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Considering the Gerrymander

LEROY C. HARDY*

Despite the great expectations fostered by landmark cases such as *Baker v. Carr*,¹ *Reynolds v. Sims*,² and *Wesberry v. Sims*³ the quest for representative government is still frustrated, by the political manipulation commonly known as gerrymandering. The resultant unusual configuration on an electoral district map elicits laughter and raised eyebrows. Its political impact causes legal dilemmas that seemingly defy resolution. As early as 1962 Dean Phil Neal of the Yale Law School alluded to gerrymandering as the next problem to be met in the reapportionment controversy⁴ and, in the interim the courts have grap-

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The writer's reapportionment experience includes the following: Assistant to the Consultant of the Reapportionment Committee in 1951; Ph.D. dissertation on the 1951 reapportionment; Consultant to the Reapportionment Committee in 1961; Consultant to the Governor (1964-1965) re: Senate and Assembly reapportionment; Consultant to the Congressional delegation in 1965 and again in 1966-67; Consultant for the City of Newport Beach redistricting in 1966; member of Los Angeles Mayor's Committee on Redistricting in 1962; and Consultant to the Congressional delegation in 1970-71.

1. 369 U.S. 186 (1962).

2. 377 U.S. 533 (1964).

3. 376 U.S. 1 (1964).

4. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUPREME COURT REV. 252 (1962). Robert G. Dixon, Jr., refers to gerrymandering as our present 'second round' of apportionment litigation in his excellent DEMOCRATIC REPRESENTATION REAPPORTIONMENT IN LAW AND POLITICS, 466 (1968).

pled with *Wright v. Rockefeller*⁵ and timidly let go. One legal journal article began with the challenging title: "Identifying Gerrymanders."⁶ In a recent symposium on reapportionment one section was expectantly titled "Gerrymandering: Privileged Sanctuary or Next Judicial Target?"⁷ Another article—"Quantitative and Descriptive Guidelines to Minimize Gerrymandering"—presumably attempted to offer guidelines.⁸ Unfortunately, despite the multitude of pages in law journals, political science periodicals and other academic treatises, where cases are properly noted and the cruelty to representative government is deplored, judges are still left without guidance for reaching a solution of the gerrymandering problem. Terminology difficulties and misconceptions have led the experts into digressions from the principal issue.

Here let us take a tentative step toward clarifying of the nature of gerrymandering. As Professor Robert Dixon, Jr., has observed, any redistricting is a gerrymander because any line drawn on a political map represents an electoral advantage for someone.¹⁰ But to say that all redistricting is gerrymandering is to confuse the issue. That makes a common political term meaningless as a device to refine political and legal thinking. We here contend that the gerrymander is a form of political manipulation similar to bribery, vote stuffing, etc. Control of the technique requires an analysis of the species, delineation of its variations, and a method of detection. More precise terminology in relation to the gerrymander technique will distinguish it from other forms of electoral manipulation and enable the courts to confront its worst features realistically. Fundamental to the clarification of current misconceptions is a view beyond the generalities based on illustrations of notorious gerrymanders. Extreme disparities must be separated from the intent of total redistricting within a state or other political unit.

5. 376 U.S. 52 (1964).

6. Gottlieb, *Identifying Gerrymanders*, 15 ST. LOUIS U.L.J. 540 (1970-71).

7. G. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970's, 121 (N.W. Polsby Ed. 1971).

8. G. Baker, *Quantitative and Descriptive Guidelines to Minimize Gerrymandering*, in Papayanopoulos, DEMOCRATIC REPRESENTATION AND APPORTIONMENT: QUANTITATIVE METHODS, MEASURES, AND CRITERIA, 219 ANNALS OF THE NEW YORK ACADEMY OF SCIENCES, 200 (1973).

9. The literature on reapportionment, redistricting and gerrymandering is extensive. Two useful bibliographies are: R. Silva and J. Boyd, *Selected Bibliography on Legislative Apportionment and Districting* (1968) (mimeographed by the National Municipal League); and D. ALLEN, SR., LEGISLATIVE SOURCEBOOK: THE CALIFORNIA LEGISLATURE AND REAPPORTIONMENT 1849-1965 at 223 (1965).

