIONMENT PUZZLE* 168-71 (1984) (discussing the "twin sins of dispersion and concentration" of minority groups in racial redistricting); Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in *REPRESENTATION AND REDISTRICTING ISSUES* 7, 9 (1982) (recognizing that single-member redistricting is a zero-sum game).

⁸⁵ See *City of Mobile*, 446 U.S. at 66 n.12; *Connor v. Finch*, 431 U.S. 407, 415 (1977); *Mahan v. Howell*, 410 U.S. 315, 333 (1973); *Connor v. Johnson*, 402 U.S. 690, 692 (1971).

⁸⁶ 446 U.S. 55, 66-68 (1980). For criticism of *City of Mobile*, see, for example, Copeland, *The Status of Minority Voting Rights: A Look at Section V Preclearance Protections and Recent Decisions Affecting Multi-Member Voting Districts*, 28 How. L.J. 417, 428 (1985) (noting the "fragility" of a decision characterized by five separate opinions); Comment, *City of Mobile v. Bolden: A Setback in the Fight Against Dis-*

invidious intent is necessary for an equal protection claim, Congress recognized the near impossibility of proof absent the "smoking gun."⁸⁷ Hence Congress, exercising its powers under the civil rights amendments, redrafted section 2 of the Voting Rights Act of 1965⁸⁸ to eliminate the need for minority plaintiffs to prove an invidious intent.⁸⁹ Although the amended section 2 directs courts to consider "the totality of circumstances" in determining whether or not political participation is open to members of a class protected by the Act, the amendment seemingly contradicts itself by explicitly eschewing proportional representation.⁹⁰ Consequently, future litigation involving racial gerrymandering is much more likely to arise under section 2 of the Voting Rights Act than under the equal protection clause.⁹¹ What racial gerrymandering and political gerrymandering ostensibly have in common, however, is an identifiable group that is the intended target of unconstitutional discrimination.⁹²

crimination, 47 BROOKLYN L. REV. 169, 173 (1980) (charging that *City of Mobile* "effectively undercuts" constitutional challenges of vote-dilution schemes); Note, *City of Mobile v. Bolden: Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments*, 18 HOUS. L. REV. 611, 611 (1981) (calling *City of Mobile* "a significant step backward").

⁸⁷ See Blacksher, *Drawing Single-Member Districts to Comply with the Voting Rights Amendments of 1982*, 17 URB. LAW. 347, 350 (1985) (citing as a rare example *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (three-judge court), *aff'd mem.*, 459 U.S. 1166 (1983)); see also Blacksher & Menefee, *supra* note 74, at 31-32 (describing the Senate Judiciary Committee's assessment that an intent test places an "unacceptable burden" on plaintiffs in voting discrimination cases).

In contrast, the Court did not wait for Congress in the area of criminal process. See *Batson v. Kentucky*, 106 S. Ct. 1712, 1720-21 (1985) (in applying the equal protection clause to the use of peremptory challenges in criminal jury trials, the Court rejected *Swain v. Alabama*, 380 U.S. 202 (1965), as setting an impossible burden of proof).

⁸⁸ See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134 (codified at 42 U.S.C. § 1973(b) (1982)).

⁸⁹ See *Thornburg v. Gingles*, 106 S. Ct. 2752, 2762-64 (1986).

⁹⁰ See 42 U.S.C. § 1973(b) (1982).

⁹¹ See *Thornburg*, 106 S. Ct. at 2752 (challenging the use of multimember districts in North Carolina); see also Baker, *supra* note 44, at 269 (commenting on the role of the judiciary after the 1982 amendments); Blacksher, *supra* note 87, at 353-66 (analyzing standards for single-member districts after the 1982 amendments); Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1616 (1983) (arguing that the creation of minority-dominated "safe districts" serves the racial equality norm of the equal protection clause, but infringes on the political equality norm of the equal protection clause and U.S. Const. art. I, § 2); Note, *Results of the Results Test: The Impact of the 1982 Amendments to Section 2 of the Voting Rights Act on Dilution Suits*, 2 J.L. & POL. 341, 357-64 (1985) (analyzing the impact of the 1982 amendments).

⁹² Compare *Davis*, 106 S. Ct. at 2806 ("that the claim is submitted by a political group, rather than a racial group, does not distinguish it") with *id.* at 2820 (O'Connor, J., concurring in the judgment) (arguing that the Democratic and Republican parties, unlike racial minorities, are not discrete and insular groups).

C. Numerical Gerrymandering

In the context of this Comment, "numerical gerrymandering" refers to redistricting plans in which the populations of different legislative districts within a state are unequal.⁹³ Shortly after *Baker*, the Court declared in *Wesberry v. Sanders*⁹⁴ that "one person, one vote"⁹⁵ governed in congressional redistricting, thus introducing the notion of "equal representation."⁹⁶ The Court expanded on equal representation

⁹³ Beyond the scope of this Comment are the three ultimate gerrymanders: 1) the electoral college, see Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away*, 33 UCLA L. REV. 257, 279-81 (1985) (discussing unfairness in the operation of the electoral college); Still, *Political Equality and Election Systems*, 91 ETHICS 375, 392-93 (1981) (discussing how the electoral college fails to satisfy various criteria for political equality), 2) the United States Senate, see Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 755 n.14 (1964) (Stewart, J., dissenting) (pointing out that, at that time, 17% of the population of the United States elected 52% of United States senators); Levinson, *supra*, at 264 n.29 (noting the conflict between Reynolds v. Sims, 377 U.S. 533 (1964), requiring under the equal protection clause "substantially equal" representation, and the electoral process for the Senate), and 3) the apportionment of congressmen among the states, see M. BALINSKI & H. YOUNG, FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE 1-66, app. B at 157 (1982) (reviewing the various methods of apportioning seats in Congress among the states and applying the six major methods (Adams, Dean, Hill, Webster, Jefferson, and Hamilton) to 19 federal censuses from 1791 to 1970); Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 88-89 (1985) (as of 1982, the ideal congressional district population in Nevada was 393,345, while that in South Dakota was 690,178); Note, *supra* note 10, at 1432-34 (explaining how seats in Congress are apportioned).

Also beyond the scope of this Comment are inequalities generated by population undercounts. See Note, *supra* note 10, at 1463 (arguing that the Constitution requires statistical adjustments of actual census counts to compensate for undercounts); Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 HARV. L. REV. 841, 863 (1981) (arguing the Census Bureau should prepare adjusted statistics to account for differential undercounting).

⁹⁴ 376 U.S. 1 (1964).

⁹⁵ *Id.* at 18 (citing Gray v. Sanders, 372 U.S. 368, 381 (1963) (overturning county-unit system of counting votes)). Although the Court originally used the phrase "one person, one vote" it has subsequently shifted back and forth between that phrase and "one man, one vote." See Note, *Reapportionment: A Call for a Consistent Quantitative Standard*, 70 IOWA L. REV. 663, 663 n.3 (1985).

⁹⁶ *Wesberry*, 376 U.S. at 18 ("While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives."). Justice Black relied on article I, section 2 in reaching this conclusion. See *id.* at 7-8; see also Black, *Representation in Law and Equity*, in NOMOS X: REPRESENTATION 131, 134-36 (J. Pennock & J. Chapman eds. 1968) (restating Justice Black's constitutional argument and concluding that it is more sensible than contrary arguments). But see Karcher v. Daggett, 462 U.S. 725, 745 (1983) (Stevens, J., concurring) (acknowledging *Wesberry* on stare decisis grounds but noting that article I, section 2, "says nothing about the composition of congressional districts within a state"); *Wesberry*, 376 U.S. at 30-45 (Harlan, J., dissenting) (disputing Justice Black's use of the Framers' intent and instead arguing that Wood v. Broom, 287 U.S. 1 (1932), and article I, section 4, left the matter to Congress); Auerbach, *The*

in *Reynolds v. Sims*.⁹⁷ Relying on the statement that "[t]he right to vote is personal",⁹⁸ the *Reynolds* Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."⁹⁹ Elaborating on the purpose behind this right, the Court declared that "[f]ull and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature."¹⁰⁰

The pursuit of voter equality in *Reynolds* raised problems of mea-

Reapportionment Cases: One Person, One Vote-One Vote, One Value, 1964 SUP. CT. REV. 1, 5 ("Mr. Justice Black's effort to show that the Court's conclusion is compelled by the language of Article I, § 2, read in the light of the intent of the Framers of the Constitution, is not convincing."); Carpenter, *Wesberry v. Sanders: A Case of Oversimplification*, 9 VILL. L. REV. 415, 417 (1964) ("Mr. Justice Black's forays into history can be painful."); Kauper, *Some Comments on the Reapportionment Cases*, 63 MICH. L. REV. 243, 247 (1964) (While there is a constitutionally protected right to vote, "[i]t is another thing to say that this right to vote furnishes the key to legislative apportionment problems."); Note, *Beyond Wesberry: State Apportionment and Equal Protection*, 39 N.Y.U. L. REV. 264, 265 (1964) ("In resting its decision upon section 2, the Court failed to establish precedent for state legislative apportionment cases, which must rest upon the equal protection clause.").

- ⁹⁷ 377 U.S. 533 (1964); see also Black, *supra* note 96, at 132-33 (distinguishing between *Reynolds*, in which the Court ruled on state legislative districting, which is central to the structure of the state government (perhaps the primary state concern), and *Wesberry*, in which the Court ruled on districting for federal elections, a more appropriate subject for federal review).

⁹⁸ *Reynolds*, 377 U.S. at 561 (citing *United States v. Bathgate*, 246 U.S. 220, 227 (1918)); see also R. HANSON, *supra* note 32, at 76 (interpreting *Reynolds* and its companion case *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713 (1964), as supporting the proposition that the right to vote is personal).

⁹⁹ *Reynolds*, 377 U.S. at 568. In particular, the *Reynolds* Court held that no analogy existed between the federal legislative structure and a state system in which each county had a least one member in the lower chamber, with the remaining members allocated by population, and had equal representation in the upper chamber, because the federal structure was a compromise made in "unique historical circumstances" to establish the union of formerly independent states, while the political structure of the states is merely an administrative convenience. See *id.* at 574-75; see also *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 724-26, 738 nn.31-32 (1964) (striking down a Colorado redistricting scheme modeled after the federal plan by districting the lower chamber of the state legislature by population, but guaranteeing one state senator to each county in the upper chamber); J. FORDHAM, *THE STATE LEGISLATIVE INSTITUTION* 30 (1959) (arguing that the federal analogy is inapplicable to state-created subdivisions); McKay, *supra* note 60, at 690 (noting that the "Great Compromise" dealt with inter-, not intrastate, apportionment); Tyler, *What is Representative Government?*, NEW REPUBLIC, July 16, 1962, at 15, 17 ("The 13 original states created the United States; the counties were created by the states."). There are arguments other than the federal analogy that could be used to defend bicameral legislatures having one body not representative of equally populated districts. See R. HANSON, *supra* note 32, at 112-13.

¹⁰⁰ *Reynolds*, 377 U.S. at 565; cf. *Davis*, 106 S. Ct. at 2806 (quoting *Reynolds* to support "the justiciability of claims going to the adequacy of representation in state legislatures").

surement and mathematics.¹⁰¹ In *Wesberry*, Justice Black had stressed absolute equality in congressional redistricting as a fundamental goal of the Constitution to be pursued despite possible mathematical imprecision.¹⁰² In contrast, Chief Justice Warren determined in *Reynolds* that in state redistricting "[m]athematical exactness or precision is hardly a workable constitutional requirement."¹⁰³ Consequently, the Court expressed a willingness to accept small deviations as long as they advanced a rational state policy.¹⁰⁴

An *equal* vote, however, is not necessarily an *equally effective* vote.¹⁰⁵ The effectiveness of any individual vote depends on the ability

¹⁰¹ See Backstrom, *Problems of Implementing Redistricting*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 84, at 43, 44-49 (discussing the problems that arise in trying to attain mathematical equality in practical operation); see also Dixon, *Representation Values and Reapportionment Practice: The Eschatology of "One-Man, One-Vote"*, in NOMOS X: REPRESENTATION, *supra* note 96, at 167, 184-85 (presenting the three different methods used by the Court to measure malapportionment in the 1964 reapportionment cases).

¹⁰² See *Wesberry*, 376 U.S. at 18.

¹⁰³ *Reynolds*, 377 U.S. at 577.

¹⁰⁴ See *id.* at 578-81; see also Mahan v. Howell, 410 U.S. 315, 322 (1973) (finding the equal protection standard for state legislative redistricting less strict than the article I, section 2 standard governing congressional redistricting). Compare *Karcher v. Daggett*, 462 U.S. 725 (1983) (invalidating New Jersey legislative plan with variance of 0.6984% between largest and smallest congressional districts) with *Brown v. Thomson*, 462 U.S. 835 (1983) (sustaining Wyoming state legislative plan with a population variance of 89% between largest and smallest districts, which resulted from the statutory entitlement of each county to its own representative, because legitimate state policy of preserving integrity of political subdivision was applied in a consistent and nondiscriminatory fashion and dilution of voting power on which challenge was based was de minimis). Other commentators have discussed this inconsistency. See Grofman, *supra* note 93, at 82-83 (reviewing, inter alia, *Karcher* and *Brown*, both decided the same day, and the Burger Court approach to the state-congressional dichotomy in redistricting); Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1, 16-17 (1985) (same—adding that the result in *Karcher* is preferable to that in *Brown*); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 493, 596-98 (1986) (noting that Justices Burger, Rehnquist, and Powell upheld both plans; that Justices Brennan, Marshall, and Blackmun struck down both; and arguing that Justice White's vote to sustain the plan in *Karcher* but not that in *Thompson* was motivated by the degree of malapportionment; that Justice Stevens distinguished the cases based on political gerrymandering; and that Justice O'Connor's opinion is explainable in terms of republicanism). See generally Dexter, *Standards for Representative Selection and Apportionment*, in NOMOS X: REPRESENTATION, *supra* note 96, at 158-66 (decrying the overemphasis of "one man, one vote" and the underemphasis of communication areas, cultural and social groups, interests, traditions, legislative efficiency and efficacy, and social invention); Dixon, *supra* note 1, at 220 (The absolute population equality rule for congressional redistricting "leaves little or no room for recognition of traditional political subdivision lines[,] . . . may reduce creativity . . . [, and] foster gerrymandering.").

¹⁰⁵ The Court sought to guarantee the latter. See *Reynolds*, 377 U.S. at 579 ("Whatever the means of accomplishment, the overriding objective must be substantial equality of population among various districts, so that the vote of any citizen is *approx-*

of the individual to combine her vote with others.¹⁰⁸ As Justice Stewart noted in dissent in *Lucas v. Forty-Fourth General Assembly*,¹⁰⁷ the companion case to *Reynolds*, equally populated districts do not necessarily guarantee majoritarian rule.¹⁰⁸ For example, by using political gerrymandering, a numerically inferior but politically dominant party can create equally populated districts yet waste votes of the subordinate political party by packing the latter's votes in a few districts.¹⁰⁹ Votes are wasted in any election, however, even without gerrymandering.¹¹⁰ The only alternatives that better¹¹¹ recognize an equally effective vote are

imately equal in weight to that of any other citizen in the State." (emphasis added)). The distinction is significant. See Rogowski, *supra* note 35, at 426-30 (presenting four competing doctrines of the right to representation and their consequences: no right to representation, the right to representation, the right to fair representation, and the right to equally powerful representation); Still, *supra* note 92, at 378-85 (presenting six criteria for political equality: universal equal suffrage, equal shares of the total vote in a political unit, equal probabilities of casting the deciding vote, anonymity, majority rule, and proportional group representation). See generally Grofman, *Fair and Equal Representation*, 91 ETHICS 477, 477-83 (1981) (discussing problems posed by the Rogowski and Still analyses); Rae, *Two Contradictory Ideas of (Political) Equality*, 91 ETHICS 451, 451-54 (1981) (distinguishing between "treating different people differently in order to treat them equally" and treating people "identically in order to treat them equally").

