RORSCHACH TESTS, ART CRITICISM, AND THE JURISPRUDENCE OF GERRYMANDERING

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After perusing the leading and trailing cases on legislative redistricting, the scholarly output parsing them, and memoranda advising or warning legislators how best and constitutionally to accomplish their decennial opportunity to embalm themselves in power, there seems almost nothing left to say on the subject. So, say it I shall.

Earl Warren rated the reapportionment cases[1] the most significant decisions of the Supreme Court during his years as its Chief Justice.[2] In terms of the impact of a constitutional decision on the governance of the country, he was on the mark. In tandem with the contemporaneous Voting Rights Act,[3] the political complexion of the country—and of every state—was transformed.

The interaction between the Constitutional imperative of equality for individual voters drawn directly from the Equal Protection Clause of the Fourteenth Amendment[4] and the statutory protection of the voting rights of minorities as a class[5] has produced continuing adventures in a thicket of political and legal brambles. And lurking in that thicket is the gerrymander, the immortal beast that emerges from decennial slumber to ravage the

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1. Davis v. Mann, 377 U.S. 678 (1964); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Roman v. Sincock, 377 U.S. 695 (1964); WMCA v. Lomenzo, 377 U.S. 633 (1964); Baker v. Carr, 369 U.S. 186 (1962).

2. Steven J. Simmons, *Earl Warren, the Warren Court and Civil Liberties*, 2 PEPP. L. REV. 1, 4 (1975).

3. 42 U.S.C. § 1971 (2006).

4. *See Reynolds*, 377 U.S. at 561 (identifying the Equal Protection Clause of the Fourteenth Amendment as a "predominant consideration" in determining the constitutionality of apportionment schemes).

5. *See id.* at 565 (discussing the need to protect the voting rights of minorities as a class).

legislative landscape and escape with only superficial wounds from the black-robed knights of the courts.

Whether racial or partisan, the gerrymander remains an unconquered champion. In its racial incarnation, it cracks and packs minority communities. The result can be legal, depending on the "totality of the circumstances."[6] As a test of the effect of a gerrymander, regardless of its intent, on the ability of a racial minority to have a reasonable opportunity to elect a candidate of its choice, totality of circumstances is a judicial Rorschach Test. Different courts look at the same blot on a state map and see quite different things. The Supreme Court, of course, is supposed to know what the blot really means, except when it does not and tells a lower court to take another look and guess again.

Racial gerrymanders are easily tamed compared to the political specie. In the first place, courts believe, on substantial evidence, that they exist. Courts believe they can recognize one when they see it, even when disguised. And courts believe they have the power and skill to slay it, or at least drive it back into the legislative underworld where it will abide until the next census, when it can emerge in a new and more creative shape.

Political gerrymanders are more slippery. They are regularly rampant in the legislative wild, boldly trumpeting their intentions and dismembering their quarry. Their marauding is denounced not only by their victims, but by editors, reformers, altruists, and all right-thinking folk as unjust, unfair, and undemocratic. With rare exceptions, leaders of the ruling parties have bravely endured the shame of harboring and periodically unleashing their very own gerrymanders.

Notwithstanding wide recognition of the existence—even proliferation—of partisan gerrymanders, none have been captured in a judicial snare. The Supreme Court's ruminations on the matter are akin to art criticism. A bare majority of the current Court appears convinced that standards exist, or may evolve, by which they could at least consign the most bizarre or grotesque partisan gerrymanders to the constitutional animal refuge.[7] A plurality of four justices has concluded that when it comes to this

6. Thornburg v. Gingles, 478 U.S. 30, 36 (1986).

7. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (suggesting that a challenge to a "sufficiently suspect" voting district may lead to a reliable standard to assess political gerrymanders).

kind of art, they are not judges.[8]

The roots of the problem perplexing the justices lay in the political and legal theories of *individual* equality on which the "one person, one vote" rule of *Reynolds v. Sims* was based.[9] If all citizens are created equal, each is entitled, at the most basic and fundamental level, to an equal voice in choosing their representatives. As Menken memorably characterized Maryland's apportionment system in a 1928 tirade against the rural rule of the state: "The vote of a malarious peasant on the lower Eastern Shore counts as much as the votes of twelve Baltimoreans. But that can't last. It is not only unjust and undemocratic; it is absurd."[10]

The injustice, in all its absurdity, lasted another thirty-six years, until the Court concluded that "the conscience of the people's representatives" was so well insulated from being "seared by an aroused popular conscience,"[11] that the only way a fundamental right to equal representation could be achieved was through judicial relief. The Court concluded that normal judicial remedies—primarily declaratory judgments, injunctions against holding elections under unconstitutional systems of representation, or, where these did not suffice, judicially administered redistricting—were sufficient for the task at hand.[12] It worked. There were no riots. One-person, one-vote is, after six decennial reapportionments of state legislative and U.S. representative seats, an uncontroversial principle of American constitutional democracy.