10. R. DIXON, JR., *supra* note 4 at 460.

To accomplish this goal we here consider: (1) origin of the term and definitions, (2) classification, (3) analysis—what a gerrymander is not, (4) the incumbent factor, (5) guidelines, (6) redistricting practices, and (7) the political essence. Let us hope that this methodical approach to the gerrymander problem will guide the courts in the next reapportionment.

1a) *The Term*

Coining a Political Term: The origin of the term gerrymander is one of the oft-told tales of American politics.¹¹ In 1812 the Democratic-Republican Party redistricted the State of Massachusetts to the detriment of the opposition Federalist Party. Elbridge Gerry was governor at the time. One of the districts had a peculiarly distorted contour as was clearly seen when *The Boston Weekly Messenger* published a map of it. Soon afterward, the shape of the district was examined and discussed at a dinner party where someone remarked, "The district needed wings, and Mr. Tisdale, the artist, readily provided them making the map of the district resemble a prehistoric monster." Thereupon one of the guests suggested the name "salamander" for it. Someone else, probably Mr. Alsop, responded with, "Gerrymander is what you mean." Thus a term was coined that has since been variously used as a noun and/or verb in American political life.¹²

Whether Governor Gerry had any influence in the actual creation of the district is questionable.¹³ Still, he is involved, and thus this illustrious founding father, later Vice-President, defender of the ideal of popular government and annual elections, has acquired an undeserved reputation for the "evil."¹⁴ To attribute gerrymandering to the governor ignores the fact that rivalry between the legislature (which has responsibility for drawing

11. Among the better accounts of the use of the term are: E. GRIFFITH, *RISE OF THE GERRYMANDER IN THE UNITED STATES*, Chapter II (1907); R. LUCE, *LEGISLATIVE PRINCIPLES*, 395 (1930); and Griffin, *The Gerrymander*, 97 *OUTLOOK* 187 (1911).

12. Griffin, *supra* note 11 at 187. Not as well known is the short duration of the infamous predator. In the Spring 1813 elections the Federalists captured the district which prompted a cartoon in the form of a skeleton labeled: Hatched 1812. Died 1813. The cartoon is reproduced in Griffin, *id.*

13. G. BILLIAS, *ELBRIDGE GERRY: FOUNDING FATHER AND REPUBLICAN STATESMAN*, 317 (1976).

14. GRIFFITH, *supra* note 11 at 26.

district lines) and the executive was then more intense than it is now. Executive interference would surely have been prohibited. The political creature known as "gerrymander" was surely devised by a legislature composed of individuals vitally interested in their own electoral prospects.

Although Massachusetts' 1812 distortion is the classic example, Mr. Elmer C. Griffith long ago revealed that the techniques which produce gerrymanders had already long been practiced in America. He ascertained that the first known appearance of a district which could have been called a gerrymander occurred in Pennsylvania as early as 1705.¹⁵ In North Carolina in 1732 gerrymanders were constructed to favor one section of the colony over another.¹⁶ One of the most clever of the gerrymanders of the early period was discovered to have existed in New Jersey in 1798.¹⁷ Another five were noted in New York between 1802 and 1809.¹⁸ James Madison faced the gerrymander monster created by Patrick Henry who hoped to frustrate the career of the future President.¹⁹

1b) Definitions

According to *Encyclopedia Britannica*, a gerrymander is an action "to alter unfairly or abnormally, as the political map of a state, etc." As a noun, the term is "an unnatural and arbitrary redistricting of a state or county."²⁰ The fifteenth edition says that gerrymandering is a term used in U.S. politics "to describe the drawing of boundaries of electoral districts, wards, and other subdivisions, in order to give an unfair advantage to one party over its rivals."²¹ The same edition makes the point that the 1812 action tended to consolidate the Federalist votes into

15. *Id.* at 28.

16. *Id.* at 47.

17. *Id.* at 57-59.

18. *Id.* at 31-32.