¹⁰⁸ See Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 177-82 (1984) (examining the tension in *Reynolds* between individual and group rights). But see Lowenstein, *supra* note 5, at 6 (arguing that the rights vindicated in *Reynolds* are those of the individual, not the group; the restructuring of the electoral system resulting from that vindication was a by-product, not a constitutional end).

¹⁰⁷ 377 U.S. 713 (1964); see also Blacksher & Menefee, *supra* note 74, at 13 & n.93 (discussing, among other things, Justice Stewart's dissent in *Lucas*). A congressional attempt to amend the Constitution to reverse *Lucas*, the so-called "Dirksen Amendment," failed. See 111 CONG. REC. 19,373 (1965); see also Backstrom, Robins & Eller, *supra* note 1, at 1125 n.18 (noting the failure of the Dirksen Amendment).

¹⁰⁸ See *Lucas*, 377 U.S. at 750 n.12 (Stewart, J., dissenting); see also Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection*, 58 TEX. L. REV. 1029, 1074 (1980) (demonstrating by example how equally populated districts and minority rule may not be inconsistent); Lowenstein & Steinberg, *supra* note 104, at 6-7 (same (citing Bernoulli's theorem)); Note, *supra* note 106, at 166 n.13 (stating that a minority of "the voters can elect a majority of the legislators"). But see Lowenstein, *supra* note 5, at 7 (arguing that Justice Stewart's focus on the number of voters who could elect a majority of the legislature because the right to vote is an individual right, not a right of 26% or 74%).

One commentator has taken a different tack and argued that *Lucas* was wrongly decided because the *Reynolds* Court misinterpreted the guarantee clause. See Note, *Rule of Law*, *supra* note 37, at 576-77.

¹⁰⁹ See *Davis*, 106 S. Ct. at 2802 n.6; Backstrom, Robins & Eller, *supra* note 1, app. at 1154; Grofman, *supra* note 93, at 117.

¹¹⁰ See Levinson, *supra* note 93, at 265 (noting that those who vote for losers in any election are by definition underrepresented, as their votes are discarded); Lowenstein & Steinberg, *supra* note 104, at 14 n.36 (same).

¹¹¹ The word "better" is deliberately used to address the criticism that even under proportional representation, some votes are wasted in any system in which representation is discrete and finite. See *supra* note 110.

proportional representation or "at-large election of every representative body at every level."¹¹² But the at-large election can be an unconstitutional device to discriminate against minorities.¹¹³ For example, if blacks comprise only one-third of the voters in a multimember district, a black can never hold office without white support, while a white can win without black support even when blacks are concentrated in one part of the multimember district.¹¹⁴ Thus, the only remaining remedy is proportional representation.¹¹⁵ The *Davis* Court unanimously

¹¹² Rogowski, *supra* note 36, at 429. Actually, at-large representation via multimember districts is the rule, not the exception, in a majority of local jurisdictions, for positions on city, county and school district boards. See Baker, *supra* note 44, at 274; see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-8 (1978) (describing legal challenges to multimember districts and the constitutional standards by which multimember districts have been evaluated); Carpeneti, *supra* note 32, at 670 nn.23-24 (defining and describing "multimember district" in which "at-large elections" are held as opposed to single member districts); Copeland, *supra* note 86, at 424 (same). In the case of state legislatures, 30 of 99 state legislative chambers were based at least in part on multimember districts in 1981. See Grofman, *supra* note 93, at 177-80. In the case of congressional districts, statute prohibits the use of multimember districts except in states that have "in all previous elections elected its Representatives at large . . ." 2 U.S.C. § 2c (1982).

¹¹³ See *Rogers v. Lodge*, 458 U.S. 613, 616-17 (1982); *City of Mobile*, 446 U.S. at 105 (Marshall, J., dissenting); *White v. Regester*, 412 U.S. 755, 765 (1973); see also Baker, *supra* note 44, at 268 ("The second problem of multimember districts is the impact of winner-take-all elections on minority groupings in a particular district."); Blacksher & Menefee, *supra* note 74, at 37 & n.255 (criticizing the turn-of-the-century progressive movement with its advocacy of at-large districting as aiming to "put in office the 'best' citizens from all-white business and professional classes" while "neutralizing readily mobilized racial, ethnic and economic minority groups"); Copeland, *supra* note 86, at 424 (noting the argument that racially polarized voting and multimember districting leads to minority vote dilution); Engstrom & McDonald, *supra* note 75, at 204 (describing the argument that at-large election schemes discriminate against racial minorities); Note *Ghetto Voting and At-Large Elections: A Subtle Infringement upon Minority Rights*, 58 GEO. L.J. 989, 996-97 (1970) (arguing that at-large systems in contrast to wards discriminate against blacks). See generally Grofman, *Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 84, at 107, 112-17 (concluding, in light of nine studies of multimember jurisdictions, that multimember districts discriminate against minorities more than single-member districts).

¹¹⁴ See Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 868 (1982) ("Because blacks are not a majority of the voting age population in many American cities, when elections are conducted at-large a black candidate must receive white support to be elected.").

¹¹⁵ Proportional representation is not without certain advantages. See Hallett, *Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 113, 117-24 (A. Lijphart & B. Grofman eds. 1984) [hereinafter CHOOSING AN ELECTORAL SYSTEM]; Lakeman, *The Case for Proportional Representation*, in *id.* at 41, 44-51; Note, *supra* note 106, at 182-88. But see Duverger, *Which Is the Best Electoral System?*, in CHOOSING AN ELECTORAL SYSTEM, *supra*, at 38-39 (arguing that plurality and majority systems are preferable to proportional representation in certain circumstances); Hermens, *Representation and Proportional Representation*, in *id.*

agreed, however, that the Constitution does not mandate proportional representation.¹¹⁶

D. Political Gerrymandering

The "equally effective" vote language in *Reynolds*¹¹⁷ inevitably created a tension between majoritarian rule and proportional representation.¹¹⁸ Nonetheless, the Court refused to consider the justiciability of political gerrymandering in a series of summary dispositions.¹¹⁹ The first indication that the Court might hold political gerrymandering justiciable was *Gaffney v. Cummings*.¹²⁰ The *Gaffney* Court upheld a Connecticut reapportionment scheme in which a board, appointed by representatives of both political parties,¹²¹ adhered to a "policy of 'political fairness.'" ¹²² Under this policy, the board proposed to adopt a plan structured to reflect in both houses of the state legislature the two parties' political strength.¹²³ This policy amounted to a "bipartisan ger-

at 15, 19-23 (describing the political fragmentation caused by proportional representation).

¹¹⁶ See *Davis*, 106 S. Ct. at 2809; *id.* at 2817, 2823-24 (O'Connor, J., concurring in the judgment); *id.* at 2830 n.7 (Powell, J., concurring and dissenting).

¹¹⁷ 377 U.S. at 565, 581 ("effective and adequately weighted vote").

¹¹⁸ Professor C. Edwin Baker states that "[t]he notion of equal efficacy of votes has no apparent operational meaning in the districting context" because the consequences to the individual voter of redistricting depend on her values, and voters' values differ. Baker, *supra* note 108, at 1078. If that is true, however, then a gerrymander cannot, by definition, exist. What matters for equal protection purposes is not how voters view their own values but the objective purpose of those doing the redistricting. See *id.* at 1079-80 (the "equality of respect" explanation).

¹¹⁹ See, e.g., *Jimenez v. Hidalgo County Water Improvement Dist. No. 2*, 424 U.S. 950 (1976), *affg* 68 F.R.D. 668 (S.D. Tex. 1975) (refusing, *inter alia*, to expand constitutional protection from political gerrymandering when no racial discrimination is involved); *Ferrell v. Hall*, 406 U.S. 939 (1972), *affg* *Ferrell v. Oklahoma ex rel. Hall*, 339 F. Supp. 73 (W.D. Okla. 1972) (holding that political gerrymandering in single-member districting is nonjusticiable (citing *Wells v. Rockefeller*, 398 U.S. 901 (1970); *WMCA, Inc. v. Lomenzo*, 382 U.S. 4 (1965))); *Wells v. Rockefeller*, 398 U.S. 901 (1970), *affg* 311 F. Supp. 48 (S.D.N.Y. 1970) (holding that political gerrymandering is nonjusticiable as long as redistricting plan complies with the *Reynolds* mandate of equal representation); *WMCA, Inc. v. Lomenzo*, 382 U.S. 4, 5-6 (1965) (Harlan, J., concurring) (explicitly rejecting the argument that political gerrymandering may be subject to federal constitutional attack).

¹²⁰ 412 U.S. 735 (1973).

¹²¹ *Id.* at 736.

¹²² *Id.* at 738.

¹²³ *Id.* By maximizing the number of safe seats, both parties conversely minimized the number of competitive or swing seats. Commentators have criticized the diminishment of swing seats as fostering "increased rigidity in decisionmaking and insensitivity to changing public opinion on the part of seemingly unbeatable legislators." Backstrom, Robins & Eller, *supra* note 1, at 1130 n.31 (citing Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234 (1972); Lebedoff, *The Essential Reform*, HARPER'S, Oct. 1976, at 16-19; Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in

rymander."¹²⁴ "I'll scratch your back if you'll scratch mine." But in sustaining the plan, the *Gaffney* Court recognized the inherent context of the redistricting process: "Politics and political considerations are inseparable from districting and apportionment."¹²⁵ The Court flatly rejected suggestions¹²⁶ that those who redistrict should ignore political data because such an approach might produce "the most grossly gerrymandered results."¹²⁷

The tension in *Reynolds* manifests itself in *Gaffney*. Read narrowly, *Gaffney* stands not only for the proposition that political gerrymandering is justiciable but also for the proposition that "whatever harms political gerrymandering may sometimes occasion should be tolerated as inextricably associated with the legislative business of redistricting."¹²⁸ In other words, the majority's decisions prevail.¹²⁹ If read in light of a broad interpretation of the *Reynolds* "equally effective

REAPPORTIONMENT IN THE 1970s 249 (N. Polsby ed. 1971); Tuft, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540, 549-53 (1973); see also Comment, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. CHI. L. REV. 398, 401 (1974) (maintaining that "legislatures should be apportioned so as to minimize the extent to which any representative is able to rely solely on a single interest group"). But see *infra* note 319 and accompanying text (noting the values of stability and experience in legislator-constituent relations).

¹²⁴ See *Davis*, 106 S. Ct. at 2821-22 (O'Connor, J., concurring in the judgment) (citing *Gaffney* as a constitutionally permissible bipartisan gerrymander).

¹²⁵ *Gaffney*, 412 U.S. at 753.

¹²⁶ See, e.g., *Congressional Anti-Gerrymandering Act of 1979: Hearings on S. 596 Before the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 37 (1979) (statement of David Cohen, President, Common Cause) (testifying as to the distortions that have resulted in the past from politically influenced redistricting plans); B. CAIN, *supra* note 84, at 2-4 (outlining proposals to reform redistricting and commenting on the danger of treating redistricting as a political question); COMMON CAUSE, *TOWARD A SYSTEM OF FAIR AND EFFECTIVE REPRESENTATION* 40-79 (1977) (offering a model state constitutional amendment and act prohibiting the use of political data in redistricting); Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation"*, 14 HARV. J. ON LEGIS. 825, 864-904 (1977) (offering a model state constitutional amendment and act prohibiting the use of political data in redistricting). It is beyond the scope of this Comment to discuss the appropriateness of redistricting by "nonpartisan" commissions. But see B. CAIN, *supra* note 84, at 189 ("[T]he public should protect its own interests . . ."); J. LOCKE, *OF CIVIL GOVERNMENT*, SECOND TREATISE § 141 (Gateway Editions, Ltd. ed. 1955) (1689) ("The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others."); Dixon, *supra* note 1, at 245 ("Nonpartisan politics is a contradiction in terms."); Grofman, *supra* note 93, at 124 (redistricting "involves the need to reconcile multiple and conflicting desirable social goals").

¹²⁷ *Gaffney*, 412 U.S. at 753, quoted in *Davis*, 106 S. Ct. at 2808.

¹²⁸ *Davis*, 106 S. Ct. at 2821 (O'Connor, J., concurring in the judgment).

¹²⁹ But cf. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736-37 (1964) (overturning Colorado reapportionment plan approved by statewide referendum).

voice,"¹³⁰ however, *Gaffney* would intimate that proportional representation is constitutionally mandated.¹³¹

A more recent decision that propelled the Court towards its holding in *Davis* was *Karcher v. Daggett*.¹³² In *Karcher*, the Court invalidated, on "one person, one-vote" grounds, a New Jersey congressional redistricting plan in which the variance in population from the largest to the smallest district was 0.6984%.¹³³ The *Karcher* Court rejected the defense that the variance was de minimis. "If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?" asked Justice Brennan.¹³⁴ Justice Stevens, concurring, asserted that the New Jersey plan was also political gerrymandering. Justice Stevens argued that racial and political gerrymandering were indistinguishable since the same equal protection clause applied to both;¹³⁵ he then presented criteria that a plaintiff must show in order to establish a prima facie case of political gerrymandering.¹³⁶ If a plaintiff met those criteria, Justice Stevens would then shift the burden to the state to defend the plan.¹³⁷ Justice White dissented from Justice Brennan's majority, calling the mathematical inequality "a trifling."¹³⁸ Justice White noted, however, that "a far greater potential threat to equality of representation [was] the gerrymander."¹³⁹ Finally, Justice Powell dissented but

¹³⁰ *Reynolds*, 377 U.S. at 565.

¹³¹ See *Gaffney*, 412 U.S. at 752-53; cf. Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 23 (arguing that in *Gaffney* the Court permitted proportional representation but did not mandate it); Note, *supra* note 106, at 169 & n.35 (noting that in *Gaffney* the Court specifically approved a proportional representation plan).

¹³² 462 U.S. 725 (1983); see also Note, *supra* note 106, at 170 n.37 (analyzing each Justice's opinion in terms of the problems of gerrymandering).

¹³³ See *Karcher*, 462 U.S. at 728, 740-42; see also Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J.L. & POL. 357, 360-62 (1983) (summarizing the *Karcher* litigation).

¹³⁴ *Karcher*, 462 U.S. at 732.

¹³⁵ See *id.* at 749-50 (Stevens, J., concurring); see also *Cousins I*, 466 F.2d at 850 ("[T]he Equal Protection Clause protects 'voting rights and political groups . . . as well as economic units, racial communities, and other entities.'" (quoting *Williams v. Rhodes*, 393 U.S. 23, 39 (1968) (Douglas, J., concurring))); Weinstein, *supra* note 133, at 363 ("Justice Stevens had no doubt that equal protection principles apply to partisan gerrymanders.").

