Apportionment and the Right to Vote *"Fair and Foul"*

Kenneth R. Thompson and Alex Devience

Alex Devience, Professor of Business Law, DePaul University
Kenneth R. Thompson, Professor of Management, DePaul University

Article I of the American Constitution vests all legislative powers granted therein to a Congress which consists of two chambers: a Senate composed of two Senators from each state elected, after 1913, by the people in statewide elections, and a House of Representatives.[1] The Article specifies three rules regarding the elective process of members to the House. Section 2 provides that the number of representatives to be elected from each state shall be apportioned by Congress to the states on a population basis and that the representatives shall be chosen by the people of the several states. Section 4 states that times, places and manner of holding elections for representatives "shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations…"[2]

The Framers were not unaware of the difficulties attendant to drafting an equitable election law and believed that under the concept of federalism and inherent differences in national and state interests, a discretionary power ought to reside in one or the other legislative bodies.[3] Alexander Hamilton, in *The Federalist*, saw the need for compromise on who would have the constitutional authority to regulate elections:

> It will, I presume, be readily conceded that there are only three ways in which this power [regulating the right to vote] could have been reasonably modified and disposed: that it must either have been lodged entirely in the national legislatures, or wholly in the state legislatures, or primarily in the latter and ultimately in the former. The last mode has, with reason, been preferred by the Convention… but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interpretation necessary to its safety.[4]

[1] U.S. Const. art. I. Article 2, § 3 originally provided that Senators were to be chosen by the state legislatures but the Nineteenth Amendment directed that Senators be elected by one
[2] U.S. Const., art. I, §§ 2 and 4.
[3] Page Smith, THE CONSTITUTION, A DOCUMENTARY AND NARRATIVE HISTORY, 204-206 (1980); THE FEDERALIST PAPERS NUMBER 52 (Madison) Benjamin Fletcher Wright, ed. (Harvard University Press, 1961).
[4] FEDERALIST PAPERS, NUMBER 54 (Hamilton).

Although the Framers of the Constitution considered the right of the people to vote one of the fundamental articles of a republican form of government, no other singular constitutional term has engendered a higher political furor or created more disparate U.S. Supreme Court decisions than the controversies that surround the right to vote.[5] Legal commentators and political scientists for decades have inveighed against perceived voting abuses in apportionment cases as unconstitutional artifices enacted by state legislatures to dilute the voting strength of other political groups to protect an incumbency or advantageously affect the election of favored candidates. A historical review of the Supreme Court's response to the controversy and restatement of current law on the subject present a perplexing study of one of the most fundamental and seemingly inviolate rights of the people in a democratic government.[6]

The controversy is centered generally on one of the structural principles of the Constitution, the doctrine of separation of powers. In its most dogmatic form, the doctrine is based on the notion of three distinct functions of government that ought to be exercised respectively by three separate branches of government, which should be equal and mutually independent.[7] Montesquieu joined the notion to the idea of a "mixed constitution" of "checks and balances;" it being desirable, the celebrated political philosopher said, to divide the powers of government, first, in order to keep to a minimum the powers lodged in any single organ of government; and secondly, in order to be able to oppose organ to organ.[8]

Historically, the legislative and the executive branches of government under the Constitution were the political branches with whose exercise of constitutional and political powers granted to them, the judiciary would not interfere. It was not within the province of the Courts to inquire into the policies underlying action taken by the political branches in the exercise of their constitutionally conceded powers.[9] In 1803 in *Marbury v. Madison* where the Court declared for itself the power to determine the constitutionality of federal legislation, Chief Justice John Marshall wrote rather conclusively: "The province of the [Supreme Court] is solely to decide on the rights of individuals, not to inquire how the executive or its officers perform

[5] See, e.g.: The New York Times, July 29, 2006, 24.
[6] Bernard Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77 (1985).
[7] John Locke, THE SECOND TREATISE ON CIVIL GOVERNMENT, § 141 (1690). Also see, for the historical background of the principle, P.W. Duff and H. E. Whiteside, "Delegata Potestas Non Potest Delegari," Selected Essays on Constitutional Law, IV, 291-316 (1938).
[8] Baron de Montesquieu, THE SPIRIT OF LAWS, BOOK IX, Ch. II (1748).
[9] See, e.g., Decatur v. Paulding, 14 Pet. 497, 516 (1840) [interference of the courts with the performance of the political duties of the executive (and legislative) branch "would be productive of nothing but mischief."].

duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws submitted to the executive, can never be made in this Court." [10]

The Supreme Court has consistently held that as a matter of constitutional law sections 2 and 4 of Article I "gives the states primary responsibility for apportionment of their… congressional districts" and by the text in section 4, Congress may set further requirements.[11] Congress has been traditionally reluctant to assert its oversight power and not until 1842 did Congress undertake to exercise that power when it passed a law requiring states to apportion voting of representatives in single-member districts.[12] Otherwise, Congress left it entirely to the states to define the territorial areas from which representatives would be chosen. The right to vote in state elections is nowhere expressly mentioned in the Constitution but unless a state election statute was discriminatory and violated a specific constitutional amendment, federal courts would refuse to hear voting challenges.[13]