The reapportionment cases addressed only the right of each person to have a vote of equal weight in the selection of representatives—an individual political right fundamental to democratic governance.[13] The decision cured the historic failure of states to redistribute legislative power to reflect the changing distribution of their populations.

8. Vieth v. Jubelirer, 541 U.S. 267 (2004).

9. *See id.* at 269–70 ("The lack . . . of any agreed upon model of fair and effective representation makes the analysis difficult.").

10. *See* Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1057 (1957–1958) (quoting H.L. Mencken).

11. Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

12. *See id.* at 247, 276 (identifying declaratory judgments and injunctions against holding elections as forms of redress for violations of the Voting Rights Act).

13. Reynolds v. Sims, 377 U.S. 533, 560-62 (1964) ("[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . .").

The Court had already tangled with the gerrymander by the time it decided the reapportionment cases. It found that the manipulation of Tuskegee's municipal boundary to exclude black residents from the city violated the Fifteenth Amendment.[14] On the same day—February 17, 1964—that it decided the Constitution required congressional districts to contain equal populations,[15] the Court also upheld the artful packing of black voters into a New York City congressional district, agreeing that there were non-racial reasons for its creation.[16]

Justice Douglas, joined by Justice Goldberg, wrote a strong dissent, arguing that there could be no justification under the Fourteenth Amendment for a racial gerrymander that separated races into separate districts: "[r]otten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards."[17] Analogizing the creation of racial districts to the practice of the British Raj in establishing communal segregation in India, Douglas wrote, "[h]ere the individual is important, not his race. . . . Of course, race, like religion, plays an important role in the choices which individual voters make from among various candidates. But, government has no business designing electoral districts along racial or religious lines."[18] Justice Goldberg's separate dissent also emphasized that "[t]he Fourteenth Amendment commands equality, and racial segregation by law is inequality."[19]

The Voting Rights Act of 1965[20] took a different view, concluding that the deliberate creation of districts with heavy majorities of African Americans was, if not the only way, an expeditious way of ensuring that black voters in racially polarized southern communities would have an opportunity to elect representatives of their choice. The "totality of the circumstances" test propounded by Justice Brennan in *Thornburg v. Gingles*,[21] along with the rules of thumb used by the Department of Justice in reviewing plans in the covered states, has resulted in a

14. Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960).
15. Wesberry v. Sanders, 376 U.S. 1, 18 (1964).
16. Wright v. Rockefeller, 376 U.S. 52, 56 (1964).
17. *Id.* at 62.
18. *Id.* at 66.
19. *Wright*, 376 U.S. at 69.
20. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).
21. Thornburg v. Gingles, 478 U.S. 30, 36–42 (1986).

substantial increase in the number of minority representatives and other officials at all levels of government.[22]

At the same time, the rules designed to prevent invidious discrimination against racial minorities in districting stimulated creative districting. Some ruling parties found that by lassoing supermajorities of African Americans or Hispanics into a few districts, however widely they were distributed across the state, they could change substantially the two-party composition of legislative bodies. With the aid of Geographic Information Systems ("GIS") technology, gerrymandering took on forms that made the original artistry of Governor Elbridge Gerry appear primitive.

A majority of the Court struck a glancing blow at this practice when, in its role as art critic, it found that a North Carolina congressional district created to provide a second constituency likely to elect black congressmen was so bizarrely shaped that the district court should apply strict scrutiny in reviewing it. This required the state to show a compelling interest in justifying its form.[23] Justice O'Connor explained:

> [W]e believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.[24]

The lower court was not of the same school of art criticism. It found the district in compliance with the Voting Rights Act based on a "compelling purpose," leading to two further trips up and down the judicial staircase to find a pleasing shape.[25] By the

22. Jocelyn Benson, *Preparing for 2007: Legal and Legislative Issues Surrounding the Reauthorization of Section 5 of the Voting Rights Act*, 67 U. PITT. L. REV. 125, 126 (2005) (noting how the U.S. Department of Justice evaluates redistricting plans to determine "whether the changes will have a 'retrogressive' effect on minority electoral power," a practice known as the "preclearance test").