¹³⁶ See *Karcher*, 462 U.S. at 750-61 (Stevens, J., concurring).

¹³⁷ *Id.* at 760-61 (Stevens, J., concurring).

¹³⁸ See *id.* at 766 (White, J., dissenting).

¹³⁹ *Id.* at 776 (White, J., dissenting) (quoting *Wells v. Rockefeller*, 394 U.S. 542, 555 (1969) (White, J., dissenting)). Since *Karcher* precludes discrepancies in population among districts in congressional seats and requires meaningful justification in state legislative redistricting, gerrymandering "is the main tool available to legislatures that seek to use the redistricting process to advantage one political group over another." Weinstein, *supra* note 133, at 358; see also Baker, *supra* note 44, at 270-71 (concluding that the gerrymanders of 1970 and 1980 were more elaborate than previous years because of the need to construct districts of equal population). See generally P. MUS-

expressed his concern that gerrymandering is "profoundly destructive of the apportionment goal of 'fair and effective representation.'" ¹⁴⁰

II. *DAVIS V. BANDEMER*: THE DECISION

Six members of the *Davis* Court took the next logical step from the "equally effective vote" language in *Reynolds v. Sims*¹⁴¹ and held that redistricting presented a justiciable question. A constitutional requirement of proportional representation, the logical endpoint of this progression, is not, however, consistent with pluralism and republicanism.¹⁴² Thus the six Justices split into two camps, one led by Justice White, the other by Justice Powell, as how best to employ equal protection standards in an attempt to brake the slide towards proportional representation. Part A of this section analyzes the justiciability holding and demonstrates that both Justice White's majority opinion and Justice O'Connor's dissent are consistent with constitutional theories of republicanism and pluralism; their disagreement is merely one of degree, not of kind. Part B then looks at the competing equal protection standards that Justices White and Powell present.

A. *Justiciability*

Taking the next logical step from the "equally effective" language in *Reynolds*, six members of the Court in *Davis* held that redistricting presented a justiciable question. Justice White began his opinion for the majority by summarizing the Court's expansion of judicial review from *Baker* to *Reynolds*, the racial gerrymandering cases, and the bipartisan political gerrymandering case, *Gaffney*.¹⁴³ Justice White then dismissed the post-*Baker* summary treatments of political gerrymandering cases as not controlling.¹⁴⁴ Justice White reviewed the political question doctrine enunciated in *Baker* and held that it did not bar adjudication of Bandemer's claim.¹⁴⁵ In particular, Justice White rejected the argument that the inability to develop a clear standard precluded

GROVE, *supra* note 6, at 51-52 (collecting literature on the impact of the requirement of mathematical equality on political gerrymandering).

¹⁴⁰ *Karcher*, 462 U.S. at 787 (Powell, J., dissenting).

¹⁴¹ 377 U.S. 533, 565 (1964).

¹⁴² Yet another objection beyond the scope of this Comment is that proportional representation cannot result from plurality-based districts. See Grofman, *supra* note 93, at 158-59 ("This statistical fact cannot be changed by court fiat.").

¹⁴³ See *Davis*, 106 S. Ct. at 2803-04.

¹⁴⁴ *Id.* at 2804.

¹⁴⁵ See *id.* at 2804-06.

justiciability.¹⁴⁶

Three members of the Court disagreed. Justice O'Connor, writing for Chief Justice Burger, Justice Rehnquist, and herself, strongly maintained that the majority's decision was inconsistent with the emergence of a stable two-party system and the Framers' intent.¹⁴⁷ First, the Court's equation of racial and political minorities was both erroneous¹⁴⁸ and an invitation to the members of every identifiable group to bring gerrymandering claims.¹⁴⁹ Second, the Framers never contemplated any group right to representation.¹⁵⁰ Third, numerical gerrymandering was distinguishable from political gerrymandering because no bright lines such as one person, one vote exist in the political context.¹⁵¹ Finally, the majority's reliance on *Gaffney* was misplaced; in *Gaffney* the Court had sustained the political gerrymandering.¹⁵²

In terms of constitutional theory, however, the disagreement between the wings of the Court appears to be more a matter of degree than of kind. Both the opinions of White and O'Connor are consistent with a model of "deliberative democracy" which combines elements of pluralism and republicanism.¹⁵³ Pluralism treats "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."¹⁵⁴

¹⁴⁶ See *id.* at 2805.

¹⁴⁷ See *id.* at 2817 (O'Connor, J., concurring in the judgment).

¹⁴⁸ See *id.* at 2819-21 (O'Connor, J., concurring in the judgment).

¹⁴⁹ See *id.* at 2818 (O'Connor, J., concurring in the judgment); cf. *supra* note 8 (noting the response to *Davis*).

¹⁵⁰ See *Davis*, 106 S. Ct. at 2818 (O'Connor, J., concurring in the judgment); cf. *Baker v. Carr*, 369 U.S. 186, 301 (1962) (Frankfurter, J., dissenting) (arguing that the Framers never contemplated the justiciability of malapportionment claims).

¹⁵¹ See *Davis*, 106 S. Ct. at 2818 (O'Connor, J., concurring in the judgment).

¹⁵² See *id.* at 2821-22 (O'Connor, J., concurring in the judgment).

¹⁵³ See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-49 (1985); see also J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 293-98 (1983) (describing the interplay between adversarial relations and the unifying tendencies of civic virtue in politics at the national level); Mansbridge, *Living with Conflict: Representation in the Theory of Adversary Democracy*, 92 ETHICS 466, 469 (1981) (noting that representation can combine unitary (republican) and adversary (pluralist) forms); cf. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 58-60 (1986) (criticizing Sunstein for consigning civic virtue to elected representatives and pluralism to the citizenry).

¹⁵⁴ Michelman, *supra* note 153, at 21; see also J. ELY, *supra* note 37, at 80 (defining pluralism as structuring government "so that a variety of voices would be guaranteed their say and no majority coalition could dominate"); Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 720 (1985) (describing pluralist politics as "myriad pressure groups, each typically representing a fraction of the population, bargain[ing] with one another for mutual support"); Bennett, *Reflections on the Role of Motivation under the Equal Protection Clause*, 79 NW. U.L. REV. 1009, 1012 (1984) (noting that from the pluralist perspective, trade-offs reconcile and advance the private

Madison's statement in *The Federalist Papers* is a classic example of pluralism: "Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."¹⁵⁵

In other words, society is composed of atomistic individuals, each of whom has a different set of multifaceted preferences.¹⁵⁶ The diversity of preferences varies directly with the size of the society.¹⁵⁷ As the society expands, factions, the bane of society,¹⁵⁸ are subsumed.¹⁵⁹ Moreover, the loser of one battle is likely to be the winner of another.¹⁶⁰ Hence politics is a series of ever changing coalitions, each varying with the issue.

The alternative conception that framed early discussion of the Constitution is republicanism. Republicanism is predicated on civic virtue, or the ability of citizens to set aside private interests in pursuit of

interests of organized groups); Sunstein, *supra* note 153, at 33-34 (describing various relations among pluralist factions).

¹⁵⁵ THE FEDERALIST NO. 51, at 358 (J. Madison) (B. Wright ed. 1961); *see also* THE FEDERALIST NO. 39, at 281 (J. Madison) (B. Wright ed. 1961) ("It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it").

¹⁵⁶ *See* Bennett, *supra* note 154, at 1022 ("No person has a single political identity."); *see also* THE FEDERALIST NO. 10, at 131 (J. Madison) (B. Wright ed. 1961) ("A zeal for different opinions concerning religion, concerning government, and many other points" is part of the nature of mankind . . .).

¹⁵⁷ As Madison wrote: "The smaller the society, the fewer probably will be the distinct parties and interests composing it . . . Extend the sphere, and you take in a greater variety of parties and interests." THE FEDERALIST NO. 10, *supra* note 156, at 135.

¹⁵⁸ *See id.* at 129 ("[t]he instability, injustice, and confusion introduced into the public councils [by factions], have, in truth, been the mortal diseases under which popular governments have everywhere perished").

¹⁵⁹ Compare THE FEDERALIST NO. 51, *supra* note 155, at 358 (in "more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated") with *id.* at 359 ("In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any principles other than those of justice and the general good . . . "). Madison maintained that the preferred method for government to protect minority factions was "by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable." *Id.* at 358; *see also* Hermens, *supra* note 115, at 17 (recounting the success of Madison's theory of government).

¹⁶⁰ *See* Bennett, *supra* note 154, at 1022 ("As the field of governmental activity has expanded, so has the likelihood that victims of factional politics on one issue will be beneficiaries on another."). *But cf.* Grofman, *For Single-Member Districts Random is Not Equal*, in REPRESENTATION AND REDISTRICTING ISSUES, *supra* note 84, at 55 (recognizing that in a winner-take-all, first-past-the-post majoritarian system of government, minorities are underrepresented).

the commonweal.¹⁶¹ As Hamilton wrote in *The Federalist Papers*:

When occasions present themselves, in which the interests of people are at variance with their inclinations, it is the duty of the person whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.¹⁶²

Unlike pluralism, wherein preferences are exogenous to the political process, republicanism makes preferences endogenous.¹⁶³ Political participation is not relegated to the casting of ballots in the marketplace of interests; rather it is highly deliberative.¹⁶⁴ Moreover, unlike pluralism, which relies on the market to prevent the tyranny of faction, education and prevailing morality are the principal defenses of republicanism.¹⁶⁵ Whereas pluralism links the expansion of society to the reduced capac-

¹⁶¹ See J. ROUSSEAU, *THE SOCIAL CONTRACT* 19-22 (R. Harrington trans. 1893). Rousseau indicates that the perfect social compact involves:

the total alienation of each associate with all his rights to the entire community

. . . [T]he alienation being without reserve, the union is as complete as it can be, and no associate has anything to claim: for, if some rights remained to individuals . . . each being in some points his own judge, would soon profess to be so in everything; . . . the association would necessarily become tyrannical and useless.

Id. at 21; see also Michelman, *supra* note 153, at 18 ("Republicanism's 'animating principle' is said to be civic virtue."); *id.* at 58 ("Civic virtue can be understood as a certain combination of motivation and ability: the motivation to deal with public questions by sincere engagement in deliberative colloquy aimed at discernment of the general good, and the ability to do it well").

¹⁶² *THE FEDERALIST* NO. 71, at 459 (A. Hamilton) (B. Wright ed. 1961).

¹⁶³ See Sunstein, *supra* note 153, at 31; Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1691 (1984).

¹⁶⁴ See J. ROUSSEAU, *supra* note 161, at 158 ("As long as men united together look upon themselves as a single body, they have but one will relating to the common preservation and general welfare."); see also Michelman, *supra* note 153, at 19 ("[R]epublicanism favors a highly participatory form of politics, involving citizens directly in dialogue and discussion"); Sunstein, *supra* note 153, at 31 ("through discussion people can . . . escape private interests and engage in pursuit of the public good"). See generally G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 5-7 (1986) [hereinafter *CONSTITUTIONAL LAW*] (summarizing the argument underlying republicanism).

¹⁶⁵ See J. ROUSSEAU, *supra* note 161, at 57 ("the public must be taught to know what it wants"); *id.* at 59 ("He who ventures to undertake to give institutions to a people, should feel himself in [a] condition to . . . transform the individual"); *id.* at 65 ("the wise lawgiver will not begin by making good laws, but he will first see whether the people for whom they are destined is [sic] ready to bear them."); Sunstein, *supra* note 153, at 32 ("instill principles of virtue in the hope of ensuring that the spirit of faction will not develop"); see also Michelman, *supra* note 153, at 18-19 ("Cultivation of this public spirit is 'government's first task'" (citing *CONSTITUTIONAL LAW*, *supra* note 164, at 5))).

ity of factions to combine against the public interest, republicanism minimizes the size of society in order to maximize civic virtue.¹⁶⁶

Professor Sunstein has developed a spectrum he labels "deliberative democracy," which reconciles the differences between these competing constitutional theories.¹⁶⁷ At the republican extreme lies a Congress that deliberates important issues in the interest of society as a whole.¹⁶⁸ At the other end, the pluralist extreme likens congressional lawmaking to the operation of a marketplace.¹⁶⁹ Although Professor Sunstein declines to suggest where any particular issue falls along this spectrum,¹⁷⁰ his model provides an informative framework for analyzing the White

¹⁶⁶ See J. ROUSSEAU, *supra* note 161, at 68-72. As Rousseau observed:

Nature has fixed a limit to the stature of a well-formed man, and when this limit is passed there are only giants and dwarfs; it is the same with regard to the best constitution of a state. . . . There is in every political body a *maximum* of force which it cannot pass, and from which it often recedes after having enlarged itself too much. The farther the social cord is stretched, the more relaxed it becomes; and in general a small state is proportionately stronger than a large one.

Id. at 68-69; *cf.* Michelman, *supra* note 153, at 19 (An expanded national sphere "would lack the spiritual and material homogeneity . . . required to support and reward unselfish devotion to the common good" and would deprive citizens of the "deliberation and debate which 'inculcate[s] civic virtue.'" (citing CONSTITUTIONAL LAW, *supra* note 164, at 5)).

Of course, Rousseau qualified his argument regarding size by recognizing the state's need to protect itself:

On the other hand the state should give itself a certain basis for the sake of solidity, to resist the shocks which it will not fail to experience The weak risk being soon swallowed up; and none can be preserved except by placing themselves in equilibrium with the others, which equalizes the pressure.

J. ROUSSEAU, *supra* note 161, at 71.

The ideal model of republicanism is the town meeting. Sunstein, *supra* note 153, at 31; *see also* J. MANSBRIDGE, *supra* note 153, at 39-138 (using a town meeting as a paradigm for studying the relationship between adversary (pluralist) and unitary (republican) politics). As to the apportionment that may be necessary in larger groups, Rousseau viewed it as a necessary evil. "People the territory equally, extend everywhere the same rights, carry everywhere abundance and life Remember that the walls of cities are formed from the ruins of country dwellings. For each palace that I see erected in the capital, I seem to see a whole country in ruins." J. ROUSSEAU, *supra* note 161, at 141; *see also* de Grazia, *General Theory of Apportionment*, 17 LAW & CONTEMP. PROBS. 256, 256 (1952) (citing Rousseau's view that apportionment is a necessary evil).

¹⁶⁷ See Sunstein, *supra* note 153, at 45-48; *see also* Lucas, *supra* note 46, at 766 (noting the representative and deliberative nature of assemblies); Pennock, *Political Representation: An Overview*, in NOMOS X: REPRESENTATION, *supra* note 96, at 14-21 (discussing the distinction between representation by "delegates" and by "trustees," the latter having greater discretion to make choices in the interest of their constituency); *cf.* Michelman, *supra* note 153, at 55 (analyzing Sunstein's model).

¹⁶⁸ See Sunstein, *supra* note 153, at 45-48.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

and O'Connor opinions in *Davis v. Bandemer*.¹⁷¹

Justice White's view that political gerrymandering is justiciable falls closer to the pluralist pole. One explanation of Justice White's position is that groups that are victimized by political gerrymandering are excluded from the political process; the Court is merely intervening to mitigate exclusion, that is, to rectify this political market failure.¹⁷² A second explanation places the right to an equally effective vote within a "shield of 'rights'—spheres of individual autonomy into which government [via political gerrymandering] may not enter."¹⁷³ A third, more persuasive rationale precludes redistricting with the purpose of disparaging any person or group.¹⁷⁴ Each rationale places Justice White at the pluralist end of Sunstein's spectrum.