Historically, virtually all state Constitutions require that elections for state bicameral legislatures and congressional representatives be situated in single-member districts of equal or nearly equal numbers of residents. However, by virtue of substantial population growth and shifts and the state legislature's reliance on districting plans adopted years earlier but not amended to reflect the population changes, districts resulted with glaringly unequal populations.[14] From 1901 to 1961 the Tennessee legislature, for instance, ignored the state constitutional requirement that districts be reapportioned every ten years, which inaction permitted minority groups of voters to gain majoritarian control over the state legislature and congressional representative seats.[15] In Alabama, one-quarter of the state population could elect a majority of the legislative members.[16] Many such malapportionments were challenged as unconstitutional on the grounds that they diluted the voting strengths of residents in the more

[10] 1 Cr. 137, 170 (1803).
[11] Grove v. Emison. 507 U.S. 25, 34 (1993) cited by the Court in League of United Latin American Citizens, et al. v. Perry, 126 S. Ct. 2594; 165 L. Ed. 2d 609, 2006 U.S. Lexis 5178 (2006). Also, Chapman v. Meier, 420 U.S. 1 (1975); Smiley v. Holm, 285 U.S> 355, 366-367 (1932) (reapportionment implicated State's powers under Act 1, § 4). As to the right of Congress to set further requirements with respect to districting, sec; Branch v. Smith, 538 U.S. 254, 266-267 (2003).
[12] 5 Stat. 491 (1842). This requirement was dropped in 1850 (9 Stat. 428) but renewed in 1862 (12 stat. 572). In 1911 Congress required that districts be "composed of a contiguous and compact territory, … containing as nearly as practicable an equal number of inhabitants" [37 Stat. 13, 14 (1911)] but the Reapportionment Act of 1929 omitted the requirement (46 Stats. 21) and the provision seems to have just faded away.
[13] See, Gomillion v. Lightfoot, 364 U.S. 399 (1960).
[14] Baker v. Carr, 369 U.S. 186 (1962).
[15] Id. at 189.
[16] Reynolds v. Sims, 377 U.S. 533 (1964).

populous districts and violated the equal protection of the law. Until the 1960s the challenges were considered by the Court to involve political questions and therefore beyond the reach of the Court.

The concept of "political question" is a well established judicial principle, first articulated by the Court in *Marbury v. Madison*[17] as to the executive and later in 1849 to Congress in *Luther v. Borden.*[18] In *Borden,* the Court was requested to resolve a dispute about the lawful government of Rhode Island that arose between two competing political groups. The Court held "[I]t is no part of the judicial functions of any court of the United States to prescribe the qualifications of voters in a state, …; nor has it the right to determine what political privileges the citizens are entitled to, unless there is an established constitution or law to govern its decision."[19] Each House, in a State or Congress under Article I of the Constitution, said the Court, is "the judge of elections, activities and qualifications of its members."[20]

In *Wood v. Broom* the Court addressed the political question issue for the first time in a challenge to an apportionment map formed by the Mississippi legislature. Plaintiffs alleged that the voting district was purposefully not contiguous which created unequal populations and violated Article I, § 4 and the Equal Protection Clause of the Fourteenth Amendment. The Court held that there was no federal requirement that such congressional districts should be equal and therefore raised a question properly for the state legislature and Congress to resolve and thus it was nonjusticiable.[21] In 1946 in *Colegrove v. Green,* Illinois voters brought a malapportionment suit challenging a state districting plan that was relied upon by the state assembly in an unmodified manner since it was passed in 1900.[22] Plaintiffs claimed the plan failed to reflect the population growth and shifts, which created substantial voting inequalities between the districts and deprived voters of their equal protection under the law. The Court rejected the challenge on the basis that it was a political question and the courts had no viable standards on which to judge a matter that was entrusted to the states and Congress under the Constitution. Justice Frankfurter explained:

[17] Supra, m. 10.
[18] 48 U.S. (7 How.) (1847).
[19] Id. at 41.
[20] Id.
[21] 287 U.S. 1 (1932).
[22] 328 U.S. 549 [1946].

> To sustain this action would cut very deep into the very being of Congress… This controversy concerns matters that bring courts into immediate and active relations with party contests. [It] is hostile to a democratic system to involve the judicially in the politics of the people. [Courts] ought not to enter this thicket.[23]

Justice Black, in a dissent which cast the die in future case reasoning, argued:

> While the Constitution contains no express provision requiring that Congressional election districts established by the States must contain approximately equal populations, the constitutional guaranteed right to vote and the right to have one's vote counted clearly imply the policy that State election systems, no matter what their form, should be designed to give approximately equal weight of each vote cast… legislation which must inevitably bring about glaringly unequal representation in Congress in favor of special classes and groups should be invalidated, "whether accomplished ingeniously or ingenuously."[24]

Equal Protection of the Law

The Fourteenth Amendment to the U.S. Constitution declares that no state shall "deny to any person within its jurisdiction the equal protection of the law."[25] Justice Field in Ex Parte Virginia explained what the nature of the rights protected under the equal protection clause: "[T]he equality of the protection secured extends only to civil rights as distinguished from those that are political…. It secures to all their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of government and its administration as they stood previous to its adoption…"[26]

The Supreme Court opened the texture of equal protection in the oft-cited case of *Yick Wo v. Hopkins*, [27]

[23] Id. at 566.
[24] Id. at 570.
[25] U.S. Const. amend X14 (1868).
[26] 100 U.S. 339 (1879).
[27] 118 U.S. 356 (1886).

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. [28]

Not until the 1960s did the Supreme Court give the equal protection clause a legal significance in cases involving the denial of the right to vote and malapportionment cases.