23. Shaw v. Reno, 509 U.S. 630, 653 (1993).

24. *Id.* at 647.

25. Shaw v. Hunt, 861 F. Supp. 408, 437–38 (E.D.N.C. 1994).

time the third reconfiguration reached the Supreme Court, the 2000 Census made a new start necessary.[26]

My purpose is not to deconstruct *Shaw v. Reno*.[27] What is interesting is that it brought into sharp focus the issue first presented in *Wright v. Rockefeller*—the use of race as a creative instrument of political gerrymandering.[28] Combined with the non-dilution doctrine[29] and the inability of the Court to fashion standards for curbing political gerrymandering, it contributed to the replacement of Democratic hegemony with Republican hegemony in the South.[30] Because there is a high correlation between African Americans and Democrats,[31] the creation of black supermajorities in a few districts—to ensure a high probability, but not full certainty, of electing a black representative—racially polarized voting within districts has been replaced by partisan polarization among districts.[32] Notwithstanding the good that has come of electing more minorities to public office at all levels of government, there are also perverse effects on the governmental system.

In his dissent in *Shaw,* Justice Stevens made a perceptive observation: "The duty to govern impartially is abused when a group with power over the electoral process defines electoral boundaries solely to enhance its own political strength at the expense of any weaker group."[33] He elaborated, again in dissent, in *Vieth v. Jubelirer*:

26. Shaw v. Hunt, 517 U.S. 899, 901 (1996); Hunt v. Cromartie, 526 U.S. 541, 543 (1999); Easley v. Cromartie, 532 U.S. 234, 237–38 (2001).

27. *See* Shaw v. Reno, 509 U.S. 630, 642 (1993).

28. *Id.*

29. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665, 1666 (2001) (discussing how Section 2 of the Voting Rights Act prevents "vote dilution" by having states create districts that provide a fair chance to racial minorities in electing their candidate of choice).

30. Hastings Wyman, *The GOP's New Hegemony in the South*, THE HILL'S CONGRESS BLOG (Nov. 12, 2010, 3:02 PM), http://thehill.com/blogs/congress-blog/politics/128969-the-gops-new-hegemony-in-the-south (noting how redistricting in the South has contributed to Republican legislative gains).

31. Terry M. Neal & Thomas B. Edsall, *Democrats Fear Loss of Black Loyalty*, WASHINGTON POST, Aug. 3, 1998, at A01, *available at* http://www.washingtonpost.com/wp-srv/politics/campaigns/keyraces98/stories/keydem080398.htm.

32. Alan Abramowitz, Brad Alexander & Matthew Gunning, *Don't Blame Redistricting for Uncompetitive Elections*, 39 PS: POL. SCI. & POL. 87, 89 (2006) (stating that a partisan "shift in the partisan composition of House districts" has contributed to an "increase in partisan polarization among House districts").

33. Shaw v. Reno, 509 U.S. at 677–78.

> The concept of equal justice under law requires the State to govern impartially. Today's plurality opinion would exempt governing officials from that duty in the context of legislative redistricting and would give license, for the first time, to partisan gerrymanders that are devoid of any rational justification. In my view, when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.[34]

This concern goes to the heart of what is wrong with gerrymandering, and it is also why it has been so difficult to deal with gerrymandering as an equal protection issue.

As Justices Douglas and Goldberg pointed out, equal protection has to do with the equality of individuals and the invidious classifications of groups that result in discriminatory treatment of the persons in those groups.[35] Thus, exclusion of minorities or women from juries, the practice of law, voting, public accommodations, housing, marriage, military service, and other similar institutions, runs afoul of the great civil rights clause.[36]

Gerrymandering, in its post-*Reynolds*, *Gingles*, and *Shaw* forms, cheerfully accepts the constitutional imperative of equal representation while assiduously striving to ensure that one political interest gets more than its fair share of elected representatives. As a friend of mine once put it: "Of course I believe in the two party system; mine and the one that always loses." The sole purpose of gerrymandering is to stack the deck so that the group with power to draw districts draws them in a way that perpetuates its power. The dealer wins and the winner deals.

34. Vieth v. Jubelirer, 541 U.S. 267, 317–18 (2004) (citations omitted).

35. Wright v. Rockefeller, 376 U.S. 52, 69 (1964).

36. *See* U.S. CONST. amend. XIV, §2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *see also Wright*, 376 U.S. at 67, 69.

It is a great game for dealers.