Placing Justice O'Connor's opinion on the spectrum is more problematic. One interpretation, consistent with her complaint that Justice White provides no manageable standards,¹⁷⁵ is that "[p]olitics consists of uninhibited interest-group struggle in the expectation that the struggle will promote social welfare better than any alternative system."¹⁷⁶ This nears the pluralist pole; political gerrymandering is merely the legislative market at work. Other language in Justice O'Connor's opinion, however, suggests a more republican interpretation of political gerrymandering.¹⁷⁷ For example, she argued that "the opportunity to con-

¹⁷¹ 106 S. Ct. 2797 (1986).

¹⁷² See *id.* at 2803; see also Ackerman, *supra* note 154, at 715 n.4 (arguing that the Court's concern should be about the capacity of a group to effectuate *substantive* political outcomes); Sunstein, *supra* note 153, at 34 (discussing the conception of minority groups articulated by the Court in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)); cf. Karst, *supra* note 8, at 347 (discussing continuing problems in the dilution of minority votes); Note, *Rule of Law*, *supra* note 37, at 574 ("Certain factions within the states had gained and maintained a stranglehold on state governments by effectively excluding other factions from equal participation in state politics" (footnote omitted)).

¹⁷³ Sunstein, *supra* note 153, at 33.

¹⁷⁴ See Baker, *supra* note 108, at 1079; Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 972-84 (1983); cf. Neal, *supra* note 50, at 274 (injury in numerical gerrymandering cases is to a group (e.g. urban versus suburban interests), whereas injury in racial gerrymandering is a personal injustice).

¹⁷⁵ See *Davis*, 106 S. Ct. at 2822 (O'Connor, J., concurring in the judgment).

¹⁷⁶ Sunstein, *supra* note 153, at 33.

¹⁷⁷ In the numerical gerrymandering case, *Brown v. Thomson*, 462 U.S. 835 (1983), Justice O'Connor provided the key vote in sustaining a Wyoming redistricting plan that guaranteed a representative for every county but allowed an 89% deviation from population equality. *Id.* at 848 (O'Connor, J., concurring in the judgment). On the same day the Court decided *Brown*, however, Justice O'Connor provided a key vote in *Karcher v. Daggett*, 462 U.S. 725 (1983). Professor Sherry argues that:

Both votes are consistent with classical republican ideals. In *Karcher*, O'Connor voted to uphold the principle of "one person, one vote," thus preserving to each citizen an undiluted voice in the electoral process. In

trol the drawing of electoral boundaries . . . plays no small role in fostering active participation in the political parties at every level."¹⁷⁸ Redistricting is thus a means to a consensually agreed upon end of encouraging political participation.¹⁷⁹ The more this end is the product of

Brown, however, that republican principle collided with another classical ideal. O'Connor's reliance on the importance of preserving county boundaries, a justification rejected by the liberal dissenters, echoes a theme . . . : the notion of the community itself as an independent entity with interests to be protected. O'Connor was willing to protect individuals' access to community membership and participation only to the point at which it conflicted with ensuring the viability of a certain type of community. The priority of the community's interests, at the cost of diminishing the value of membership for some of its members, recalls the republican demand that individuals subordinate their selfish desires for the needs of the collective. O'Connor's emphasis on the fact that the additional deviation in this case was quite small suggests both a limit to the sacrifices that communities may demand of their members and a feminine tendency to examine apportionment questions in context rather than in the abstract.

Sherry, *supra* note 104, at 598 (footnotes omitted).

¹⁷⁸ *Davis*, 106 S. Ct. at 2817; see also Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 42-43 (1962) (offering an example of gerrymandering fostering political parties in which the governor and a majority of voters are of one party but the state legislature is controlled by the other). But see *Davis v. Mann*, 377 U.S. 678, 692 (1964) (rejecting the balancing of urban and rural power as a grounds for upholding districts of unequal population); Comment, *supra* note 1, at 999 ("to preserve the two party system by guaranteeing a single party control of a legislative house is to destroy the purpose of that system").

In a pure republican polity, redistricting is an irrelevant concern because civic virtue, not parochialism, motivates legislators. Cf. *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 & n.24 (1977) (finding that Hasidic Jews drawn into minority-dominated districts still would be represented by Hasidic Jews in nonminority districts, thus implying those Hasidic Jews in minority-dominated districts should rely on virtual, not actual, representation); Black, *supra* note 96, at 140-41 (maintaining that a system of virtual representation currently exists in the United States, given that legislators represent both those who supported their opponents and those who did not vote, as well as their own supporters); Neal, *supra* note 50, at 279 ("representatives from 'rural' districts also serve as spokesmen for some voters in 'urban' districts"); Rogowski, *supra* note 36, at 424-25 ("a bloc vote is usually more powerful as a strong minority in many constituencies than as a majority in only a few"). But see R. HANSON, *supra* note 32, at 7 (noting the vehement criticism of the colonists of the system of virtual representation before the revolution); Michelman, *supra* note 153, at 51-54 (analyzing the colonists' critique of the British virtual representation system); Comment, *supra* note 1, at 991 n.113 (same, noting the grievances catalogued in the Declaration of Independence).

¹⁷⁹ See Duverger, *supra* note 115, at 36-38 (explaining why majority rule is preferable to proportional representation); Hermens, *supra* note 115, at 19-23 (arguing that proportional representation promotes instability); see also Bickel, *supra* note 178, at 41 (citing the Weimar and French Fourth Republics as examples of the deleterious effects of proportional representation); Kirkpatrick, *Democratic Elections, Democratic Government and Democratic Theory*, in *DEMOCRACY AT THE POLLS* 325, 340 (1981) (tying the collapse of the Weimar Republic to its excessive reliance on proportional representation at the expense of other values such as stability and majoritarianism). But see Hallett, *supra* note 115, at 119-24 (claiming that proportional representation enhances minority participation); Lakeman, *supra* note 115, at 47-49 (arguing that pro-

a "unitary" state of common interests, the less it requires political equality."¹⁸⁰

While both the White and O'Connor opinions may be discussed in terms of Professor Sunstein's deliberative democracy model, a constitutional requirement of the equally effective vote—proportional representation—cannot be placed on the spectrum. A constitutional requirement of proportional representation, essentially the reification of particular factions, is contrary to the pluralist model. Likewise, a constitutional requirement of proportional representation is inconsistent with the republican model because it suggests that something other than civic virtue motivates legislative decisionmaking.¹⁸¹

The inconsistency between requiring proportional representation and the Constitution can be demonstrated more directly. A "better" form of proportional representation would not stop with redistricting, but would instead require that each member of Congress have an equally effective vote in representing the effective votes of her constituents. To make that vote effective, the member would be entitled to "win" a proportionate number of votes in Congress.¹⁸² Certainly no one suggests that the Constitution requires such an outcome.

Finally, an expansive notion of an effective vote also clashes with

portional representation minimizes adversarial politics); Note, *supra* note 106, at 175-82 (arguing that the Constitution mandates proportional representation). For the importance of participation, see Baker, *supra* note 174, at 960-63 (outlining the political participation principle of the equality of respect model of equal protection). See generally B. CAIN, *supra* note 84, at 2 (arguing that political gerrymandering reduces participation); Lawson, *Challenging Regulation of Political Parties: The California Case*, 2 J.L. & POL. 263, 263-65 (1985) (noting the role of political parties in promoting participation); Powell, *Voting Turnout in Thirty Democracies: Partisan, Legal, and Socio-Economic Influences*, in *CONTROVERSIES IN VOTING BEHAVIOR* 34, 39-40 (R. Niemi & H. Weisberg eds. 2d ed. 1984) (presenting empirical data documenting that proportional representation encourages participation).

¹⁸⁰ Mansbridge, *supra* note 153, at 469; see also Moeller, *supra* note 70, at 212-13 (claiming that the Court is a political actor yet has refused to be accommodating in redistricting). But see Backstrom, Robins & Eller, *supra* note 1, at 1122 n.9 ("partisan gerrymandering is a major concern . . . in a system dominated by party politics").

¹⁸¹ Cf. Bennett, *supra* note 154, at 1020 ("[E]ven the most effective statesmanship provide[s] insufficient protection for the politically weak."). Both Bennett and this Comment recognize the tension between Sunstein's model and the "equally effective vote" guaranteed in *Reynolds*. Unlike Bennett, however, this Comment challenges whether the Constitution literally guarantees an "equally effective vote."

¹⁸² See Grofman & Scarow, *The Riddle of Apportionment: Equality of What?*, 70 NAT'L CIVIC REV. 242, 247-48 (1981) (examining the argument for "effective" representation); Lowenstein, *supra* note 5, at 12 (asking "[a]m I deprived of equal protection if my state legislator is a drunkard, has a high absentee rate, rarely authors bills that are enacted, and is generally regarded as ineffective?"); cf. Kilgarlin v. Hill, 386 U.S. 120, 126 (1967) (Douglas, J., concurring) (allowing each person in a multimember district to vote for only one legislator ensures that "a minority, either political or otherwise, would have a chance to elect at least one representative").

other decisions by the Court that deny the existence of other "effective" constitutional rights. For example, the Constitution protects speech but it does not guarantee effective speech.¹⁸³ Logically, the Constitution recognizes the right to an equal vote, but not the right to an equally effective vote.¹⁸⁴

Thus a requirement of proportional representation cannot be rec-

¹⁸³ See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (invalidating state law requiring newspapers to publish political candidates' responses to editorials); see also Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 985-90 (1978) (rejecting the market failure interpretation of first amendment doctrine); cf. *United States v. Saylor*, 322 U.S. 385, 389 (1944) (stuffing of ballot boxes infringes upon right to have valid ballots accurately counted); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (requiring that all valid ballots cast be counted).

This analogy to speech can be extended. Districting is a permissible time, place, and manner regulation of voting. See, e.g., CAL. ELEC. CODE § 17 (West 1977) (defining elector in terms of United States citizenship, age, place of residence, and length of residence); N.Y. ELEC. LAW § 5-102 (McKinney 1978) (same); R.I. GEN. LAWS § 17-1-3 (1986 Supp.) (same); see also U.S. CONST. amend. XIV, § 5 (authorizing state legislatures to prescribe the "times, places and manner of holding elections for senators and representatives"). "The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . ." *Tashjian v. Republican Party*, 107 S. Ct. 544, 550 (1986) (Connecticut closed primary statute limiting primary vote to registered party members impermissibly interfered with the party's right to extend the vote to independent voters). Hence, political gerrymandering may simply be viewed as an invalid time, place, and manner regulation. See *Leading Cases*, *supra* note 5, at 159 n.44 (noting that several of the amici in *Davis* made such an argument, which the Court declined to address); cf. Lowenstein, *supra* note 5, at 15 (arguing that *Davis* is not a "fundamental rights" case).

¹⁸⁴ See Shapiro, *supra* note 69, at 232 (pointing out the contradiction in *Reynolds*). Compare *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) ("[E]ffective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature.") with *id.* at 579 ("the overriding objective must be substantial equality of population among the various districts"). Lowenstein and Steinberg interpret the "equally effective vote" language in *Reynolds* to mean the marginal voter whose sole vote determines the outcome of the election. Since very few congressional and state legislative elections are decided by a single vote, Lowenstein and Steinberg suggest that the probability of the marginal voter playing a decisive role is akin to the risk of being "run over by a truck on the way to the polling place." Lowenstein & Steinberg, *supra* note 104, at 14 n.38. Of course, their argument withers empirically in the face of the relatively small populations of state legislative districts in states such as Rhode Island, New Hampshire, and Delaware. Their argument also is flawed logically because it mistakenly assumes that an individual votes in a vacuum. Any observer of politics should recognize that a highly competitive election draws a higher voter turnout than a noncompetitive contest; each voter thinks she could be the marginal voter. Cf. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 750 n.12 (1964) (Stewart, J., dissenting) ("electoral systems are intended to serve functions other than satisfying mathematical theories"); Dexter, *supra* note 104, at 158-66 (recognizing communication areas; culture and social groups; interests, traditions, legislative efficiency and efficacy; and social invention as other redistricting criteria); Still, *supra* note 93, at 382-83 (positing that one requirement of political equality is anonymity).

onciled with the deliberative democracy understanding of the Constitution. Yet six members of the Court in *Davis* inched down the *Reynolds* slippery slope toward proportional representation. Conscious of this tension, the six justices produced two divergent sets of equal protection standards in an attempt to brake the slide.

B. *Equal Protection Standards*

Justice White characterized an equal protection claim based on political gerrymandering as comprised of two components: (1) "intentional discrimination against an identifiable political group" and (2) "an actual discriminatory effect on that group."¹⁸⁵ By neglecting to define "discriminatory effect," however, Justice White failed to explain why one is a necessary condition of an equal protection claim. Justice Powell, on the other hand, held that an invidious intent to discriminate alone could be sufficient to invalidate a redistricting scheme.¹⁸⁶

Both opinions reject a political process explanation for redistricting¹⁸⁷ because implicit in each opinion is a recognition that redistricting is not a value-neutral process that can be remedied by mechanically rectifying the ability of discrete and insular groups to participate. Rather, both opinions comport with an equality of respect model of equal protection. As presented by Professor Baker, the equality of respect model is based on three principles:

First, the state must recognize the fundamental nature of people's right to participate in a political process that chooses and attempts to implement the group's conception of the good society—a political participation principle. Second, the state must not pursue purposes, and the political process must not further individuals' preferences, to subordinate or to denigrate the inherent worth of any category of citizens. Third, the state must guarantee to everyone those resources and opportunities that the existing community treats as necessary for full life and participation in that community.¹⁸⁸

¹⁸⁵ *Davis*, 106 S. Ct. at 2808.

¹⁸⁶ See *Davis*, 106 S. Ct. at 2832 n.12 (Powell, J., concurring and dissenting) ("[P]roof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering.").

¹⁸⁷ Cf. J. ELY, *supra* note 37, at 77 ("[E]qual participation in the processes of government is by no means self-evidently linked to . . . equal participation in the benefits and costs that process generates."). For a critique of the political process approach, see Baker, *supra* note 108, at 1041-70; Regan, *Community and Justice in Constitutional Theory*, 1985 WIS. L. REV. 1073, 1108-23.

¹⁸⁸ Baker, *supra* note 174, at 959. But see Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J.

In the voting context the equality of respect model emphasizes an objective analysis of "how the state treats the person's act, the person's vote."¹⁸⁹ Thus, Section B of this Part analyzes the opinions of both Justices White and Powell and concludes that Justice Powell's opinion is preferable because it is articulated more clearly and relies more heavily, although not completely, on an objective approach.

1. Justice White's Opinion

a. *Assuming Discriminatory Intent*

Not every disparate impact is the product of an invidious intent to discriminate.¹⁹⁰ Consequently, the plaintiff in an equal protection action must show evidence of an invidious intent.¹⁹¹ Redistricting presents

89, 102 (1984) (arguing that "[t]he theoretical basis for [Baker's model] casts us adrift from the Constitution . . . insofar as it leaves us neither with answers nor with any justifiable way of approaching the questions").

¹⁸⁹ Baker, *supra* note 108, at 1079.