Denial of the Right to Vote

Prior to 1960, by virtue of the political question doctrine and the precedential interpretation of the equal protection clause, the states had virtually an unfettered right to set voting qualifications for residents. In Breedlove v. Sutter, for example, the Supreme Court upheld a Georgia law that required the payment of a poll tax of $1.50 as a condition to exercise the right to vote.[29] The Court also upheld a North Carolina statute that provided "only those who were literate should exercise the right to vote; the test being was that a resident must be 'able to read and write any section of the state constitution in the English language."[30] In 1944, the Supreme Court held in *U.S. v. Saylor* that the right to vote given citizens in Article I applied only to residents who were able to meet the requirements as prescribed by the states for voting, but presciently admonished the states that "the right to vote comes not from the State but the Constitution, and, under the Equal Protection Clause in the Fourteenth Amendment, it is a right that no state must abridge."[31]

In 1966, the Supreme Court, citing *Saylor* in *Harper v. Virginia State Board of Elections*, held that the equal protection clause did apply to abusive voting laws and invalidated a state statute that required the payment of a poll tax as a condition to vote.[32] The compelling interest of the state, said the Court, "is limited to the power to fix qualifications" and when the suffrage franchise is granted to the electorate, the equal protection clause confers a substantive right to

[28] Id. at 367
[29] 302 U.S. 277 (1937).
[30] Lassiter v. Northhampton County Board of Elections, 360 U.S. 45 (1957).
[31] 322 U.S. 385 (1944).
[32] 383 U.S. 663 (1966).

participate in elections on an equal basis with other qualified voters, and any line drawn on wealth, like race, is invalid.[33]

In *Kramer v. Union Free School District*, a New York statute provided that school district residents could vote in a school district election only if they owned property or were parents of a child enrolled in the district.[34] Petitioner, neither a property owner or parent, challenged the statute on the grounds the qualification denied him equal protection under the law. The Supreme Court held that if a state statute grants the right to vote to a resident on a selective basis but denies the suffrage to others, a court must determine whether the subject restriction is necessary to promote a compelling state interest. In such cases:

> [T]he general presumption of constitutionality afforded state statutes [under the separation of powers] and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people.[35]

When the challenge to the statute is, in effect, a challenge on the assumption of a political question, the assumption can no longer serve as the basis for presuming the constitutionality of a state voting law. Moreover, the assumption is no less under attack because the legislature which decides who may participate in an election at the various levels of political choice, is fairly elected. Legislation which delegates decision-making to bodies elected by only a portion of those residents eligible to vote by virtue of state law can cause unfair representation. The Court rejected the presumption that merely because some residents do not own property or are not parents they were not interested in educational affairs.[36]

Justice Stewart, with Justices Black and Harlan, vigorously dissented, viewing a rational basis as the firmer constitutional principle for discerning the constitutionality of a voting restriction:

> Clearly, a State may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries

[33] Id. at 669-670.
[34] 395 U.S. 621 (1969).
[35] Id. at 630.
[36] Id. at 634.

> than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally better informed regarding state affairs than are nonresidents, will be more likely than nonresidents to vote responsibly. And, the same may be said of legislative assumptions regarding the electoral competence of adults and literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn cannot infallibly perform their intended legislative function. Just as "[i]lliterate people may be intelligent voters," non-residents or minors might also, in some instances, be interested, informed, and intelligent participants in the electoral process.[37]

The application of the Court's strict scrutiny test under fourteenth amendments in vote restrictions statutes has been established as a firm principle of federal law. The Court, under the rule, has held unconstitutional state statutes that have disenfranchised classes of people such as service members, newly arrived residents, some federal employees, and ex-felons; not on the basis of the right to vote in Article I but under the Equal Protection Clause of the Fourteenth Amendment.

Dilution of the Right to Vote

Article I Section 2 of the Constitution specifies that the people of the several states shall elect their members of the House of Representatives and that the number of representatives from each state to be elected would be proportional to the population of the country.[38] The Constitution, however, left it entirely to the states to determine the circumstances and process as to how the congressional representatives and state legislators should be elected.

The right to vote for state legislators is nowhere expressly mentioned in the U.S. Constitution but most state constitutions require that state and congressional representatives be based on the single-member districts of equal or nearly equal population numbers.[39] However, population growth, shifts, and a reluctance of some state legislatures to reapportion voting districts and refusal to accord with the changes led to districts with highly unequal populations with the result that minority groups of voters were able to attain majoritarian control over the legislatures and congressional representatives. The census requirement in Article I applies at the

[37] Id. at 650.
[38] U.S. Const. Art. I, §§ 2 and 4.
[39] JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION, 60 (1992).

federal level and means only that Congress must reassess and reassign, if necessary, the number of House seats allocated to each state, but the Article is otherwise silent on what size the Congressional districts in the state must be or when and how elections shall be conducted.[40]

For almost one hundred seventy years, the Court refused to hear challenges to malapportionment and partisan gerrymandering plans on the grounds they were nonjusticiable political questions and within the province of the states and Congress to resolve. Justice Frankfurter, one recalls, admonished that Courts "ought not enter into the political thicket" but in 1962 the Court did enter the fray, and, indeed, a thicket it became.[41]

In *Baker v. Carr*, decided in 1962, the Supreme Court abandoned its earlier ruling in *Colegrove* when it considered a similar Tennessee malapportionment claim and held that such challenges were justiciable under the Equal Protection Clause.[42] Plaintiffs contended that the state legislature's reliance on an apportionment map enacted in 1900 and unmodified since, created unequal districts, which created grossly unequal voter districts with vote disparities of 42:1. Such apportionment, held the Court, was made in an arbitrarily and capricious manner and unconstitutional.