19. Tyler observed that mere fortune prevented another founding father from having his name blighted by the term "henrymander": M. TYLER, *LIFE OF HENRY*, 352 (1966). Of passing interest is the fact that James Madison's second Vice-President was none other than Elbridge Gerry. Another President, William McKinley, also met the gerrymander several times. After frequent efforts of similar design the Democratic redistricting of 1890 in Ohio accomplished McKinley's defeat. MacNeil reports: "The people of Ohio resented McKinley's ouster and promptly elected him governor. His overwhelming victory in the gubernatorial race led to his nomination and election as President in 1896"; N. MACNEIL, *FORGE OF DEMOCRACY: THE HOUSE OF REPRESENTATIVES*, 140 (1963). See also R. BROOKS, *POLITICAL PARTIES AND ELECTORAL PROBLEMS*, 477 (3rd ed. 1933).

20. 10 *ENCYCLOPEDIA BRITANNICA*, 1314 (1945).

21. 4 *ENCYCLOPEDIA BRITANNICA*, 509 (1975).

new senatorial districts to give disproportionate representation to the rival Democratic-Republicans.²²

Webster says that a gerrymander is "to divide (a state, county, etc.) into election districts or other civil divisions in an unnatural and unfair way, with a view to give one political party an advantage over its opponent, or for some other improper purpose . . . hence to manipulate, as fact arguments, etc., in order to gain an unfair advantage or to reach unwarranted conclusions."²³ The *Random House Dictionary* defines the term in this manner: the dividing of a state, county, etc., into election districts so as to give one political party a majority in many districts while concentrating the voting strength of the other party into as few a number of districts as possible.²⁴

The *Encyclopaedia of the Social Sciences* article on gerrymandering describes the process as

the abuse of power whereby the political party dominant at the time in a legislature arranges constituencies unequally so that its voting strength may count for as much as possible at elections and that of the other party or parties for as little as possible. To accomplish this design it masses the voters of the opposing parties in a small number of districts and so distributes its own voters that they can carry a large number of districts by small majorities.²⁵

The *International Encyclopaedia of the Social Sciences* does not include gerrymandering, but in the apportionment article, the term is defined as "the creation of artificial constituencies with arbitrary boundaries that are consciously drawn for partisan advantage."²⁶

Certain common characterizations emerge from these "authoritative" books. Gerrymandering is a technique used for partisan purpose in the creation of constituencies. In the original gerrymandering action and in the latest Random House definition the consolidation of opposition strength seems to be characteristic. The term gerrymander is a noun which, precisely used in a technical sense, has main qualifiers of "arbitrary" and "unnatural." As a verb, gerrymandering indicates a redistrict-

22. *Id.*

23. WEBSTER'S NEW INTERNATIONAL DICTIONARY, 1052 (2nd ed. 1947).

24. RANDOM HOUSE DICTIONARY, 594 (1967).

25. 6 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 638 (E. Seligman ed. 1931).

26. 1 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES, 368 (D. Sills ed. 1968).

ing process which has been manipulated by the creation of constituencies which are arbitrary, unnatural and unfair (in an unequal vote sense). An electoral system that provides conditional boundaries (e.g., each county will have one district, or all seats in a given county will be elected at-large) is in a sense creating constituencies having considerable impact on the political process, but technically gerrymandering is the drawing of lines within the confines of the electoral system. The electoral system may be unfair from different normative perspectives, but such manipulation is distinct from a manipulation of the system itself for partisan purposes.

Although our consideration of classification will elaborate on the concepts of "arbitrary" and "unnatural," in this discussion of definition it is desirable to use an illustration to clarify the nature of the qualifiers. *Life* magazine in 1951 published an article categorizing a Cape Cod congressional district as a member of the "Gerrymander Zoo."²⁷ The elongated, hooked peninsula was naturally peculiar in shape, not an arbitrary creation but actually appropriate. In an excellent book on geography and politics Professor Stanley Brunn used the 4th, 13th, and 16th congressional districts of California to illustrate gerrymanders, but the features of those districts are also not arbitrary or unnatural, given the geographical terrain, county and state boundaries and population concentrations with which redistricters had to deal.²⁸ As subsequently noted, to judge gerrymanders it is essential to investigate carefully the political intent, as well as geographical configurations of building blocks and population concentrations, before determining the existence of a gerrymander.

2) Classification

On the basis of a study of congressional districts from 1870 to the present and participation in the creation of districts in several redistrictings, six principal types of gerrymanders appear: (1) silent, (2) concentrated, (3) elongated, (4) dispersed, (5) eliminated, and (6) projected. The descriptive adjective indicates the purpose for which each gerrymander was created; that is, the arbitrary and/or unnatural reason for its creation.²⁹ A subspecies can be noted in one or two of the types.