¹⁹⁰ See, e.g., *Wayte v. United States*, 470 U.S. 598, 609-10 (1985) (sustaining the prosecution of active objector to draft registration absent proof of an invidious intent to violate first amendment rights); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977) (sustaining a city zoning ordinance in the absence of proof of an invidious intent to discriminate on the basis of race); *Washington v. Davis*, 426 U.S. 229, 246 (1976) (sustaining a police department hiring policy in the absence of an invidious intent to discriminate on the basis of race).

An additional, yet important, question that is beyond the scope of this Comment is what constitutes "an identifiable group," see *Davis*, 106 S. Ct. at 2808, against whom there is purposeful discrimination. See *United States v. City of Los Angeles*, No. CV 85-7739 JMI (JR), slip op. at 2 (C.D. Cal. Sept. 10, 1986) (refusing to allow homeowners' group to intervene in a redistricting suit); see also Lowenstein, *supra* note 5, at 10-11 (asking whether "Democratic voters" means those who voted for Democrats in a particular election, those who vote for Democrats generally, those who called themselves Democrats, or those who formally register with election officials as Democrats).

¹⁹¹ See *Wayte*, 470 U.S. at 608; *Arlington Heights*, 429 U.S. at 265-68; *Washington*, 426 U.S. at 239-45; see also Baker, *supra* note 174, at 972-84 (demonstrating that the no subordinating purpose principle of the equality of respect model most coherently explains equal protection case law); Raveson, *Unmasking the Motives of Government Decisionmakers: A Subpoena For Your Thoughts?*, 63 N.C.L. REV. 879, 883-89 (1985) (arguing that the Court's reinvigoration of intent analysis amounts to a reassessment of the separation of powers doctrine); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1054 (1978) (when evaluating facially neutral enactments, the Court's evidentiary issue is "would the government have taken the same action apart from prejudice?"); Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 341-43 (1986) (criticizing the Court for substituting a rigid interpretation of intent in recent cases for the flexible standard adopted in *Arlington Heights* and *Washington*). But see *Palmer v. Thompson*, 403 U.S. 217, 223-24 (1971) (refusing to inquire into a city council's motives for closing city-owned swimming pools after a desegregation order); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (refusing to inquire into Congress's motives for amending the Selective Service Act to prohibit the knowing destruction of draft cards); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (stating that

a particularly peculiar problem for motivational analysis. Justice White aptly noted that there are no neutral lines for legislative districts: "[E]very line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place."¹⁹² Similarly, Justice White rejected the suggestion that those who redistrict eschew political data such as past voting patterns and party registration statistics:¹⁹³

[T]his politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.¹⁹⁴

Justice White recognized that voters of both political parties are neither uniformly distributed nor rigidly segregated in any state.¹⁹⁵ Recognizing a problem, however, is not the same as solving it by offering a workable standard. In *Davis*, Justice White appeared to presume a discriminatory intent: "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."¹⁹⁶ Yet Justice White qualified this assumption with a footnote stating that a plaintiff still must prove discriminatory intent.¹⁹⁷ What Justice White gave with one

the Court should approach with "much circumspection" an inquiry into the motives for repealing a land grant).

¹⁹² *Davis*, 106 S. Ct. at 2808 n.10 (quoting Dixon, *supra* note 84, at 7-8); see also Bennett, *supra* note 154, at 1010-11 (recognizing that any apportionment decision will affect minority groups in some way).

¹⁹³ See *supra* notes 126-27 and accompanying text.

¹⁹⁴ *Davis*, 106 S. Ct. at 2808 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). The district court in *Gaffney* actually tried to draft its own plan as an alternative to the one ultimately upheld by the Court. The special master, then-Professor Robert Bork, did not rely on political data. "His resultant plan, though it certainly was not his intent, was so favorable to the Democratic party that . . . he was specially congratulated by the state Democratic chairman . . ." Dixon, *supra* note 84, at 18-19; see also P. MUSGROVE, *supra* note 6, at 6 (explaining why results-driven gerrymandering would exist even if redistricting were somehow randomized, thus eliminating intent).

¹⁹⁵ If all voters were uniformly distributed across the state, the majority party would capture every district. See Lowenstein & Steinberg, *supra* note 104, at 6 & n.16. In contrast, if all voters were segregated by district according to party affiliation, each party would capture districts equal to its proportion in the population. See Still, *supra* note 93, at 384-85. Of course neither of these conditions exists in any state. But see Karst, *supra* note 8, at 346-51 (ethnic gerrymandering signifies legislative awareness of cultural politics and discernible patterns of ethnic voting). In practice, however, single-member districting has tended to benefit the majority party. See Backstrom, Robins & Eller, *supra* note 1, at 1134 n.43.

¹⁹⁶ *Davis*, 106 S. Ct. at 2809.

¹⁹⁷ See *id.* at 2809 n.11 ("That discriminatory intent may not be difficult to prove

hand, he took with the other.

b. *Ascertaining Actual Discriminatory Effect*

Justice White had little more success in trying to establish a discriminatory effect standard. Under his analysis, "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."¹⁹⁸ Justice White drew on the racial gerrymandering precedents and focused on the ability of a particular group to influence the political process.¹⁹⁹ But he set a high standard of proof, requiring the plaintiff to show a "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."²⁰⁰

Justice White's discriminatory effects standard is open to attack on two grounds. First, "consistent degradation," like the "equally effective" requirement in *Reynolds*, is another example of the Court trying to use one rule to accomplish two goals.²⁰¹ "Consistent degradation" has both a temporal and a spatial quality. In the temporal context, "consistent degradation" is particularly hard to prove because many states hold state legislative elections only two or three times during a decennium.²⁰² In the spatial context, "consistent degradation" is difficult to ascertain because it presumes that some unknown de minimis threshold exists below which a discriminatory effect is tolerable.²⁰³

Second, Justice White's focus on effects requires the Court "to describe the required outcomes or to identify principles with which one can determine required outcomes [and] to justify requiring these out-

in this context does not, of course, mean that it need not be proved at all to succeed on such a claim.").

¹⁹⁸ *Id.* at 2810.

¹⁹⁹ *See id.* at 2809-10.

²⁰⁰ *Id.* at 2811.

²⁰¹ Tinbergen's rule explains the particular problem with Justice White's standard: the number of policy variables must be at least equal to the number of policy ends. *See* J. TINBERGEN, *ON THE THEORY OF ECONOMIC POLICY* 39 (1952).

²⁰² *Compare Davis*, 106 S. Ct. at 2814 (rejecting the claim of plaintiff Indiana Democrats for lack of proof because proof was based on only one election) *with id.* at 2814 n.17 (suggesting future plaintiffs can make claims based on projected election results). Thirty-seven states have four-year terms for members of the upper chamber of their state legislatures. Nebraska has a four-year term for its unicameral, nonpartisan state legislature. Alabama, Louisiana, Maryland, and Mississippi have four-year terms for members of both houses of their state legislatures. *See THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES* 87 (1986).

²⁰³ *See Leading Cases*, *supra* note 5, at 161. In his discussion of the Israeli Knesset, Professor Levinson raises the counterpoise to Justice White's problem—in a system of proportional representation, at what level is a group entitled to representation? *See Levinson*, *supra* note 93, at 273-74.

comes.”²⁰⁴ But Justice White conceded that “there are no neutral lines for legislative districts . . . every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.”²⁰⁵ Justice White’s reliance on projected election results when no election has occurred to set the standard for comparing the redistricting scheme with the required outcome²⁰⁶ is disingenuous at best.

2. Justice Powell’s Opinion

In contrast, Justice Powell relied on a more contextual approach to invalidate the Indiana redistricting plan. Justice Powell’s approach was based on Justice Stevens’s concurrence in *Karcher v. Daggett*²⁰⁷ three years earlier. Not surprisingly, Justice Stevens concurred with Justice Powell in *Davis*. Unlike Justice White, Justice Powell indicated that showing a discriminatory effect was not a necessary condition of a political gerrymandering claim.²⁰⁸ An invidious intent was sufficient.

Justice Powell used compactness as a contextual standard to infer an invidious intent. First, a court should consider whether any districts are irregularly shaped.²⁰⁹ Irregularly shaped districts are potentially a sufficient condition for a claim of political gerrymandering.²¹⁰ Justice Powell cited the twenty-eight sided “dragon” in *Gomillion v. Lightfoot*²¹¹ and the “fishhook” and “swan” in *Karcher* as providing convincing proof of a political gerrymander without any other evidence.²¹² Justice Powell, however, failed to establish any standard by

²⁰⁴ Baker, *supra* note 174, at 935.

²⁰⁵ *Davis*, 106 S. Ct. at 2808 n.10 (quoting Dixon, *supra* note 84, at 7-8); see also P. MUSGROVE, *supra* note 6, at 6 (explaining why if gerrymandering is defined in terms of effects, even a randomly-generated redistricting plan is a gerrymander); Backstrom, *supra* note 101, at 46 (“Give a chimp in a zoo a crayon and a map, and the resulting plan will have differential effects on people.”).

²⁰⁶ See *Davis*, 106 S. Ct. at 2814 n.17; cf. Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 167 (1955) (questioning whether the guarantee of fundamental rights should “rise, fall, or change along with the latest fashions of psychological literature”). But see Hess, *supra* note 5, at 229 (advocating an “effects” test as distinguished from a results test (citing Backstrom, Robins & Eller, *supra* note 1, at 1131-39)).

²⁰⁷ 462 U.S. 725 (1983) (Stevens, J., concurring).

²⁰⁸ See *Davis*, 106 S. Ct. at 2831 n.10 (Powell, J., concurring and dissenting).

²⁰⁹ *Id.* at 2832 (Powell, J., concurring and dissenting).

²¹⁰ *Id.* at 2832 n.12 (Powell, J., concurring and dissenting); cf. *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985) (Powell, J.) (“A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification.”).

²¹¹ 364 U.S. 339 (1960).

²¹² See *Davis*, 106 S. Ct. at 2832 n.12 (Powell, J., concurring and dissenting) (citing the redistricting maps appended to *Gomillion*, 364 U.S. at 348, and *Karcher*,

which to determine if a district is "appropriately" shaped. Justice Powell's reliance on shape is troublesome because irregular shapes may have rational purposes unrelated to political gerrymandering.²¹³

The second compactness factor Powell considered is the adherence to established political subdivision boundaries.²¹⁴ Political gerrymandering entails the "splitting" of communities to maximize political control.²¹⁵ As Justice Powell noted, however, "[i]ntelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose."²¹⁶ Moreover, "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."²¹⁷ Maintaining the integrity of political subdivisions enables citizens to "focus their political activities."²¹⁸ On the other hand, focusing on the boundaries of political subdivisions is problematic in two ways. First, it is constitutionally problematic in light of *Reynolds* because "[l]egislators are elected by voters, not farms or cities or economic interests."²¹⁹ Second, the standard is politically problematic

462 U.S. at 744). Justice Powell also suggested that Indiana House District 66 in the *Davis* plan "perhaps most closely resembles a salamander." *Id.* at 2827 n.3 (Powell, J., concurring and dissenting); see also *id.* at 2840 (map of house district 66).

²¹³ See B. CAIN, *supra* note 84, at 50-51 (noting that compactness creates a bias in favor of the majority, thus implying that strangely-shaped districts may be rationally related to the goal of minority representation); P. MUSGROVE, *supra* note 6, at 52-54 (arguing that a compactness standard creates a bias towards the party that can best gerrymander while simultaneously drawing compact districts); see also Sickels, *supra* note 6, at 1300 ("strained shapes are not always reliable signs that partisan . . . interests are being served, while the most regularly drawn district may [have been intended] to aid one party"); cf. Dixon, *supra* note 1, at 249 (questioning what value contiguity of districts serves "[g]iven the realities of modern communication and of anomie with one's neighbors"); Lowenstein & Steinberg, *supra* note 104, at 22 (questioning what value compactness of districts serves with modern transportation and communication).

²¹⁴ See *Davis*, 106 S. Ct. at 2832 (Powell, J., concurring and dissenting).

²¹⁵ See, e.g., *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 934 (W.D. Mo.) (requiring for reapportionment that the state first approach population equality and then designate "compact and contiguous" districts), *aff'd sub nom.* *Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 714-15 (Tenn. 1982) (same).

²¹⁶ *Davis*, 106 S. Ct. at 2833-34 (Powell, J., concurring and dissenting). But see Lowenstein & Steinberg, *supra* note 104, at 23-35 (arguing that attempts to prohibit splitting are not politically neutral because they tend to advance the interests of the Republican party). Implicit in Lowenstein and Steinberg's argument is the reality of contemporary demographics. But see Shapiro, *supra* note 69, at 238 (noting Lowenstein and Steinberg's paradoxical view that "[o]nly an affirmative gerrymander in favor of the Democratic Party will result in ungerrymandered districts").

²¹⁷ *Reynolds*, 377 U.S. at 578-79.

²¹⁸ *Davis*, 106 S. Ct. at 2832 n.13 (Powell, J., concurring and dissenting).

²¹⁹ *Reynolds*, 377 U.S. at 562. But see *Brown v. Thompson*, 462 U.S. 835, 845-46 (1983) ("The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Pro-

because the representation of a political subdivision is enhanced when it is divided; that is, a community has two representatives rather than one.²²⁰

Justice Powell also held that the context in which a plan was adopted is relevant.²²¹ Consistent with the equality of respect model, rectification of procedural deficiencies is not sufficient to correct an otherwise purposeful political gerrymander.²²² If such rectification were sufficient, a legislature could cure an unconstitutional plan by adding a few public hearings or a few members of the subordinate party to the redistricting authority.²²³ Thus meaningful political participation is key.

Obviously, the opinions of Justices Powell and White are flawed. Justice Powell's opinion is preferable, however, because it is better articulated. First, by focusing on compactness and the existence of participation, Justice Powell's opinion is easier for lower courts to follow. Second and more importantly, Justice Powell's opinion explicitly recog-

tection Clause."); *Abate v. Mundt*, 403 U.S. 182, 185 (1971) (stating that "the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality").

²²⁰ See Lowenstein & Steinberg, *supra* note 104, at 27-35. But see Dexter, *supra* note 104, at 158-59 (splitting a community defeats its voters' senses of efficacy and competence); Niemi, Powell & Bicknell, *The Effects of Congruity Between Community and District on Salience of U.S. House Candidates*, 11 LEGIS. STUD. Q. 187, 193 (1986) (demonstrating empirically that the more a community is divided into districts, the less familiar or recognized a candidate becomes).

Justice Powell's proposal is also problematic because it assumes that political subdivisions are compact. But see Lowenstein & Steinberg, *supra* note 104, at 34 n.91 (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 n.18 (1973) ("[A]ny plan that attempts to follow Connecticut's 'oddly shaped' town lines . . . is bound to contain some irregularly shaped districts."); B. CAIN, *supra* note 84, at 46 (enumerating strangely shaped California cities that compete with "the most creative efforts of gerrymanderers over the years")); see also *Legislature v. Reinecke*, 10 Cal. 3d 396, 413, 516 P.2d 6, 17, 110 Cal. Rptr. 718, 729 (1973) (Appendix, Report and Recommendations of Special Masters on Reapportionment) ("Some cities have exceedingly irregular boundaries with an odd assortment of 'fingers' and 'peninsulas' jutting out from the basic part of the city.").