Justice Brennan writing for the majority discerned from previous case decisions six circumstances by which the political question doctrine would apply including, as relevant in the *Baker* decision, that there be "a lack of judicially discoverable and manageable standards for resolving 'the political question'."[43] Such standards were present to permit the Court to hear an apportionment claim; "Judicial standards under the Equal Protection Clause are well developed and familiar and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply <u>arbitrary and capricious</u> action (emphasis added)."[44] No other commentary or direction was

[40] U.S. Const. Art I § 2. Congress has not always complied with its affirmative mandate to reapportion representatives among the states after the census is taken. It failed to make such apportionment after the 1920 census, being unable to reach agreement for allotting representation without further increasing the size of the House. By the act 46 Stat. 21 (1929), it was provided that the membership of the House should henceforth be restricted to 435 members. See: THE CONSTITUTION OF THE UNITED STATES ANALYSIS AND INTERPRETATION 90; Library of Congress, Edward S. Corwin, editor.
[41] Supra, n. 23.
[42] 369 U.S. 186 (1962).
[43] Id. at 197.
[44] Id.

stated by the Court to define the vague "arbitrary and capricious" districting as a workable or manageable standard for lower courts.

Justice Frankfurter harshly dissented:

> The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation – a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex. [Disregard] of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.
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> The majority decision created the situation where: "its jurisdiction in the abstract is meaningless. It is as devoid of reality as "a brooding omnipresence in the sky," for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. [To] charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omnicompetence to judges….[45]

The following year in *Gray v. Sanders*, the Court reviewed Georgia's county unit system under which the votes in the least populous counties computed at almost on hundred times more than those in the most populated counties in the statewide election for governor.[46] The Court struck down the state districting statute simply because the plan weighed population unequally: "The conception of political equality," declared Justice Douglas, "from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fourteenth, Seventeenth and Nineteenth

[45] Id. at 209, 210.
[46] 372 U.S. 368 (1963).

Amendments can mean only one thing – one person, one vote."[47] The unequal districting deprived citizens access of fully exercising their right by what was an invidious scheme that deprived those citizens of the equal protection of the law. But in 1964, the Court backed away from an equal protection reasoning to justify hearings of malapportionment claims. In *Westbury v. Sanders*, the Court enhanced the right of the people to vote but not under a fourteenth amendment theory: "[W]e hold that, construed in its historical content, the command of Article I, section 2 that 'representatives be chosen by the people of the several states' means that, as nearly as practicable, one man's vote in a congressional election is to be worth as much as another's."[48]

Four months later the Court again tinkered with its reasoning in *Baker and Westbury*. In its most expressive decision on malapportionment the Court held in *Reynolds v. Sims*, that as an essential constitutional justiciable standard, the equal protection clause required that the seats in the State legislatures must be apportioned by districts on an equal population basis: "Simply stated, an individual's right to vote for state legislatures are constitutionally impaired when its weight is, in a substantial fashion, diluted when compared with votes of citizens living in other parts of the state… [emphasis added]" and to achieve this, the Equal Protection Clause required the state legislature to make "an honest and good faith effort to construct districts… as nearly of equal population as possible."[49] Chief Justice Earl Warren stated that "some distinctions may well be made in congressional [as well] as legislature representations."[50] The majority opinion again did not provide any clear direction as how to discern "an honest and good faith effort" or express any specific criteria to allow lower courts to discern the subjective factors of "honest" and "good faith" efforts except, suggested the Chief Justice, "Somewhat more flexibility may therefore be constitutional with respect to state legislative apportionments, than in congressional districting."[51] Mathematical equality could produce more political harm than good for "[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."[52] The majority in *Reynolds* was thus aware of the problem of partisan gerrymanders, the one-person,

[47] Id. at 381.
[48] 376 U.S. 1, 7-8 (1964).
[49] 377 U.S. 533, 541 and 543 (1964).
[50] Id. at 551.
[51] Id.
[52] Id. Justice Harlan, dissent, 621-622.

one-vote rule seemed to some justices that the Court was in effect silently sanctioning gerrymander schemes.

The Court in *Karcher v. Daggett* invalidated a New Jersey congressional apportionment plan that diluted Republican voting strength in district territories because the population deviations between the districts did not reflect a good faith effort to achieve population equality.[53] Justice Stevens voiced the notion that near-equality of voting districts would facilitate partisan gerrymanders which, the Justice indicated, should be treated the same as malapportionments:

> The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. If they serve no purpose other than to favor one segment – whether racial, ethnic, religious, economic, ***or political*** – that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.[54]

Justice Powell in a dissent agreed with the majority opinion that district equality would advance gerrymandering and could cause significant voting dilution. He blamed prior cases that required an "uncompromising emphasis on numerical equality" which could "encourage and legitimatize even the most outrageous partisan gerrymandering."[55] Justice Powell suggested that apportioned districts should simulate compactness and disregard traditional political boundaries; if not, the state should be required to probatively show a nondiscriminatory reason for its plan.[56]

Justice White, also dissenting, argued that there should be a standard of maximum permissible deviations in districting plans, suggesting not more than five percent. States then could consider natural or established lines of political districts without achieving mathematical equality and could harmonize mathematical equality and malapportionment and gerrymander standards.[57]

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[53] 462 U.S. 725 (1983).
[54] Id. at 776-776.
[55] Id. at 785.
[56] Id at 788.
[57] Id. at 780-781.