27. *Speaking of Pictures, Congressional Districts in the Gerrymandering Zoo*, LIFE, April 16, 1951, at 10.

28. S. BRUNN, *GEOGRAPHY AND POLITICS IN AMERICA*, 169 (1974).

29. This classification was originally developed in the author's Ph.D. dis-

The Silent Gerrymander. A silent gerrymander results from the failure of a reapportioning body (normally the legislature) to redistrict the state despite significant population changes. The common feature of a silent gerrymander has been the decision of the reapportioning body not to act even though the constitution requires periodic redistricting. Inaction may perpetuate the political power of one party in an arbitrary manner and also violate constitutional provisions.

Throughout the nation many silent gerrymanders came into existence between 1910 and 1929 because Congress failed to reapportion the national legislative districts in accordance with the 1920 Census.³⁰ Districts based upon the population of 1911 were left unchanged. Several states retained representation that their population no longer justified, while other states were denied representation that their population increases warranted. Notably in the former category was Missouri and in the latter California.³¹

Failure of the Congress to act was coupled with a similar

sertation; L. Hardy, *The California Reapportionment of 1951* at 391 (unpublished Ph.D. dissertation, University of California, 1955) [hereinafter cited as *Reapportionment of 1951*]. The initial pattern was elaborated in a paper delivered at the 1961 American Political Science Association Convention; L. Hardy, *The Theory and Practice of Reapportionment*, Sept. 1960 (mimeographed paper for the American Political Science Association). The present classification represents a development on the basis of four redistricting experiences since that time.

Other similar classifications have been produced, the most frequently cited being: A. HACKER, CONGRESSIONAL DISTRICTING, THE ISSUE OF EQUAL REPRESENTATION, 46 (1963). See also BRUNN, *supra* note 28, at 168-71; W. KEEFE and M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 80-82 (2d ed. 1968).

30. An overview of the congressional picture is found in E. Tanner, *Congressional Reapportionment, 1910 to 1930*, (unpublished Ph.D. dissertation University of Texas, Austin, 1937). The definitive coverage of this period in the California context is: G. Bemis, *Representation in the California Legislature, 1911-31*, (unpublished Ph.D. dissertation, University of California, Berkeley, 1935); See also F. HICHBORN, STORY OF THE CALIFORNIA LEGISLATURE OF 1921 (1935) and Ahl, *Reapportionment in California*, 22 AM. POLITICAL SCI. REV., 978 (1928). An overview of the California picture is included in *Reapportionment of 1951*, *supra* note 29, at 21-37, which is also liberally paraphrased in D. ALLEN, SR., *supra* note 9 at Ch. I.

31. Missouri, with a population of 3,629,267 in 1930 had 16 seats in the House of Representatives and 18 electoral votes, while California with a 5,677,251 population had 11 House seats and 13 electoral votes. See, R. BROOKS, *supra* note 19 at 480.

reluctance of many states to alter their legislative districts. California was a prime example. In the early 1920s Southern California and urban areas in general continued to grow more rapidly than other parts of the state. Northern and rural legislators refused to redistrict the state, despite constitutional provisions requiring a reapportionment every ten years, with representation in both houses to be based on population.³² Districts no longer justified by population became silent gerrymanders.

Resistance on the national and state levels to reapportionment was an attempt to ignore the great transition in American life from a rural to an urban society. "Status quo" elements naturally fought vigorously the realignment of districts which would deplete their political power. In state after state population as the basis for representation in both houses meant the newly populated areas would ultimately take control of the legislature. California's solution to the impasse was approval of an initiative measure to change the basis of representation in the upper house. Thereafter in the state senate no county could have more than one senator, and no more than three counties could be grouped in one senatorial district.³³ Rural and northern elements were thereby given dominance in the Senate by the introduction of area as the basis of representation.

In this process silent gerrymanders were eliminated and a new sub-specie of gerrymander was created—the constitutional gerrymander.³⁴ In effect, the constitutionally-stipulated criteria (for at least one house) made alteration of districts (or constituencies) impossible. Compromise was bought at a great price. The democratic promise of "one man one vote" was exchanged for acres and trees in the "cow counties." As the population continued to shift toward urban areas, the distance from "one man one vote" increased; now with constitutional sanction, whereas the former silent gerrymanders could have been altered by legislative action. Constitutional stipulations allowed little alteration of senate districts and virtually froze representation in the upper house regardless of future population shifts.