²²¹ See *Davis*, 106 S. Ct. at 2832-33 (Powell, J., concurring and dissenting). For example, in *Davis*, the reapportionment act was a "vehicle bill," the details of which were decided by a legislative Conference Committee which denied effective membership to the subordinate party. Four members of the subordinate party served as "advisors" to the committee. The "advisors" were excluded from the mapmaking process and were denied voting privileges. In drafting the actual plan, the Conference Committee relied on the computer technology of the dominant party's political organization. No member of the public or the subordinate party had access to either the computer program's input or output. The Conference Committee never held promised hearings for voters to air their concerns. Finally, when the bill was reported by the Conference Committee, the subordinate party had only 40 hours to review the districting of 4000 precincts. *Id.* at 2833 (Powell, J., concurring and dissenting).

²²² See Baker, *supra* note 174, at 978.

²²³ See *id.* A legislator would call such a hearing a dog and pony show.

nizes the primacy of invidious purpose in analyzing political gerrymandering claims, whereas Justice White's opinion minimizes the implications of such an inquiry. Indeed, Justice White's criticism of Justice Powell's decision is contradictory. According to Justice White, Justice Powell's factors "support a finding that an intention to discriminate was present and that districts were drawn in accordance with that intention, but they do not show any actual disadvantage beyond that shown by the election results" ²²⁴

III. HIDE AND SEEK: SPEECH OR DEBATE

"[T]he ubiquity of the tendency to see the world [in terms of reducing all collective wholes into their individual parts] may partially explain why most lawyers and legal theorists assume that the real concern in the motive/purpose inquiry must be with individual subjective motives" ²²⁵ Hence, not surprisingly, the opinions of Justices White and Powell in *Davis v. Bandemer* ²²⁶ and Justice Stevens in *Karcher v. Daggett* ²²⁷ all refer to the subjective motivations of legislators in developing redistricting plans. ²²⁸ This Section of this Comment explains why an attempt to analyze the subjective motivations of legislators is fraught with problems of proof.

Theoretically, an easy and obvious way to establish subjective intent is to discover clearly nonprivileged communications of state legislators. ²²⁹ For example, in *Karcher*, Justice Stevens made pointed use of a letter signed by the Speaker of the New Jersey House of Representatives. In that letter, the Speaker, a Democrat, tried to justify political gerrymandering on the ground that the New Jersey Republican Party had politically gerrymandered in the past. ²³⁰ In the 1990 redistricting

²²⁴ *Davis*, 106 S. Ct. at 2814.

²²⁵ Baker, *supra* note 173, at 974; *see, e.g.*, Raveson, *supra* note 191, at 883 (referring to the Court's increasing attention to the subjective intent of decisionmakers); Sunstein, *supra* note 153, at 79-81 (discussing methods for identifying and handling legislative and administrative motivations).

²²⁶ 106 S. Ct. 2797 (1986).

²²⁷ 462 U.S. 725 (1983).

²²⁸ *See Davis*, 106 S. Ct. at 2802 n.5; *id.* at 2834 (Powell, J., concurring and dissenting); *Karcher*, 462 U.S. at 763-64 (Stevens, J., concurring).

²²⁹ *See, e.g., Karcher*, 462 U.S. at 763-64 (Stevens, J., concurring) (letter from state legislator outlining purposes behind redistricting admitted as evidence); *In re Orans*, 45 Misc. 2d 616, 643-44, 257 N.Y.S.2d 839, 865 (N.Y. Sup. Ct.) (letter from a state legislator may be used as an admission against interest), *aff'd*, 15 N.Y.2d 339, 206 N.E.2d 854, 258 N.Y.S.2d 825, *appeal dismissed*, 382 U.S. 10 (1965); *see also* Raveson, *supra* note 191, at 946 n.412 (discussing the scope and ramifications of different discovery tools).

²³⁰ *See Karcher*, 462 U.S. at 763-64 (Stevens, J., concurring). The district court reproduced the letter in its entirety. *See Daggett v. Kimmelman*, 535 F. Supp. 978,

cycle, however, legislators will not leave such an obviously incriminatory paper trail.²³¹ With the advent of the justiciability of political gerrymandering, legislative candor, such as that seen in *Karcher*, will disappear.²³²

A second way to establish subjective intent is to depose legislators. If plaintiffs rely on depositions, however, legislators may make use of the speech or debate clauses of state constitutions to avoid testifying.²³³ This immunity appears in most state constitutions²³⁴ and is usually modeled after the analogous federal constitutional provision for Congress.²³⁵ The purpose of the immunity is not to protect any particular kind of speech but generally to insulate legislators from intimidation by co-equal branches of government, a separation of powers argument, and to prevent time-consuming distraction.²³⁶ This reliance on both purposes, however, is debatable because the immunity to suit does not protect all lawmaker conduct.²³⁷

989-93 (D.N.J. 1982). See generally Weinstein, *supra* note 133, at 358-59 (explaining the context in which *Karcher* arose).

²³¹ Cf. *City of Mobile v. Bolden*, 446 U.S. 55, 135 (1980) (Marshall, J., dissenting) (warning that legislators may still adopt discriminatory policies if they are able to "mask their motives through the use of subtlety and illusion").

²³² See Baker, *supra* note 31, at 14; Hess, *supra* note 5, at 239; Raveson, *supra* note 191, at 926 & n.312. But see Weinstein, *supra* note 133, at 374 (arguing that redistricting is an inherently public enterprise, thus making proof of intent "readily available in many cases").

²³³ See *Holmes v. Farmer*, 475 A.2d 976, 983 (R.I. 1984) (legislators and aides relying on privilege). But see *Bush v. Martin*, 251 F. Supp. 484, 495 n.40 (S.D. Tex. 1966) (legislators and aides not relying on privilege).

²³⁴ See, e.g., COLO. CONST. art. V, § 16; N.Y. CONST. art. III, § 11; R.I. CONST. art. IV, § 5.

²³⁵ See U.S. CONST. art. I, § 6 ("[F]or any Speech or Debate in either House [the Senators and Representatives] shall not be questioned in any other Place."); see also Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 *SUFFOLK U.L. REV.* 1, 2-3 (1968) (noting that the language of the legislative privilege in some state constitutional provisions is actually more liberal than the language in the analogous federal provision); Raveson, *supra* note 191, at 913 n.241 (although most state constitutions provide state legislators with analogous speech or debate privileges, "the individual clauses differ widely, both in applicability and scope").

²³⁶ See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975); *United States v. Johnson*, 383 U.S. 169, 180 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951); *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 130 (1810); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528 (9th Cir. 1983); *Holmes*, 475 A.2d at 982; see also Raveson, *supra* note 191, at 923 (noting that the speech or debate clause prohibits legislators' compelled testimony in order to protect "freedom from time-consuming distraction and freedom from intimidation"); Note, *The Scope of Immunity for Legislators and Their Employees*, 77 *YALE L.J.* 366, 385 (1967) (arguing that considered individually, the distraction and separation of powers arguments are insufficient, but when considered together they "add up to a fairly coherent view of the scope of the privilege").

²³⁷ See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979) (explaining that

Typically, the immunity covers legislators and their aides, on the theory that legislators cannot personally perform all their functions.²³⁸ Even in states in which the state constitution does not explicitly provide for the immunity, the Court has found a general common law legislative immunity to suit for official actions.²³⁹ This immunity sometimes extends to bodies acting in a quasi-legislative capacity.²⁴⁰

The courts have not definitively resolved, however, whether the immunity to suit also creates an evidentiary privilege.²⁴¹ The Court held in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*²⁴² that, in unusual circumstances, a plaintiff can call individual legislators to testify as proof of subjective intent.²⁴³ The Court then noted, however, that "such testimony frequently will be barred by privilege."²⁴⁴ But the Court failed to give any content to the term "fre-

the privilege does not apply to remarks of United States senator made off the Senate floor); *Davis v. Passman*, 442 U.S. 228, 235 n.11 (1979) (stating that the privilege does not apply to the hiring practices of members of Congress); *Eastland*, 421 U.S. at 511 n.17 (stating that the privilege does not excuse a senator from answering a complaint); *Gravel v. United States*, 408 U.S. 606, 627-29 (1972) (noting that a senatorial aide may not claim privilege if no legislative action is implicated); see also Note, *Evidentiary Implications of the Speech or Debate Clause*, 88 YALE L.J. 1280, 1298 (1979) (arguing that the privilege should not apply to nonlegislative acts regardless of the nexus between those acts to legislative acts).

²³⁸ See, e.g., *Holmes*, 475 A.2d at 984 (explaining that "[f]or the purpose of construing the privilege, legislators and legislative aides are to be 'treated as one'" (quoting *Gravel*, 408 U.S. at 616)); *State v. Beno*, 116 Wis. 2d 122, 146, 341 N.W.2d 668, 680 (1984) (recognizing that legislators rely on their employees so that legislators do not have to perform all tasks personally). But see, e.g., *Kilbourn v. Thompson*, 103 U.S. 168, 197 (1880) (holding that when Congress exceeded its authority, sergeant-at-arms cannot claim privilege).

²³⁹ See *Tenney*, 341 U.S. at 376-79 (holding that state legislators are immune to suit for the same policy reasons that members of Congress are immune).

²⁴⁰ See *Supreme Court v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731-34 (1980) (extending legislative privilege to the Virginia Supreme Court, which promulgates ethical standards for the Virginia bar); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-02 (1979) (not extending legislative privilege to interstate planning board); cf. *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F. Supp. 578, 583 n.4 (E.D. Pa.) (declining to consider issue of legislative immunity of members of reapportionment commission based on *Supreme Court* because complaint was dismissed on other grounds), *aff'd*, 459 U.S. 801 (1982).

²⁴¹ See *Raveson*, *supra* note 191, at 910. But cf. *Holmes*, 475 A.2d at 984 (citing *United States v. Peoples Temple of the Disciples of Christ*, 515 F. Supp. 246, 248-49 (D.D.C. 1981)) (the speech or debate clause "must be construed as an immunity from suit as well as a testimonial privilege."); *Kerttula v. Abood*, 686 P.2d 1197, 1204 (Alaska 1984) (citing *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530 (9th Cir. 1983)) (recognizing both an evidentiary privilege and an immunity from suit in the Alaskan speech or debate clause).

²⁴² 429 U.S. 252 (1977).

²⁴³ See *id.* at 268.

²⁴⁴ *Id.*; cf. *Marion v. Hall*, 429 So. 2d 937, 944 (Ala. 1983) (Torbert, C.J., concurring) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972), for the proposi-

quently."²⁴⁵ In state courts, the issue thus posed is whether judicial review of a challenged statute or redistricting plan takes precedence over the separation of powers.²⁴⁶ In federal courts, the issue is whether judicial review should be conditioned by state constitutional privileges.²⁴⁷

Notwithstanding these questions, procedural concerns also exist. For example, even if an evidentiary privilege does exist, to whom does it accrue? If it accrues to the legislative body and the body does not waive it,²⁴⁸ then no individual legislator can testify as to her motivations or those of her colleagues.²⁴⁹ On the other hand, if it accrues to the individual, then only the individual can waive it.²⁵⁰

When the privilege exists—either by virtue of a constitutional provision or by judicial construct—and it is not waived, ascertaining subjective legislative intent can be extremely difficult. *May v. Cooperman*²⁵¹ exemplifies this difficulty. In *May*, the Third Circuit considered the constitutionality of a New Jersey statute that required public schools to permit students to observe a one-minute period of silence "for quiet and private contemplation or introspection."²⁵² Since the principal issue was whether or not the statute implicated the first

tion that the speech or debate clause protects against inquiry into the motivation for legislative acts). White similarly struggled in *Davis* to ascertain legislative intent by creating a rule and then limiting it. See *Davis*, 106 S. Ct. at 2809 & n.11.

²⁴⁵ See *Raveson*, *supra* note 191, at 913 n.238 (specifying that "[t]he Court did not indicate why and under what circumstances legislators might not be privileged to refuse to testify").

²⁴⁶ Professor *Raveson* argues that judicial review takes precedence over the speech or debate clause, thus qualifying the privilege in the evidentiary context. See *id.* at 924.

²⁴⁷ See *id.* at 913 n.241 (arguing that "separation of powers principles justify a lesser privilege for state legislators in civil proceedings than that afforded members of Congress"); cf. *United States v. Gillock*, 445 U.S. 360, 368 (1986) (refusing to recognize a state constitutional privilege in a federal criminal proceeding); *In re Grand Jury Subpoena*, 626 F. Supp. 1319, 1325-29 (M.D. Pa. 1986) (recognizing a common law privilege for state legislators who were not the target of a criminal investigation).

²⁴⁸ See, e.g., *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 56-58, 687 P.2d 622, 631-33 (1984) (sustaining motion to dismiss by the Kansas legislature on speech or debate grounds); cf. Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 340-41 (1965) (noting that Congress has waived its privilege when it passes antibribery statutes).

²⁴⁹ See, e.g., *Holmes v. Farmer*, 475 A.2d 976, 984-85 (R.I. 1984) (sustaining the refusal of the trial court to hear an individual legislator's testimony on the ground that the legislature had not waived its institutional privilege); see also *Raveson*, *supra* note 191, at 938 (concluding that "[w]hether the institution ever should be permitted to waive the privilege for individual legislators is debatable").

²⁵⁰ See, e.g., *In re Grand Jury Proceedings*, 563 F.2d 577, 585 (3d Cir. 1977) (stating that the privilege accrued to the individual lawmaker, not to the legislature as an institution).

²⁵¹ 780 F.2d 240 (3d Cir. 1985), *appeal filed sub nom.* *Karcher v. May*, 107 S. Ct. 946 (1987).

²⁵² See *id.* at 241.

amendment establishment clause,²⁵³ the court had to consider whether or not the legislation had a secular purpose.²⁵⁴ The Speaker of the New Jersey Assembly and the President of the State Senate intervened as defendants,²⁵⁵ but the district court ruled prior to trial that the plaintiffs could not depose the legislators.²⁵⁶

Judge Gibbons, for the majority, relied on the district court's objective contextual approach to ascertaining legislative purpose to sustain the district court's finding of an impermissible purpose.²⁵⁷ The district court had found that the tendered purpose of the moment of silence was a pretext because evidence suggested it had no pedagogical value.²⁵⁸ The district court also noted other, less facially neutral attempts to put prayer in the classroom, focusing particularly on the past actions of the sponsor of this legislation.²⁵⁹ Judge Gibbons brushed aside the defendant's objection to the use of newspaper clippings as superfluous in light of the hearsay testimony of educational experts and of witnesses who attended the committee hearings on the bill.²⁶⁰

In contrast, Judge Becker, writing in dissent, divided the evidence into five categories and analyzed each in isolation. First, the testimony of the witnesses who attended the hearings was "at best underwhelming" because it demonstrated only what two assemblymen thought about the issue.²⁶¹ Second, the newspaper evidence did not satisfy any

²⁵³ See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

²⁵⁴ See *May*, 780 F.2d at 246 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

²⁵⁵ See *id.* at 242. The procedural posture of *May* before the Court has been complicated by the fact that the defendant New Jersey legislature as a body withdrew its appeal to the Court in April 1986, leaving only the two state legislators (who no longer served in the same capacities in the state legislature) as defendants. At oral argument, "well over half of the hourlong argument, and most of the questions from all eight Justices centered on the Justices' evident doubts whether the two legislators had legal standing to appeal, and thus whether the Court itself had jurisdiction to determine the constitutionality of the law at all." *Period of Silence Debated in Court*, N.Y. Times, Oct. 7, 1987, at B10, col. 6; see also *Minute of Silence*, 56 U.S.L.W. 3177 (Sept. 22, 1987) (describing the arguments in the *May* litigation). See generally Brief for Amicus Curiae United States at 8-13, *Karcher v. May*, No. 85-1551 (U.S. argued October 6, 1987) (arguing that the defendant-legislators lack standing).