Political Gerrymandering

Political gerrymandering can be traced back to the beginning of the eighteenth century when several counties conspired to minimize the political power of the City of Philadelphia by refusing to allow it to merge or expand its city districts into surrounding jurisdictions and thus deny it additional representation. There were also allegations that Patrick Henry attempted to gerrymander James Madison out of the First Congress in 1788.[58] The term gerrymander first appeared as an amalgam of the name of Massachusetts Governor Elbridge Gerry and the "salamander-like" odd outline of an election district Gerry was credited with forming to protect the Antifederalist party political advantages.[59] By 1840, gerrymandering was a recognized strategy in party politics and generally sought in legislation plans enacted for the formation of voting districts for congressional representatives and state legislators. It was generally conceded that each political party could with political superiority have a constitutional right to seek to gain control over legislative or congressional seats that was not proportionate to its statewide numerical strength.

Congress sought from time to time to regulate gerrymandering by providing for contiguous and compact districts and quotas for equally-populated territories, but such rules were not extended beyond their terms except for the single-member voting districts.[60]

The Supreme Court avoided the gerrymander appointment issue for the reason that there were no reliable standards or constitutional criterion to determine how election districts should be fairly drawn. This created the political question principle which precluded the Court from entering the fray. The Court did however invalidate gerrymander plans if there was a probative showing that it was adopted or retained to discriminate against a race or ethnic group. In 1960 the court struck down an Alabama statute that resculpted the shape of the City of Tuskegee from a square to "an uncouth twenty-eight sided figure."[61] The new boundary lines caused the removal of all but five black residents from the city voting district while not affecting a single white voter. The Court held that the obvious and only purpose of the gerrymander scheme was to deprive black residents from exercising their right to vote under the Fifteenth Amendment.[62]

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[58] See Vieth v. Jubelirer, 124 S. Ct. 1769, 1774-76 (2004) (short history of gerrymandering with citations to scholarly research).
[59] Id.
[60] Supra, n. 12.
[61] Gomillion v. Lightfoot, 364 U.S. 339 (1960).
[62] U.S. Const. amend XIV (1868).

But if racially motivated gerrymanders are unconstitutional, what of gerrymanders designed principally to minimize the relative voting strength of particular political parties and ethnic groups. The issue in partisan gerrymanders was of a different tenor than in malapportionment cases which were structured to give a minority group of voters the majoritarian control of the state and congressional representatives and racial gerrymanders under the Fifteenth Amendment. If voting districts were of equal or nearly equal populations, the Court's ruling in *Becker v. Carr* and the long line of successor cases that followed held that as long as the one person, one vote standard was met, what difference did the shape of the equally-populated district have on the rule?

In *Gaffney v. Cummings*, the challengers of a state districting plan contended that even if the plan satisfied the *Westbury – Reynolds* one-person, one-vote requirement, the districting plan was "invidiously discriminatory" because it was drawn to "achieve a rough approximation of political strengths of the Democratic and Republican Parities."[63] The map reflected a seven plus percent population deviation in the state House districts and two percent deviation among Senate districts. The Court held that the notion of a political fairness principle was not unconstitutional:

> Politics and political considerations are inseparable from districting and apportionment. [It] may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results. [Districting schemes may be invalid] if racial or political groups [are] fenced out of the political process and their voting strength invidiously minimized, [but there is no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.[64]

Mobile, Alabama has been governed by a City Commission composed of three commissioners elected not in districts but by the residents of the city at large. Although Mobile

[63] 412 U.S. 735, 737 (1973).
[64] Id. at 753.

has a substantial black population, no black had ever been elected to the commission since 1911. In *City of Mobile v. Bolden*, the Court rejected a claim that the retention of an at-large electoral system in such circumstances unconstitutionally diluted the black voting strength.[65] Justice Stewart, writing for the majority, noted that multimember districts are not presumptively unconstitutional and would be invalid only if their purpose is "invidiously to minimize or cancel out the voting potential of racial and ethnic minorities."[66] The plaintiff, the Court ruled, "must prove that the disputed plan was conceived or operated as [a] purposeful device to further [racial] discrimination."[67] The right to equal representation in the electoral system does not protect any "political group," however defined, from electoral defeat. The hovering issue from Bolden was the seeming constitutional inconsistency between Justice Stewart's proposition that there is no constitutional right to proportional representation and the one-person, one-vote principle in *Westbury* and *Reynolds*.

In the seminal case of *Davis v. Bandemer*, the Court heard a challenge by Democrats to a districting plan for the Indiana Senate and House by the Republican-controlled legislature.[68] In the 1982 state election the Democrats received almost sixty percent of the total House vote and fifty-three percent of the Senate yet won only forty-three of one hundred House seats and thirteen of twenty-five Senate seats. The Court held that the ruling in *Baker v. Carr* that malapportionment claims are justiciable apply equally to the question of partisan gerrymandering. The one-person, one-vote principle, Justice White carefully explained, had not been adopted when *Baker* was decided and therefore, the Court there "did not rely on the potential for such a rule in finding justiciability."[69]

The six member majority agreed that a claim of an unconstitutional gerrymander required proof of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[70] The Justices, however, greatly disagreed as to the method to be applied to determine the requisite discriminatory effect. Writing for a four member plurality, Justice White declared "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'

[65] 446 U.S. 55 (1980).
[66] Id. at 63.
[67] Id at 64.
[68] 478 U.S. 107 (1986).
[69] Id. at 123.
[70] Id. at 132.

influence on the political process as a whole."[71] Then, he explained, "a finding of unconstitutionality must be supported by evidence of 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."[72] Justices Powell and Stevens rejected the plurality's approach and formulated a measure to impose far more stringent limitations on partisan gerrymandering.