Even so, gerrymandering is an imperfect art. Districts are drawn based on forecasts of their inhabitants' past voting behavior. Asking that legislators blind themselves to the location of their own and other members' residences, and the racial, ethnic, religious, class, and partisan composition of the districts they create is asking that they not think about elephants and donkeys. With the aid of computers and GIS, it is possible to split almost any geographic unit larger than a bedroom to pack and crack voters based on their partisan propensity into districts with predictable outcomes. The object, at worst, is to maintain an electoral advantage for the winners of the last election; at best, the aim is to enhance their advantage.

The charm of this is that it can usually be done in harmony with the requirements of the Voting Rights Act. Moreover, every voter has an equal vote and every vote is counted equally, but the favored party's candidate almost always wins. *Almost always* is the rub. In politics, identity is an important predictor of future behavior, but only if it is stable over successive elections and remains the most salient determinant of electoral preference. While district lines remain stable for a decade (unless the courts or legislatures mess with them), the demography of the district's voters may change as a new generation becomes eligible to vote and older voters die—some move away, newcomers enter. Further, an increasing percentage of voters decline to affiliate with a political party, opening opportunities for insurgencies from the less favored party's candidates or primary rebellions in the dominant party.

The assumptions that voter preferences are stable over time and independent of the processes of campaigning and policy deliberation are simplistic at best. In fact, they are false.[37] Exogenous factors impact electoral outcomes, even in districts carefully designed to be noncompetitive. Incumbents lose touch and then lose either primary or general elections. Elections are nationalized or localized as a result of changes in economic conditions or the injection of wedge issues that produce cross-pressures on otherwise reliable blocs of voters. Campaign

37. *See* JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 146–47, 163–66 (1989).

donations and "independent" expenditures from organizations with no roots in a district may flood in to defeat an incumbent that has challenged their interests or to gain or hold a majority in the House of Representatives. Election laws may change to broaden or narrow both primary and general election constituencies.

All politicians worth their salt know this. That inspires them to work all the harder to create districts that reduce the odds that any of these things, singly or in combination, will affect the outcome of elections. None has ever been caught behind Rawls's veil of ignorance.[38] A fair gerrymander is an oxymoron.

Unfair has yet to be found unconstitutional, except in cases of districts that prevent a cohesive, politically polarized, and constitutionally protected racial class from having the opportunity to elect a candidate of its choice. Finding standards upon which to declare a partisan gerrymander in violation of the Equal Protection Clause has been, thus far, a judicial snipe hunt.

The problem lies in the nature of the representative process, especially as it is practiced through the medium of single-member districts. Understanding that process and the philosophical foundations of district representation may aid in discerning those elusive standards for remedying a widely recognized wrong. The logic of single-member districts is that people living in different areas of a state have distinctive, geographically based interests worthy of representation. Even in at-large electoral systems used in many cities or counties, candidates must be chosen from residence districts. The idea is that representatives should have direct experience and familiarity with—be "close to"—the unique interests of the urban, rural, suburban, mountain, and coastal communities of their districts and their economic, social, cultural, and environmental problems.

Even though the mathematics of apportionment limit the number of districts that can be provided in any state, each should, in an ideal world, encompass complete "communities of interest" to the extent the creation of districts with equal populations allows. Clearly, some communities must be divided into two or more districts, while others must be combined with neighboring communities. Absent the assumption that human and natural geography matter, districts make no sense. Non-geographic

38. JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971).

interests can be more accurately represented by any number of alternative voting schemes that offer voters more choices and more chances that at least some of their choices will be elected.[39]

Representation is not an act, but a process. It operates on at least two levels. At the district level, the representative reflects, promotes, and serves individual and collective interests of constituents. Reflecting one's constituency explains why members of the same party from districts that reflect different geographic communities in the same state may vary in their fidelity to the party line on certain issues. Before creative redistricting made them endangered species and virtually extinct, Blue Dog Democrats and Liberal Republicans survived by a combination of avid constituent service and selective partisan apostasy. In so doing, they represented their complex and heterogeneous districts. In the process, they made their parties and the government more representative of a diverse nation.

In a first-past-the-post,[40] winner-takes-all electoral system that favors a two-party system, districts designed to reflect geographically based communities of interest produced parties with different centers of gravity but overlapping orbits. Often described as "big tent"[41] parties, the Democratic and Republican parties-in-government were pragmatic coalitions rather than ideological camps. This intra-party diversity, further exacerbated by bicameralism, performed some of the same legitimating functions that multi-party coalitions provided in other countries. In our Madisonian system, the majority ruled, but the minority made that rule legitimate by forcing accommodation of its interests in return for crossing the aisle to provide the votes necessary to enact important policies.