²⁵⁶ See *May*, 780 F.2d at 252 n.9; see also *May v. Cooperman*, 572 F. Supp. 1561, 1561 n.2 (D.N.J. 1983).

²⁵⁷ See *May*, 780 F.2d at 251-52.

²⁵⁸ See *id.* (citing *May*, 572 F. Supp. at 1571).

²⁵⁹ See *id.* at 252 (citing *May*, 572 F. Supp. at 1570-71).

²⁶⁰ See *id.* at 252 n.9; cf. *Davis*, 106 S. Ct. at 2834 (Powell, J., concurring and dissenting) (citing newspaper articles as evidence of invidious intent). Judge Gibbons made a point of questioning the trial court's decision that prevented the plaintiffs from deposing the defendant-legislators. He did not, however, reverse that decision because he decided such evidence would have been merely cumulative.

²⁶¹ *Id.* at 261-62 (Becker, J., dissenting).

hearsay exception to the Federal Rules of Evidence because the people who attended the hearing did testify, and no "circumstantial guarantees of [the article's] trustworthiness" existed.²⁶² Third, community perception of the statute was "simply too amorphous and unreliable to provide the ground for constitutional decisions."²⁶³ Fourth, the testimony of the education experts addressed the efficacy of the statute as an educational device, not impermissible motive.²⁶⁴ Fifth, prior attempts by the New Jersey legislature to pass prayer statutes were irrelevant.²⁶⁵ Therefore, Judge Becker argued, the court of appeals should have reversed.

Judge Gibbons's approach demonstrates the difficult nature of objective, not to mention subjective, contextual analysis of intent: its ambiguity invites judicial usurpation or characterization of the legislative function. Reliance on the totality of the circumstances to prove intent in the absence of the testimony of legislators, like Justice Powell's strong presumption of intent from the shape of districts in *Davis*,²⁶⁶ brings to mind Justice Stewart's test for obscenity: "I know it when I see it."²⁶⁷ Judge Becker's approach, at the other extreme, is excessively rigid. By isolating each factor, he is able to minimize its import; rather than considering the evidence in the aggregate, he considers the factors individually and easily dismisses them one after another.

Nonetheless, *May* actually presents an easier case to prove than does a political gerrymandering claim. The stakes involved in redistricting are extremely high.²⁶⁸ At the same time, the incentive to testify is

²⁶² *Id.* at 262 (Becker, J., dissenting).

²⁶³ *Id.* at 264 (Becker, J., dissenting).

²⁶⁴ *Id.* at 264-65 (Becker, J., dissenting).

²⁶⁵ *Id.* at 265 (Becker, J., dissenting).

²⁶⁶ See *Davis*, 106 S. Ct. at 2831-32 & n.12 (Powell, J., concurring and dissenting); see also *Daggett v. Kimmelman*, 535 F. Supp. 978, 984 (D.N.J.) (three-judge panel) (Gibbons, J., dissenting) (commenting on the peculiar shapes of various districts), *aff'd sub nom. Karcher v. Daggett*, 462 U.S. 725 (1983).

²⁶⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); cf. *Congressional Districting: Hearings on H.R. 8953, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 98 (1971) (statement by Rep. Mikva) (Gerrymandering "is somewhat like pornography. You know it when you see it, but it's awfully hard to define.").

²⁶⁸ See *Davis*, 106 S. Ct. at 2818 (O'Connor, J., concurring in the judgment) ("Apportionment is so important to legislators and political parties that the burden of proof the plurality places on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints."). Professor Cain, a consultant in the most recent California reapportionment, aptly observes that legislators approach redistricting motivated by risk aversion, not "with the joyous expectation of securing their careers for a decade." B. CAIN, *supra* note 84, at 116-17. Cain likens this to Downs's economic theory of democracy turned on its head. Instead of voters choosing their representatives, in redistricting representatives choose their voters. *Id.* at 117 (citing A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 38-40 (1957)); cf. Cain & Campagna, *supra*

low because political gerrymandering is not the type of issue for which legislators "welcome public exposure [or] believe that their own verbal and argumentative skills will protect their personal and institutional interests."²⁶⁹

In *Holmes v. Farmer*,²⁷⁰ a 1984 redistricting case, legislators successfully asserted their evidentiary privilege. The plaintiffs in *Holmes* attempted to use testimony regarding the subjective motivations of key legislators and their aides to prove that the defendants had gerrymandered state legislative districts.²⁷¹ The Rhode Island Supreme Court, however, sustained the invocation of the speech or debate testimonial privilege by legislators and their aides in litigation attacking the constitutionality of the reapportionment of the state house of representatives.²⁷² The court, composed of former state legislators of both parties,²⁷³ also held that the trial court had erred in admitting the testimony of a state senator who purportedly waived her privilege from testifying, on the grounds that the privilege from inquiry into legislative acts accrued to the institution, not to the individual member.²⁷⁴ Since the plaintiffs were unable to prove intent, the plaintiffs failed to show that the defendants had redistricted solely for political considerations in violation of a state constitutional requirement.²⁷⁵ Consequently, the plaintiffs' suit failed. Although other courts may construe the privilege as nonevidentiary or, alternatively, construe it less broadly than did the Rhode Island court, legislators in these other jurisdictions are bound to cite *Holmes* in light of *Davis*.

note 17, at 267 (noting that while it is in the interest of an individual legislator of either party to engage in bipartisan trading to maintain the status quo, trading may further the interests of party leaders in improving party control of the legislature); Hardy, *Considering the Gerrymander*, 4 PEPPERDINE L. REV. 243, 268-69 (1977) (noting that even where legislators profess an interest in gerrymandering for partisan purposes, self-interests are usually paramount); *The 98.4% House*, Wall St. J., July 22, 1987, at 20, col. 1 (editorial) (accusing Republican officeholders of striking a "Faustian" bargain with Democrats to guarantee the status quo).

²⁶⁹ Raveson, *supra* note 191, at 924 n.304.

²⁷⁰ 475 A.2d 976 (R.I. 1984).

²⁷¹ *Id.* at 984-85.

²⁷² See *id.* at 980-85; cf. *Hispanic Coalition on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F. Supp. 578, 583 n.4 (E.D. Pa.) (declining to consider issue of legislative immunity because complaint was dismissed on other grounds), *aff'd*, 459 U.S. 801 (1982).

²⁷³ See STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, RHODE ISLAND MANUAL 293-96 (1983).

²⁷⁴ See *Holmes*, 475 A.2d at 984. The trial court later sustained objections to her testimony on relevancy grounds. *Id.* at 980.

²⁷⁵ See *id.* at 984.

IV. FINDING A WAY OUT OF THE THICKET: A RETURN TO OBJECTIVE ANALYSIS OF LEGISLATIVE PURPOSE

Judicial reliance on a subjective analysis of the motives of legislators in redistricting litigation blocks the path out of the gerrymandering thicket by introducing two new traps. On one side is judicial review of a legislative enactment.²⁷⁶ On the other side is state legislative freedom from judicial interference.²⁷⁷

Professor Raveson argues that the way to avoid the traps and ascertain subjective motivation is to qualify the speech or debate evidentiary privilege.²⁷⁸ Professor Raveson proposes to balance the need for the evidence, its relevance, its probative value, and the importance of the proof "against the degree of harm that the government will suffer from the intrusion into the decisionmakers' independence"²⁷⁹ What is important is identifying the marginal decisionmaker, determining the "but for" cause of a legislature's action.²⁸⁰ Implicit in Raveson's proposal, however, is a notion that the political process itself is value-neutral.²⁸¹ The Court needs only a better way of ascertaining what considerations went into the process.

As Professor Baker has plainly put it, "[s]ubjective intent implies there is someone who has the intent."²⁸² But even Professor Raveson, despite his sweeping claim that "objectively defined institutional intent . . . is a fiction,"²⁸³ admits:

First, at times it may be impossible to prove any individual decisionmaker's motives. Second, when the decisionmaking body is large and the vote is not close, it may be impractical or impossible to establish, without other evidence, the motives of a sufficient number of individuals to prove that those motives affected the outcome of the deliberative process. Last, most of the types of evidence available to establish illicit motivation apply to the institution as a body and not to

²⁷⁶ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803) (establishing the doctrine of judicial review).

²⁷⁷ See *Tenney v. Brandhove*, 341 U.S. 367, 372-79 (1951) (affirming the doctrine of legislative immunity).

²⁷⁸ See Raveson, *supra* note 191, at 943-44.

²⁷⁹ *Id.*

²⁸⁰ See *id.* at 955-57.

²⁸¹ See, e.g., *id.* at 888 ("The Court allows the judiciary to nullify such legislative and administrative acts only when these processes have been tainted by impermissible considerations.").

²⁸² Baker, *supra* note 174, at 984.

²⁸³ Raveson, *supra* note 191, at 962.

specific individuals.²⁸⁴

Professor Raveson thus posits that in ascertaining legislative intent a court should rely on an objective, contextual approach to legislative motivation.

The collapse of a subjective approach to legislative motivation is not surprising because, as Professor Baker points out, "[t]he social or contextual meaning of a law or act necessarily depends on the specific society that people create—on people's practices, on the politics of everyday life."²⁸⁵ In contrast to Professor Raveson's model, the equality-of-respect model of equal protection does not turn on the motives of the marginal decisionmaker. Instead, the equality-of-respect model focuses on the context in which a law exists. According to the subjective approach, legislative purpose is static. The marginal legislator's decision to vote a certain way cannot change over time. By definition, it is a question of history. Under an objective approach, on the other hand, legislative purpose can change, for example, "if the legislators' constitutional duty includes repealing laws that *become invidious*."²⁸⁶ The Court removed any doubt as to that evolving duty in the redistricting context when, in *Baker v. Carr*,²⁸⁷ it held that the plaintiffs had a justiciable claim in seeking to compel the Tennessee legislature to redress a sixty-year-old redistricting scheme.

Justice Stevens recognized the trap of analyzing subjective motivation²⁸⁸ in redistricting litigation in his prescient dissent in *Cousins v. City Council* ("*Cousins I*").²⁸⁹ In that case, a Seventh Circuit panel heard a challenge to the redistricting of the Chicago City Council. Relying on the compelled testimony of legislative aides²⁹⁰ and suggesting

²⁸⁴ *Id.* at 965; see also Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 284-85 (1972) (identifying the same problems).

²⁸⁵ Baker, *supra* note 174, at 975.

²⁸⁶ *Id.* at 981.

²⁸⁷ 369 U.S. 186 (1964); see also *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (overturning an at-large redistricting plan that was adopted for racially neutral reasons but maintained for racially discriminatory ones); Baker, *supra* note 44, at 270 (referring to status quo gerrymandering in which a once legitimate redistricting scheme becomes distorted by population shifts over time); Baker, *supra* note 34, at 2 (same); Hardy, *supra* note 268, at 249-52 (identifying the same feature as the "silent gerrymander").

²⁸⁸ For a concise discussion of Justice Stevens's approach to equal protection issues in general, see Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987).

²⁸⁹ 466 F.2d 830, 856-57 (7th Cir.) (Stevens, J., dissenting), *cert. denied*, 409 U.S. 893 (1972) [hereinafter *Cousins I*].

²⁹⁰ See *id.* at 835-36 (Fairchild, J.).

that the deposition of an alderman could be admissible,²⁹¹ the court reversed a district court decision dismissing the challenge.²⁹² Judge Stevens²⁹³ dissented. First, he relied on Justice White's dissent in *Palmer v. Thompson*²⁹⁴ to argue that subjective analysis of intent was unnecessary:

[C]ustomary indicia of legislative intent provide an adequate basis for ascertaining the purpose that a law is intended to achieve. The formal proceedings of the legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents, provide appropriate evidence of legislative purpose.²⁹⁵

Second, Judge Stevens argued that a subjective inquiry was wrong. "[I]t demeans the legislative process to inquire into private conversations between aldermen"²⁹⁶ To reiterate his objection to the use of the testimony of the aldermen's aides, Judge Stevens pointedly cited the brief of the United States Senate as amicus curiae in *United States v. Gravel*,²⁹⁷ which the Court had decided earlier that year. Two years later when *Cousins* re-appealed to the Seventh Circuit after remand ("*Cousins II*"), Judge Stevens changed his dissent to a concurrence.²⁹⁸ Whereas Judge Fairchild, writing for the court, had used a subjective approach in the first case, he focused on the objective claim in *Cousins II*.²⁹⁹

²⁹¹ See *id.* at 845-46.

²⁹² See *id.* at 846.

²⁹³ Justice Stevens served on the Seventh Circuit from 1970, see 429 F.2d xv (1970), until his 1975 appointment to the Court, see 423 U.S. xi-xiv (1975).

²⁹⁴ 403 U.S. 217, 240-71 (1971) (White, J., dissenting).

²⁹⁵ *Cousins I*, 466 F.2d at 856 (Stevens, J., dissenting); see also *Karcher v. Daggett*, 462 U.S. 725, 751, 759-60 (1983) (Stevens, J., concurring) (suggesting the consideration of "objective indicia of irregularity" or deviations from a "procedural standard"); *Cousins v. City Council*, 503 F.2d 912, 925 (7th Cir. 1974) (Stevens, J., concurring) (noting that in some cases the facts "spoke—indeed, shouted—for themselves.") [hereinafter *Cousins II*], *cert. denied*, 420 U.S. 992 (1975); cf. *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985) (resolving issue of intent without the use of "eyewitnesses" by relying on the uncontested testimony and opinions of historians); *Baker, supra* note 174, at 976-84 (discussing the Court's use of the contextual or objective purpose of a law as the "key constitutional concern").

²⁹⁶ *Cousins I*, 466 F.2d at 856-57 (Stevens, J., dissenting) (footnote omitted).

²⁹⁷ See *id.* at 857 n.34 (quoting Brief for the Senate of United States Amicus Curiae at 12-13, *United States v. Gravel*, 408 U.S. 606 (1972)).

²⁹⁸ See *Cousins II*, 503 F.2d at 925 (Stevens, J., concurring).

²⁹⁹ 503 F.2d 912 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975). Compare *Cousins I*, 466 F.2d at 834-37 (relying on the testimony of legislative aides) with *Cousins II*, 503 F.2d at 920 (noting that the testimony of legislative aides had some probative force, but refusing to reverse the district court's findings contrary to that

Since the *Cousins* litigation, however, Justice Stevens appears to have drifted toward a more subjective approach to legislative intent. Although he insisted on an objective approach in *City of Mobile v. Bolden*,³⁰⁰ in *Karcher v. Daggett*³⁰¹ Justice Stevens relied in part on a letter that the Speaker of the New Jersey Assembly had sent to a third party as proof of an invidious intent to gerrymander politically.³⁰² Thus, not surprisingly, Justice Powell's opinion in *Davis*, heavily influenced by Justice Stevens's opinion in *Karcher*, referred in detail to the depositions of those legislators who devised the plan.³⁰³ Justice White went even further, quoting the deposition of the Speaker of the Indiana House of Representatives verbatim.³⁰⁴

In light of these opinions in *Davis v. Bandemer*,³⁰⁵ where can and should the Court go to escape the thicket? First, the Court must treat the *Davis* references to the subjective motivations of legislators as dicta and nothing more. Reliance on testimony regarding subjective motivation, as Justice Stevens himself cogently pointed out in *Cousins I*, is both unnecessary and wrong.³⁰⁶ It is unnecessary because other evidence of legislative purpose exists. It is wrong because it unjustifiably impinges on the speech or debate privilege, thus implicating separation of powers. Moreover, as Professor Baker has indicated, it is irrelevant.³⁰⁷ Redistricting exists in a social context. "[T]he role of law as

testimony).