Chief Justice Burger and Justices O'Connor and Rehnquist in a hard dissent would have held claims of partisan gerrymanderings nonjusticiable. Justice O'Connor stated that courts were unable to develop a test that would not evolve into "a requirement of roughly proportional representation for every cohesive group."[73] Since claims of partisan gerrymandering would therefore be plagued either by "a lack of judicially discoverable and manageable standards" or by "the impossibility of deciding [the dispute] without an initial policy determination of a kind clearly for nonjudicial discretion." They presented a nonjusticiable political question under *Baker's* test.[74]

Justice O'Connor correctly predicted the vagaries of the unspirited assumptions in Bandemer. In the following twenty-one suits challenging district maps under Bandemer, courts denied relief in every one.[75]

Eighteen years after its decision in *Bandemer*, the Court again examined the constitutionality of political gerrymanders in *Vieth v. Jubelirer*.[76] On the case, the Republican Party controlled a majority of both chambers of the Pennsylvania Legislature and the Governorship and adopted a partisan redistricting map designed to give the Republicans at least thirteen of nineteen congressional seats even though the Republican and Democratic Parties had virtually equal support margins among the Pennsylvania voters. The Democrats alleged the revised district map was in fact a malapportionment in that it was contrary to the "one-person, one-vote" decision in *Westbury*, et al. and was a violation of the Equal Protection Clause. The Court rejected the claim.

All nine Justices agreed that the Bandemer test was unsatisfactory but they all disagreed over what to do about it. The Court, in a plurality opinion, argued that because no "discernible

[71] Id. at 134.
[72] Id.
[73] Id. at 141.
[74] Id. at 147-148.
[75] The cases are set forth in Vieth v. Jubelirer, 541 U.S. 267, 276.
[76] 541 U.S. 267 (2004).

and manageable standards" existed for the adjudication of partisan gerrymandering schemes, such schemes must necessarily be nonjusticiable issues.[77] In *Bandemer* the Court said that such a standard may exist, but the Court could not define it at that time other than an arbitrary and capricious district. In *Vieth* the Court opined that the loose "standard" employed by the Court in *Bandemer*, which involved a determination of (1) discriminatory intent and (2) discriminatory effect, was simply unworkable for evaluating political gerrymandering schemes for two reasons. First, it is difficult to determine whether the effect of a political gerrymandering scheme was intended by the legislature at the time the scheme was enacted. Second, it is even more difficult, if not impossible, to find that a group has been effectively denied its opportunity to participate in the political process because a group could effectively participate even without electing a single candidate. Justice Kennedy agreed that no justiciable standard existed and joined in with the majority in dismissing the law suit, but he would not go so far as to say that all partisan gerrymandering claims are nonjusticiable.[78] Four Justices in separate dissents proposed three different standards to replace the ineffectual *Bandemer* test.

In a recent partisan gerrymandering case, *League of United Latin American Citizens v. Perry*,[79] the Supreme Court upheld a statewide challenge to the Texas Legislature mid-term redistricting map, but that the redrawing of district lines in one district was an unconstitutional gerrymander.[80] In a largely fractured opinion, six Justices produced one hundred twenty-two pages of decision without any five of them able to agree on how to define an unconstitutional gerrymander.

In *Perry*, Texas Republicans gained control of both Houses of the state legislature in 2002 and promptly set out to increase its representation in the congressional delegation. Soon the legislature enacted a new districting plan. The plan, in particular District 23, was designed, *inter alia*, to reassure the election of a Republican Congressman from the district. The problem was that the incumbent had become less popular with the Latino residents of the district which, before redistricting was 57.5%. The incumbent in a prior election received only 8% of the Latino vote.[81] This required a new population mix.

[77] Id. at 281.
[78] Id. at 273
[79] 126 S. Ct. 2594 (2006).
[80] Id. at 2599.
[81] Id.

The new plan divided the county and the city of Laredo, on the Mexican border, that formed the county's population base. Webb County, which is 94% Latino, had previously rested entirely within District 23. Under the new plan, nearly 100,000 people were shifted into neighboring District 28. The rest of the county, approximately 93,000 people, remained in District 23. To replace the numbers District 23 lost, the State added voters in counties comprising a largely Anglo, Republican area in central Texas. In the newly drawn district, the Latino share of the citizen voting-age population dropped to 45%, though the Latino share of the total voting-age population remained just over 50%.[82]

These changes required adjustments elsewhere, of course, so the State inserted a third district between the two districts to the east of District 23, and extended all three of them farther north. New district 25 is a long, narrow strip that winds its way from McAllen and the Mexican border towns in the south to Austin, in the center of the State some 300 miles away. In between it includes seven full counties, but 77% of its population resides in split counties at the northern and southern ends. Of this 77%, roughly half reside in Hidalgo County, which includes McAllen, and half are in Travis County, which includes parts of Austin. The Latinos in District 25, comprising 55% of the district's citizen voting-age population, are also mostly divided between the two distant areas, north and south. The Latino communities at the opposite ends of District 25 have divergent "needs and interests," owing to "differences in socio-economic status, education, employment, health, and other characteristics."[83]

The Supreme Court held that the redrawing of District 23 violated Section 2 of the Voting Rights Act. The Act, which was adopted primarily to enforce the Fourteenth and Fifteenth Amendments and Section 4 of Article I provides in part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees [set forth in this Act].[84]

A State violates Section Two of the Voting Rights Act if:

[82] Id. at 2600.
[83] Id. at 2609.
[84] 42 U.S.C. § 1973 (a) (2000).