As party organization atrophied and party affiliation declined to the point that in many places more voters considered

39. *See* TODD DONOVAN WITH HEATHER SMITH, PROPORTIONAL REPRESENTATION IN LOCAL ELECTIONS: A REVIEW 3–4, 7 (Wash. State Inst. for Pub. Policy 1994), *available at* http://www.wsipp.wa.gov/rptfiles/Localelections.pdf (stating that alternative forms including proportional representation, cumulative voting, and single transferable vote systems offer voters more choices than a simple plurality).

40. *See* Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT'L POL. SCI. REV. 297, 299 (1997); William A. Galston & Elaine C. Kamarck, *The Still-Vital Center: Moderates, Democrats, and the Renewal of American Politics*, THIRDWAY.ORG 20, 22 (Feb. 2011), http://content.thirdway.org/publications/372/Third_Way_Report_-_The_Still_Vital_Center.pdf.

41. *See* Galston & Kamarck, *supra* note 40, at 14.

themselves independents than adherents of either major party, hyper-partisan redistricting has undermined the legitimacy of government and contributed to low rates of voter participation.

This brings me back to Justice Stevens's point that the duty to govern impartially should preclude redistricting decisions designed to perpetuate the power of one group by excluding, to the extent practicable, its competitors from any opportunity of replacing it.[42] Put slightly differently: in a democracy there is no legitimate state interest in a districting plan that deliberately and systemically distorts the ability of the legislature to reflect fairly the diversity and complexity of interests in a state, or changes in majority preferences, to the advantage of an incumbent group. The legitimacy of government rests in no small part on the expectation that political majorities and minorities are not permanently fixed by institutions that resist changes in public opinion and preferences. Majorities are supposed to be made accountable by elections. If elections do not matter because the electoral districts, though of equal population, were carefully and deliberately engineered to prevent changing preferences from being reasonably reflected in the composition of legislatures and the U.S. House of Representatives, ours is no longer a representative democracy.

It is one thing to lament that those in power labor to secure and enhance their positions rather than ensure an impartial government in which all significant interests participate and are represented. It is quite another thing to do something about it. A few state constitutions assign the task of drawing districts to commissions or to a small group of officials.[43]

The impartiality of the commissions varies widely. The best measure of their impartiality is probably the reaction of party leaders to their work. In Arizona, the governor, supported by the Republican-controlled Senate, impeached the non-partisan chair of the commission when its preliminary congressional redistricting

42. Shaw v. Reno, 509 U.S. at 677–78 (Stevens, J., dissenting).

43. *See* ALASKA CONST. art. VI, §§ 4, 9; ARIZ. CONST. art. IV, pt. 2, § 1(3); ARK. CONST. art. VIII, §§ 1, 4; CAL. CONST. art. XXI, § 2; COLO. CONST. art. V, § 48; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2(2); MO. CONST. art. III, § 2; MONT. CONST. art. V, § 14; N.J. CONST. art. IV, § 3, ¶ 1; OHIO CONST. art. XI, § 1; PA. CONST. art. II, § 17; WASH. CONST. art. II, § 43. Of these laws, only six appear to be reasonably independent of control by the incumbent majority party: Alaska, Arizona, California, Colorado, Idaho, and Washington.

plan reduced the number of safe Republican districts and increased the number of competitive districts.[44] Its plan also would have placed two Republican incumbents in the same district.[45] The Arizona Supreme Court reinstated the chair.[46] The California Supreme Court upheld a redistricting plan for the state senate and congressional districts challenged by Republicans, who then mounted a campaign to force the plan to referendum.[47] The Colorado Supreme Court, however, returned a plan for state house and senate districts drawn by that state's commission, which had created a number of competitive districts.[48] The court ruled that the commission was not sufficiently attentive to county boundaries to satisfy requirements set by the state constitution.[49]

States with constitutional commissions and criteria for redistricting are reasonable places to look for redistricting standards, summarized in table below.

State Constitutional Redistricting Criteria[50]

CRITERIA	STATE					
	AK	AZ	CA	CO	ID	WA
Contiguous	X	X	X	X	X	X
Compact	X	X	X	X		X
Boundaries	X	X	X	X	X	X
Community	X	X	X	X		
Competitive		X				

All standards include compliance with federal constitutional and statutory requirements. Arizona's standards

44. Mary Jo Pitzl, *Arizona Redistricting Chief Ousted*, ARIZ. REPUBLIC (Nov. 2, 2011), http://www.azcentral.com/news/election/azelections/articles/2011/11/01/20111101arizona-redistricting-brewer-wants-chair-Mathis-removed.html.