³⁰⁰ 446 U.S. 55, 90 (1980) (Stevens, J., concurring); see also Blacksher & Meneff, *supra* note 74, at 27-28 (discussing Justice Stevens's view in *Mobile* that a subjective approach would promote endless litigation); Moeller, *supra* note 70, at 222-23 (discussing Justice Stevens's concurrence).

³⁰¹ 462 U.S. 725 (1983) (Stevens, J., concurring).

³⁰² See *Karcher*, 462 U.S. at 763-64 (Stevens, J., concurring). In *Wallace v. Jaffree*, a first amendment case, Justice Stevens focused heavily on the testimony of the sponsor of legislation, who sought to return voluntary prayer to the public schools, in ascertaining legislative purpose. See 472 U.S. 38, 56-61 (1985) (focusing on the motives of Alabama State Senator Donald Holmes).

To be fair to Justice Stevens, the private conversations in *Cousins I*, 466 F.2d at 856-57, and the letter in *Karcher*, 462 U.S. at 763-64, are arguably distinguishable in that the letter was widely circulated, whereas the private conversations were not. Cf. *Cousins I*, 466 F.2d at 856 (Stevens, J., dissenting) (citing as a customary indicia of legislative intent "the public acts and deeds of . . . sponsors and opponents"). Justice Stevens's distinction should not be dispositive, however, because both the private conversations and the letter reflect the motives of but a single individual.

³⁰³ See *id.* at 2834 (Powell, J., concurring and dissenting) (referring to the testimony of the conference committee chairman).

³⁰⁴ See *id.* at 2802 n.5 (referring to the testimony of Speaker Dailey of the Indiana House of Representatives).

³⁰⁵ 106 S. Ct. 2797 (1986).

³⁰⁶ See *supra* notes 293-97 and accompanying text.

³⁰⁷ See *supra* notes 284-86 and accompanying text (discussing the importance of the context in which a law exists rather than the subjective motivation of legislators in enacting the law).

partially constituting the framework of social interaction . . . makes the contextual meaning, not the individual psychology of the enactors, most relevant."³⁰⁸ Professor Cain makes a persuasive argument that the motives of individual, risk-averse legislators confronted with redistricting can vary greatly from the purposes of political parties.³⁰⁹ Consequently, the Court must resist the temptation³¹⁰ of holding that the testimony of legislators merely recreates what happened in the legislative process and thus is historically objective.³¹¹ Such reasoning would be a triumph of form over substance because what might begin as a mere recounting of history would quickly degenerate into a probe of subjective motives.³¹²

Second, the Court must focus more on the objective standards of political gerrymandering, such as the of compactness concept advocated by Justice Powell.³¹³ This Comment, however, specifically rejects some of the propositions advanced elsewhere. One proposal is to compare statistically the effect of the challenged plan against random, "computer-generated apportionment schemes having a population deviation no greater than that of the challenged plan."³¹⁴ The difficulties with such a proposal are the same as with any other use of statistics in a social context: it is practically impossible to define a "random sample" or an effective measure of optimality.³¹⁵ The suggestion that this measure can

³⁰⁸ Baker, *supra* note 174, at 975.

³⁰⁹ See B. CAIN, *supra* note 84, at 154-55; see also Lowenstein & Steinberg, *supra* note 104, at 8 (noting that on certain issues, legislators' self-interests will cause them to desert the policies of their own parties).

³¹⁰ See *supra* note 225 and accompanying text.

³¹¹ See, e.g., *Sincock v. Gately*, 262 F. Supp. 739, 745 n.7 (D. Del. 1967) (allowing one legislator in a redistricting suit to testify as to the statements of another legislator even in the absence of a stenographic record and despite a hearsay objection); Comment, *Statutory Interpretation in California: Individual Testimony as an Extrinsic Aid*, 15 U.S.F. L. REV. 241, 247-52 (1980-81) (describing the California practice of allowing legislators to testify in lieu of recorded legislative history as to legislative history, but not subjective motivation).

³¹² See, e.g., *In re Marriage of Bouquet*, 16 Cal. 3d 583, 590-91, 546 P.2d 1371, 1374-75, 128 Cal. Rptr. 427, 430-31 (1976) (admitting a letter, written by the author of a statute to a member of the senate, that was incorporated into a senate resolution); *In re Orans*, 45 Misc. 2d 616, 643-44, 257 N.Y.S.2d 839, 865 (N.Y. Sup. Ct.) (using a letter written by one of several gerrymandering legislators as a basis for holding that a hearing on the activities of all the legislators was warranted), *aff'd*, 15 N.Y.2d 339, 206 N.E.2d 854, 258 N.Y.S.2d 825, *appeal dismissed*, 382 U.S. 10 (1965).

³¹³ *Davis*, 106 S. Ct. at 2831-34 (Powell, J., concurring and dissenting) (focusing on the shape of the district).

³¹⁴ Comment, *supra* note 18, at 135 (citing Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 316-18).

³¹⁵ See, e.g., Engstrom, *supra* note 314, at 316-17 (suggesting an algorithm that would rely on a "random" beginning point and that would "randomly" combine precincts, yet failing to give any further content to this algorithm); Weaver & Hess, A

be the basis of an allegation of gerrymandering³¹⁶ must be rejected because it "does nothing to distinguish between proper and improper purposes."³¹⁷ A more feasible approach, incorporating existing communities of interests and recognizing the risk-aversion of legislators, is to redistrict on the basis of incremental change rather than through a tabula rasa method.³¹⁸ Also known as "least change redistricting," the incremental change approach comports with the "virtues in having some continuity in office for the sake of experience, stability, and relations with constituents."³¹⁹

A second proposal also meriting swift rejection is to "require a specific degree of compactness."³²⁰ "By dividing the area of the district

Procedure for Nonpartisan Districting: Development of Computer Techniques, 73 YALE L.J. 288, 301-04 (1963) (advocating the use of computers to create "neutral plans," but admitting that certain decisions, such as the location of the centers of districts, are subject to human discretion); see also Lowenstein & Steinberg, *supra* note 104, at 64 (arguing that "random" plans are meaningless if the overall distribution favors Republicans). But see Shapiro, *supra* note 69, at 246 (rejecting the argument of Lowenstein and Steinberg by noting that random districting is only unfair if the existing system is optimally fair, which it is not); Grofman, *supra* note 93, at 92 n.67 (noting the failure of Lowenstein and Steinberg to provide any empirical data to support their central contention).

³¹⁶ See Engstrom, *supra* note 313, at 318.

³¹⁷ Lowenstein & Steinberg, *supra* note 104, at 62.

³¹⁸ See Baker v. Carr, 369 U.S. 186, 260 (1962) (Clark, J., concurring) ("One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination."); B. CAIN, *supra* note 84, at 50-51 (discussing an incrementalist method and its advantages over a tabula rasa system—it minimizes disruption to the political process and is fair to the political subdivisions involved). But see Auerbach, *supra* note 96, at 40 (suggesting that tabula rasa redistricting may promote legislative diversity); Weaver & Hess, *supra* note 315, at 289 n.6 (suggesting that tabula rasa redistricting will guarantee a prompt end to litigation); Comment, *supra* note 1, at 1039 (advocating tabula rasa redistricting by special masters). As the term suggests, tabula rasa redistricting begins with no preconceived notion of the districting. On the other hand, incremental change redistricting takes the status quo and then adjusts to reflect demographic change.

³¹⁹ Dixon, *supra* note 84, at 17; see also Lowenstein & Steinberg, *supra* note 104, at 45 (noting the reality of the seniority system in Congress); Comment, *supra* note 1, at 1039 (citing as the "obvious advantage" to this approach a court's ability to avoid having to weigh competing claims to representation).

³²⁰ Comment, *supra* note 18, at 135-36 (suggesting a standard derived by state legislatures or courts); see also Comment, *supra* note 123, at 399 (suggesting a congressionally derived standard).

Congress first required contiguity and election from districts in 1842. See Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491, 491. Congress added requirements of population equality in 1872, see Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28, and compactness in 1901, see Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733, 734. Congress did not renew these standards in 1929. See Act of June 18, 1929, ch. 28, § 22, 46 Stat. 21, 26-27; see also Wood v. Broom, 287 U.S. 1, 6-7 (1932) (discussing the history of the 1929 Act). See generally Weschler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 550 (1954) (detailing congressional efforts to regulate state redis-

by the area of the smallest possible circumscribing circle, the degree of compactness can be expressed as a percentage, with a circle representing the 'ideal of compactness,' just as the average district population is used as the ideal of population equality."³²¹ This proposal is illogical: as one district becomes more circular, thus approaching the "ideal," every contiguous district becomes less circular, thus retreating from the "ideal."³²² Furthermore, as other commentators have pointed out, such a proposal gives an advantage to the party that can create the "prettiest" gerrymander because voters are not spatially distributed.³²³ The suggestion that the courts "gradually develop a degree of compactness below which a challenger's initial burden of showing vote dilution would be satisfied"³²⁴ minimizes variations that are the result of population and geography within and among states.³²⁵

But the Court need not lapse into saying "it knows a gerrymander when it sees it." Instead, what the Court must say is that "it will presume a gerrymander when it sees it." An obvious lack of compactness, for example, may give rise to that presumption, but the state will then have the opportunity to rebut it without having to submit to any inquiry into the subjective motivations of individual legislators. In *Karcher*, Justice Brennan used such a burden-shifting standard, which

tricting of congressional districts). In 1967, however, Congress restored the requirement of election from districts. See Act of Dec. 14, 1967, Pub. L. No. 90-196, 81 Stat. 581, 581 (codified at 2 U.S.C. § 2c (1982)). Congress has since considered, but not adopted, other "anti-gerrymandering" provisions. See, e.g., S. 596, 96th Cong., 1st Sess. § 2, 125 CONG. REC. 4419-20 (1979) (requiring population equality, respect for the boundaries of local political subdivisions, contiguity, and compactness, and eschewing the use of political data and attempts at vote dilution).

³²¹ Comment, *supra* note 18, at 136 (citing Reock, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDWEST J. POL. SCI. 70, 71 (1961)).

³²² See Alfange, *supra* note 5, at 213; Backstrom, *supra* note 101, at 50; Dixon, *supra* note 1, at 250.

³²³ See, e.g., B. CAIN, *supra* note 84, at 51 (discussing the "fundamental tension" between aesthetic criteria and the good government goals of fair representation of minority groups and minority parties); P. MUSGROVE, *supra* note 6, at 53 (cautioning that the criterion of compactness introduces a bias if the perfect gerrymander differs as to parties); cf. Opinion to the Governor, 101 R.I. 203, 207-08, 221 A.2d 799, 802 (1966) ("compactness" is a principle based on an intent to provide effective representation that varies with the context, not a definition).

More than twenty years ago, Professor Vickrey demonstrated by example why a compactness measure based on a geometric criterion such as that advocated by Reock can yield a meaningless result. See Vickrey, *On the Prevention of Gerrymandering*, 76 POL. SCI. Q. 105, 105 (1961).

³²⁴ Comment, *supra* note 18, at 136.

³²⁵ See Reock, *supra* note 321, at 73-74 (conceding that a statutory degree of compactness is not possible in light of interstate geographical variations such as "panhandles" and "heavily indented coastlines" but failing to recognize, as Professors Cain and Musgrove do, see *supra* note 323, that a compactness standard can also have an intrastate bias if the perfect gerrymander differs as to parties).

attempts to ascertain the optimal redistricting plan:

First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.³²⁶

In ascertaining good faith, the Court should also focus objectively on the process by which the plan was adopted. Critical to that inquiry is the existence of the opportunity for individuals to participate independently and in groups.³²⁷ In *Davis*, for example, "[t]he legislative process consisted of nothing more than the majority party's private application of computer technology to mapmaking."³²⁸ Such a lack of real participation must give rise to a strong presumption of political gerrymandering.

In summary, the Court must return to Judge Stevens's crisp, articulate reasoning in the *Cousins* litigation. If gerrymandering is a justiciable question, then the objective purpose of the plan, not the subjective motivations of those behind it, is what is relevant. This focus is a reasonable one for the Court to take, but in doing so the Court must make it clear that subjective motivations such as those mentioned in *Davis* are

³²⁶ *Karcher*, 462 U.S. at 730-31 (Brennan, J., for himself and Marshall, Blackmun, Stevens, & O'Connor, JJ.) (citations omitted); see also *id.* at 754-55 (Stevens, J., concurring) (recognizing the difficulty plaintiffs will have in meeting their burden of proof); cf. *Opinion to the Governor*, 101 R.I. at 211, 221 A.2d at 803-04 (refusing to hold redistricting plan unconstitutional on the basis of maps alone).

With regard to variations from compactness, the Colorado legislature, for example, has stated that such variations are the result of "the shape of county boundary lines, census enumeration lines, natural boundaries, population density, and the need to retain compactness of adjacent districts." *Karcher*, 462 U.S. at 757 n.20 (Stevens, J., concurring) (citing COLO. REV. STAT. §§ 2-2-105, 2-2-203 (1980)).

³²⁷ See *Davis*, 106 S. Ct. at 2832-33 (Powell, J., concurring and dissenting, joined by Stevens, J.) (noting the exclusion of Democrats from the redistricting process); *id.* at 2817 (O'Connor, J., concurring in the judgment with Burger, C.J., & Rehnquist, J.) (redistricting plays "no small role in fostering active participation in the political process at every level"); see also Baker, *supra* note 174, at 960-63 (describing the political participation principle of the equality of respect model).

³²⁸ *Davis*, 106 S. Ct. at 2833 (Powell, J., concurring and dissenting).

immaterial.

CONCLUSION

The Court's movement toward proportional representation dates back forty years to Justice Black's dissent in *Colegrove v. Green*.³²⁹ Since then proportional representation has manifested itself in a variety of forms, including racial, numerical, and political gerrymandering. A requirement of proportional representation, however, is inconsistent with the "deliberative democracy" model of the Constitution. In *Davis v. Bandemer*,³³⁰ the Court attempted to halt the slide towards proportional representation. The equal protection standards the Court used, however, are problematic. Justice White's opinion offers little guidance. Justice Powell's opinion is more helpful, noting objective criteria such as compactness and the extent of political participation in the redistricting. But both opinions refer to the subjective motivations of individual legislators. As the equality of respect model of equal protection suggests, these references are wrong. Consequently, in future cases, the Court should abandon that language and focus on strengthening the objective standards offered by Justice Powell. Perhaps then, the courts and the state legislatures will find a path out of the gerrymandering thicket.

³²⁹ 328 U.S. 549, 566 (1946) (Black, J., dissenting).

³³⁰ 106 S. Ct. 2797 (1986).