> [B]ased on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial or ethnic group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[85]

The Voting Rights Act was for the first time applied by the Court in *Thornburg v. Gingles* where black voters challenged districts in North Carolina claiming that the apportionment impaired the plaintiff's voters "ability to elect representatives of their choice."[86] The Court identified three factors which it said must be probatively shown to sustain a claim of vote dilution of a racist bloc. First, "the minority group must be able demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[87] Second, the minority group must be "politically cohesive," meaning that the majority of minority members in the district tend to vote for candidates of a particular political affiliation.[88] Third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.[89]

The court found that all three elements set in the *Gingles* decision for a violation of Section 2 of the Voting Rights Act. First, the Court determined that Latino voters in the former District 23 were "sufficiently large and geographically compact to constitute a majority" in the district in that the Latino population constituted a majority of voting residents and possessed the electoral opportunity protected by Section 2 of the Act.[90] Breaking up of the district would deprive the Latinos of the opportunity to elect a candidate of choice in the future. The second element was indicated by the data that ninety-two percent of the non-Latinos voted for the incumbent. The third *Gingles* element of majority bloc voting was demonstrated by a finding of racially polarized voting generally throughout the state.[91]

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[85] 42 U.S.C. § 1973 (b) (2000).
[86] 478 U.S. 30 (1986).
[87] Id. at 50.
[88] Id. at 50-51.
[89] Id. 51.
[90] Id.
[91] Id. at

As to the "totality of circumstances" to determine of Section 2 was violated, the Court simply held that the vote dilution that occurred in District 23 as a result of its splitting would have implications on Hispanic voters throughout the state. The Court veered away from its prior more defined ruling in *Johnson v. DeGrandy* when it held that where "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the… population," no Section Two violation can be found to exist.[92] The Court held that while "proportionality is not dispositive" in striking down a Section Two challenge, "it is a relevant factor in the totality of [the] circumstances."[93]

The Court, although holding that the redrafted District 23 violated Section 2 of the Voting Rights Act did not invalidate the entire reapportionment map, holding the statewide map except District 23 was constitutional under *Vieth*.

The Supreme Court in *Perry* strengthened its prior holdings when a voting district is designed to intentionally discriminate against a racial or minority bloc of voters in violation of a constitutional amendment. However, it leaves the Court's *Vieth* decision substantially unaffected. *Perry* involved a districting scheme that was discriminatory in content and texture in violation of the Constitution. The Court appears to have otherwise left *Vieth* intact.

The Increasing Value of Gerrymandering

The value of Gerrymandering to a political party has been enhanced over the last decade because of the ease in obtaining information about voters. The ability to amass and analyze data and combine different data sources increases the likelihood that legislative districts can be reapportioned in a way that will enhance the party in power. Districts can be constructed to support the ruling party's continuance in maintaining a majority in the legislative, and more recently, the executive branches of government. The computer has given each party the ability to merge existing databases and add their own information in order to have a more accurate understanding of individual voter preferences, political contributions, and how often individual voters have voted in past elections. One, relatively easy to operate software program currently on the market, called Red/Blue[94] uses data from the Federal Elections Commission. By entering

[92] 512 U.S. 997 (1994).
[93] Supra n.79 at 2525.
[94] http://politicalwire.com/archives/2004/10/04/red_or_blue.html

an address, a user can find out for that address, the amount of contributions an addressee has made and to what political party. By comparing that data over a geographic grid, a user can determine the strength of a political party in the area and where there are pockets supportive of an opposing political party. Entering this data for an entire state and using sophisticated heuristic modeling that will test thousands of different geographic combinations; a political party can build a model of the state that will enhance its own political power by building "safe" districts or toward diffusing the power of opponents. A *safe* district is one designed so that a majority of voters in that district is of the same party ensuring that the candidate would win the election without much campaigning or expenditures of resources.

Even if a state's voters were relatively balanced between republicans and democrats, a reapportionment of the state's district could lead to significant increase in representations by the party in power as it manipulates district boundaries to diffuse historical power of the opposition party while enhancing its own party. For example, this is what was done in Tom Delay's former district in Texas. Because of his popularity at the time, the republican's reduced the strength of the district in the 2002 redistricting to increase other districts projected republican strength so they might be more likely to carry an additional district or two; important in bi-annual Congressional elections.