45. Gary Nelson, *Map Would Put Mesa's Senators in Same District*, ARIZ. REPUBLIC (Oct. 14, 2011), http://www.azcentral.com/community/mesa/articles/2011/10/14/20111014mesa-district-senators1014.html.

46. Ariz. Indep. Redistricting Comm'n v. Brewer, Ariz. No. CV-11-0313-SA (2011).

47. Vandermost v. Bowen, 269 P.3d 446, 451–85 (Cal. 2012).

48. *In re* Reapportionment of the Colorado Gen. Assembly, No. 11SA282, 2011 WL 5830123, at 4 (Colo. 2011) (en banc).

49. *Id.* at 3.

50. *See* ALASKA CONST. art. VI, § 6; ARIZ. CONST. art. IV, pt. 2, § 1(14); CAL. CONST. art. XXI, § 2(d); COLO. CONST. art. V, § 47; IDAHO CONST. art. III, § 5; WASH. CONST. art. II, § 43(5).

include an explicit criterion to create competitive districts to the extent feasible.[51] California's constitution directs the commission to exclude consideration of the residences of incumbents.[52] Iowa, which operates under a statute, excludes use of incumbents' residences, voter affiliation, previous election results, or any demographic information other than population, in drawing district lines.[53]

The common standards for redistricting more or less can be verified objectively. Contiguity is the best example, and there are geometric measures for compactness. Nonetheless, the task of creating a fair system of representation is complicated because one standard rarely suffices and all standards must be used in combination. Except for the requirement of equality of population, all the others must be balanced against each other. There is no universal algorithm that can be applied to guarantee fairness because there is more than a single interest to which to be fair. There is usually more than one way, for instance, to create fair districts for racial minorities. And even though the "communities of interest," economic regions, political subdivisions, political parties, and incumbent office holders lack the protected status of racial minorities under the Voting Rights Act, they have moral and political power bases that deserve respect from those charged with drawing district lines.[54] That the claims of all interests are not equal just makes it more interesting because representative systems redistribute power and lie at the heart of the most basic question of politics—who gets what?

Even more importantly, representative systems have consequences for the polity as a whole. Election systems define and facilitate the creation of constituencies. Constituencies, in turn, influence the priorities of the representatives they elect and define the character of conflict in the polity, the latitude for agreement, the capacity of the government for deliberation and decision making, and the extent to which policy choices, even the government itself, are accepted as legitimate. A system of polarized, safe districts—such as those which have evolved in many states and are reflected in their congressional delegations—has

51. ARIZ. CONST. art. IV, pt. 2, § 1(14).
52. CAL. CONST. art. XXI, § 2(e).
53. IOWA CODE, § 42.4(5) (2011).
54. *See* Miller v. Johnson, 515 U.S. 900, 906 (1995).

materially contributed to policy paralysis, incivility, and a growing sense that the institutions of government are no longer legitimate.

What seems clear from the state of redistricting artwork is that more is at issue than simple equality, which the reapportionment cases settled. What is now apparent is that equal is not always fair. The challenge is to find a path to a representative system based on the equality of voters that is also fair. This is a challenge to both politics and law.

The political front is not encouraging. There is opportunity for conscience searing in ten of sixteen states with the direct initiative for constitutional amendments that have yet to adopt impartial systems for drawing district boundaries.[55] Some of these states are so sparsely populated that it is difficult to do much damage in congressional gerrymandering, but even in these states there remains considerable opportunity for perverse creativity in state legislative districting. Of states without a constitutional initiative, Alaska, Iowa, New Jersey, and Washington either have adopted constitutional or statutory provisions that ensure reasonably fair approaches to redistricting.[56] This leaves thirty states dependent on the altruism of incumbent politicians for rescuing the Republic from the miasma of safe districts and political bipolar disorder.[57] Past and current performance does not inspire confidence that salvation is at hand.

The legal front presents a mixed picture. State courts have shown little hesitation in taking cases and enforcing standards designed to advance fairness in design of districts, using traditional remedies such as declaratory judgments and remanding plans to remedy their shortcomings.[58] Where all else

55. The Initiative and Referendum Institute at the University of Southern California reports that sixteen states allow direct constitutional initiatives. *See State I&R*, IANDRINSTITUTE.ORG, http://www.iandrinstitute.org/statewide_i&r.htm (last visited March 11, 2012). Three of those states—Arizona, California, and Colorado—have adopted strong impartial commissions. Three more—Hawaii, Missouri, and Montana—have commissions, which, at least facially, should be capable of impartial action. Each contains restrictions on commission members becoming candidates for legislative office for two to four years. *See Redistricting Commissions: Legislative Plans*, NAT'L CONF. STATE LEGISLATURES (June 25, 2008), http://www.ncsl.org/legislatures-elections/redist/2009-redistricting-commissions-table.aspx.

56. *See* ALASKA CONST. art. 6, §§ 8, 10; WASH. CONST. art. 2, § 43; IOWA CODE ANN. § 40.1 (2011); N.J. STAT. ANN. 19:4–10 (2010).

57. *See Redistricting Commissions*, *supra* note 55.

58. *See* David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087, 1101–29 (2005–2006) (reviewing

fails, they have drawn up judicial plans using special masters or advisers and ordered elections to be held under the judicial plan until the commission or the legislature produces an acceptable alternative.[59]

Federal courts have several decades of experience in approving or fashioning effective remedies for racial gerrymanders.[60] When it comes to partisan gerrymanders, however, a Supreme Court majority held that it has jurisdiction, and that the issue is justiciable, but has not coalesced on standards or remedies.[61] The problem lies in the nature of the litigants and in districting litigation. Non-racial plaintiffs tend to be the weaker (and potentially even more greatly weakened) party. Plaintiffs generally have no trouble in proving an intention to discriminate against them by creation of districts that provide a disproportionate advantage to the incumbent majority party. The relief they usually pray for is rough proportionality, but as the *Vieth* Court plurality observed: "[T]he Constitution . . . guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. Nowhere does it say that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers."[62]

It is also quite unlikely that a scheme of representation could be devised that provides proportional representation to every salient interest that claimed such a right. Those affiliated with no party constitute one of the largest electoral factions in most states—frequently more numerous than the minority party.[63] In most states they cannot vote for "independent" candidates. That does not seem quite fair, but as the Court pondered the standard problem in the context of the Equal Protection Clause, the plurality concluded:

state court interventions in the redistricting context).

59. *Id.* (discussing state court interventions in the redistricting context).

60. *See* Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 22 (2004–2005).

61. Vieth v. Jubelirer, 541 U.S. 267, 288 (2004).

62. *Id.* at 288.

63. *See* Jeffrey M. Jones, *Democratic Party ID Drops in 2010, Tying 22-Year Low*, GALLUP.COM (Jan. 5, 2011), http://www.gallup.com/poll/145463/democratic-party-drops-2010-tying-year-low.aspx.

> "Fairness" does not seem to us a judicially manageable standard. Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party's not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.[64]

Concurring in the judgment, but unwilling to abandon the search for suitable constitutional standards, Justice Kennedy laid out the task the Court must master:

> A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.[65]

Justice Kennedy went on, however, to frame the issue further:

> The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy

64. *Vieth*, 541 U.S. at 291.
65. *Id.* at 307.

> works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment: "We are in the business of rigging elections." (quoting a North Carolina state senator).[66]

The Court seems correct in saying fairness is not the *standard*. It is, however, the *outcome* to be sought, and courts have been, from the establishment of equity, the place people go to remedy unfairness and seek justice in the balancing of interests. That is what representation ultimately is about.

But that returns the discussion to workable decision rules for adjudicating redistricting cases under the Equal Protection Clause and, notably, the Due Process Clause. The former deals with the fundamental right of equality of voters, the latter with the right to fundamental fairness in the impartial organization of representative government. Resting on the successful experience of states that have established impartial processes for drawing districts, I suggest three decision rules:

1. Redistricting should be conducted by an impartial decision maker applying well-established principles of decision-making.
2. Single-member districts of equal population should be composed of contiguous territory and be compact in form.
3. Reasonable adjustments to compactness should be permitted to meet requirements of the Voting Rights Act, recognize the boundaries and integrity of political subdivisions, socio-economic communities of interest, and natural and other physiographic boundaries.

Rule 1 applies basic procedural due process standards to redistricting. It would not preclude redistricting conducted by the legislature or other elected or appointed officials. It only requires that the responsible entity not have predetermined the outcome and be capable of assembling and impartially considering

66. *Id.* at 316–17.

evidence and alternatives. It does not require that the decision-makers ignore the things that any sentient citizen knows: income, race, and religion influence voting behavior. But it would constrain the intentional exclusion of opposition parties or other interests from deliberations and the creation of districts that place them at an extreme disadvantage without reference to any objective criteria. Put bluntly, it would find unacceptable the recent congressional redistricting process in Maryland, of which the explicit aim was unseating at least one of the state's two Republican congressmen.[67] Because there is a principle of fundamental fairness at stake in the organization of a representative government, there may also be a substantive due process interest in a system that reasonably represents significant components of a state's population. Rule 1 should, once established, have a prophylactic effect and reduce the number of cases in which neither the process of redistricting nor its outcomes can pass the laugh test.