Redistricting to the benefit of the party in power can directly influence the Presidential election as well. Two states have dictated through state laws, that the allocation of electoral votes will be based on the party that wins the popular vote for President ***for each*** legislative district. In most states the allocation of electoral votes are based on the winner of the popular vote for President *for the whole state*; a winner takes all principle. Increasingly, as political parties understand more fully how votes can be manipulated by district boundaries, it is expected to see more movements to change laws so that Presidential elections will be based on legislative district rather than statewide popular votes. For example, California voters will be faced with voting on Proposition 07-0032 which has been proposed by an "interest group" with strong ties to one party. Proposition 07-0032, which will be presented to voters in an "off-year" election to change from a state winner to legislative district winner for the choice of President. The argument used is that it would be a fairer way to represent the voters of California. However,

that may be somewhat less than true. Following the 1980 census, the redistricting allowed for 5 more House of Representative victories for the party in power.[95]

Increasingly, the party in power is going to use their power to redistrict to their advantage and the improvements in data collection, analysis, and modeling are making activities such as gerrymandering more important.

The Effect on the Voting Process

It is in this climate, gerrymandering in the 21st century takes an insidious turn as a political party in power tries to influence the election. Gerrymandering hurts the voting process through actual distortions and perceptual mistrust. First, it demonstrates to the electorate that each party is attempting to overrule the political process by altering voting boundary lines. By the apportionment of the district, a particular party influences election outcome – not by ideas or concepts appealing to the voter, but by focusing on the historical predisposition of the voters in a specific geographical region. A voter who may vote the opposing party in a "safe" district may be disheartened and not vote because he or she may think the vote may not count, further weakening the psychological connection between the voter and those governing.

Second, actions by a political party to influence the outcome of an election through redistricting, coupled with the impression that elections are purchased by special interest groups with deep pockets, can have a deleterious affect on the trust that potential voters have on the potency of their vote and in confidence in the political process. As the quality of life of voters decreases because of any sorts of conditions including the schizophrenic nature of voters (e.g. wanting low taxes and high levels of government service), voters have a tendency to blame the government for these ills. Adding political gerrymandering to this equation adds another dimension to the mix of mistrust.

Why the Legislative Branch will not act

The Supreme Court has indicated in several decisions above that the legislative branch should change the law on redistricting if needed as specified by the Constitution in Article I, section 2 & 4. However, it will seldom happen, as it is not in the best interest of the party in

[95] Jeffrey Toobin, The Great Election Grab: When does gerrymandering become a threat to democracy?" **New Yorker,** December 8, 2003, page 63-80.

power.[96] Even if a political party did **not** want to engage in Gerrymandering, they would almost have to in order not to lose a competitive advantage or, once they have lost the election, they would suffer when the other side would redistrict adding further harm to the new minority party. It would not be in their best interest when they are in power to change and they would not have the power to force a change when they are not in power.

Approach to Ameliorate Redistricting

Iowa is one of the few states that have utilized a legislative solution. After the 2000 census, Iowa turned redistricting over to a nonpartisan civil-service commission. The result was 4 of 5 legislative districts had competitive races which accounted for ten percent of the nation's "close" election in 2002.[97]

One of the complaints of the Supreme Court is that there is no effect way to assess that there is damage in a redistricting plan. In an amicus curiae brief for the Vieth v Jubelirer Supreme Court case[98], one approach was offered as a means to resolve these sorts of disputes. The amicus curiae brief recommended that the foundation for resolution can be found in current anti-trust legislation where two standards are followed: determining monopoly power and demonstrating that exclusionary conduct is present. Two criteria are followed in determining **monopoly power** as it related to redistricting. First, **market share** - does one party have control over both legislative branches (one if a unicameral) and the governor's office. Any lower standard would mean the minority party approved the redistricting. Second, **the firm's ability to price above the competitive level –** the standard here is that the percentage of statewide seats is above the reasonable range of what its percentage of the statewide vote typically produces without partisan gerrymandering.

The second standard relates to **exclusionary conduct** – merely having monopoly power is not enough to constitute monopolization. Exclusionary conduct must also be proved. This requires proofs that conduct….

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[96] James Surowiecki, The Financial Page, **New Yorker** July 30, 2007, p. 46 & Einer Elhauge, Brief Amicus Curiae related to the Vieth v. Jubelirer, 2003, pg. 7-9.

[97] Jeffrey Toobin, The Great Election Grab: When does gerrymandering become a threat to democracy?" **New Yorker,** December 8, 2003, page 80.

[98] Einer Elhauge, Brief Amicus Curiae related to the Vieth v. Jubelirer, 2003

a. Tends to impair the opportunities of rivals **and**
b. Does not further competition on its merits or does so in an unnecessarily restrictive way.

In redistricting, if district lines cannot be explained by any legitimate purpose and have been drawn in such a way that the rival party predictably needs a higher statewide vote percentage than the controlling party to get a statewide majority of its seats, then there is evidence of exclusionary conduct. If both standards apply, then a case can be made that redistricting is contrary to the notion equal protection clause related to political discrimination as articulated in Bush v. Gore.[99]

In summary, the courts have been reluctant to involve themselves in gerrymandering as they maintain that this is a political issue and the Constitution leaves voting issues up to the states. The 1964 Civil Rights Act and several court decisions have narrowed the state's authority to ensure the "one man, one vote" principle and ensure a lack of discrimination on voting requirements or in redistricting. Historically, gerrymandering for political advantage has not fallen under the courts review. However, increased technology and the increasing number of states that use the legislative districts as the means to apportion executive electoral votes based on the outcome of the popular vote in legislative districts rather than through statewide vote totals increase the importance of redistricting process. Significant abuse of redistricting can lead to a weakening of the "one man, one vote" concept and create a distortion of the democratic process. In this article, we have advocated ways to address redistricting to ensure a more equitable process through legislative action and through judicial review.

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[99] Bush v. Gore, 531 U.S. 98 (2000)