Rule 2 uses the two most widely recognized neutral criteria for drawing districts. Contiguity alone invites mischief; it is the elastic tissue of the gerrymander. Together with compactness, however, the most invidious forms of partisan or racial gerrymandering can be impaired. Given residential patterns, some compact districts will undoubtedly be racially, ethnically, economically, and politically homogeneous. But other districts will be more diverse. To be sure, it is possible to draw compact districts that maximize one group's electoral advantage over that of its rivals. Where one starts the GIS system matters. But starting with compact and contiguous districts makes it harder to cheat.

The physical geography of some states can make applying Rule 2 challenging. Maryland's eastern shore tends to be a socially, economically, and politically coherent region (although there are some differences between the politics of the upper and lower shore), but it lacks sufficient population for its own congressional district. It must be combined with parts of southern Maryland or the outer suburbs of metropolitan Baltimore. Similarly, western Maryland stretches across four mountainous counties but needs additions from the Washington suburbs or central Maryland to

67. *See* Thomas F. Schaller, *Redistricting: Maryland's Cure for the Blue State Blues*, BALT. SUN (Oct. 4, 2011), http://articles.baltimoresun.com/2011-10-04/news/bs-ed-schaller-redistricting-20111004_1_8th-district-maryland-democrats-4th-district.

provide an equally populated district. In either case, creating a district as compact as feasible would be the best place to start.

Rule 3 recognizes that redistricting is not just physical geography. It is also political science. The most compact districts possible may ill serve the commonwealth. There is a compelling state interest in departing from compactness when necessary to satisfy the requirements of the Voting Rights Act.[68] The equal population requirement will require dividing some political subdivisions into two or more districts, and combining others to form a district. The physiographic features of a state—mountain ranges, bodies of water, microclimates, and man-made barriers such as freeways—as well as other recognized communities of interest such as farming regions or ethnic neighborhoods, may justify a more irregular boundary than would circumscribe a strictly compact district. This rule means that, under a totality-of-the-circumstances balancing test, departures from the compact form of equally populated districts are reasonable when made to maintain the cohesion of a census-defined community, local governmental subdivision, or well-defined economic or cultural region, or to respect natural features that have traditionally served as political and economic boundaries. A rational basis should be sufficient to justify deviations that account for this limited number of interests that are broadly recognized as legitimate state interests in the design of representative districts. Perpetuation of incumbent power and punishment of the opposition are not among those legitimate interests.[69]

Where the lines are drawn has political consequences, helping or hindering the fortunes of the incumbent and minority parties and affecting the ideological purity of primary and general election winners. I have not proposed that as many districts as feasible should be competitive. The rule is not widely used and could produce a system as unnatural as the present one, which tends to create as many non-competitive districts as possible. Without edges, there can be no middle of the road. The rules suggested here should produce some safe and some competitive

68. Strict scrutiny analysis then comes into play if race was the predominant factor, although the Court is somewhat divided on how and when it should be applied. *See* Miller v. Johnson, 515 U.S. at 901–02; *see also* Bush v. Vera, 517 U.S. 952 (1996); Easley v. Cromartie, 532 U.S. 234 (2001); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Ancheta, *supra* note 60, at 39–40.

69. *See* Cox v. Larios, 542 U.S. 947, 947 (2004).

districts and representatives that reflect the spectrum of views and temperaments in any given state.

Many of the governments in the United States, including the Congress, are undergoing crises of competence and legitimacy. In no small part, this is a result of distortions in the representative system that poorly reflect the complexity of the Republic. Restoring the capacity to govern requires attention to the totality of the circumstances that makes government both representative of the salient interests that arise from a diverse society and capable of achieving that delicate balance between rights and responsibilities that produce an effective polity.

There is now a half-century of evidence suggesting that most state legislatures and governors cannot bring themselves to discharge their duty to impartially design representative institutions that reflect faithfully the partialities of their people. This is a systemic wrong that impairs fundamental rights and fairness. There are workable and tested standards that can be applied to remedy the wrong. As it was with reapportionment, with few exceptions there is no place else to turn for relief. The Court has long since declared the issue to be justiciable. It is time for at least five to do justice.