A decade of inaction on the national level finally prompted a

32. CAL. CONST. art. 4, § 6 (West 1954) (as enacted in 1879).

33. CAL. CONST. art. 4, § 6 (West 1954) (as amended in 1926).

34. Gus Tyler and David I. Wells entitle their useful chapter, *New York: 'Constitutionally Republican'*, in *THE POLITICS OF REAPPORTIONMENT*, 221 (M. Jewell ed. 1962). Possibly the classic example of the constitutional gerrymander was the county-unit rule in Georgia; see GOSNELL, *The Gerrymander System in Georgia*, 11 *SOCIAL FORCES* 570-73 (1933) and *Gray v. Sanders*, 374 U.S. 368 (1963). Gosnell termed the unit rule in Georgia a "double-barrel" gerrymander.

reapportionment in 1929 on the threshold of another census. The resultant delay brought significant changes. California increased its representation from 11 to 20, seven of those going to Los Angeles County, whereas Missouri lost three seats. The deplorable inaction, broken only after years of difficult negotiation, must be judged from the perspective that national legislators were unwilling to yield representation to urban areas in the "grand depository" of popular will, despite the fact that the U.S. Senate protected small states on the basis of the federal principle. National legislators were not alone in their foot-dragging. Despite the acquiescence to constitutional gerrymanders in one house by many states, obstructive reluctance to redistrict was still manifest on the state level and congressional districts were not necessarily balanced. Conservative forces inside and outside the state legislatures continually blocked action and silent gerrymanders proliferated. Two significant cases—*Colegrove v. Green*³⁵ and *Baker v. Carr*³⁶—originated from legislative inaction that spawned silent gerrymanders. In *Colegrove* the complaint centered on congressional districts in Illinois that had not been reapportioned since 1901, while in *Baker* the Tennessee state legislative districts also had not been altered since that date.³⁷ In Tennessee, for example, the Shelby County District in 1901 had a population of 153,557 compared to the White County district's 15,577. By 1960 the former district had 627,019 people while the latter district had 14,157. In California the smallest state senatorial district in 1930 had 7,915 people compared to Los Angeles' 2,208,492, or a ratio of 1 to 279, but by 1960 the smallest had 14,294 and Los Angeles 6,380,711, or a ratio of almost 1 to 450.³⁸

In response to such flagrant disparities and the failure of legislatures to act, the federal courts moved into the reapportionment thicket³⁹ and eventually struck down the state constitutional stipulations that implemented the constitutional ger-

35. 328 U.S. 549 (1946).

36. 369 U.S. 186 (1962).

37. The *Baker v. Carr* litigation is reviewed in G. GRAHAM, ONE MAN, ONE VOTE: BAKER V. CARR AND THE AMERICAN LEVELLERS (1972).

38. Hardy and Sohner, *Constitutional Challenge and Political Response: California Reapportionment, 1965*, 10 WEST. POLITICAL Q. 733 (1970) [hereinafter cited as Hardy and Sohner].

39. Reynolds v. Sims, 377 U.S. 533 (1964) and companion cases.

rymanders. Thus the courts served as the powerful legal exterminators of the silent and constitutional gerrymanders.

Even with a relatively equal basis for restricting after each census, the disparities still exist and possibly will grow during this decade. Some extremes may occur, such as the 13th California Congressional⁴⁰ district (1961) which was underpopulated with 368,100 people in 1960 and overpopulated with 565,400 by 1966, but such variations will be the exception, rather than the rule. Indeed, technically if the growth occurs between regular redistricting actions (e.g. between censuses) it is not a gerrymander, since the original district was relatively equal to other electoral units of that time. Continual redistricting is hardly warranted, and the stability of district identity probably outweighs the advantage of interim tinkering. Even assuming that the term "silent gerrymander" was inappropriately used, it would be a specie of short lifespan. Population growth and mobility are natural during a decade, and they hardly warrant a continual effort at precise equality. Actually, the lack of precise figures, or at least common figures that the redistricting actors will accept, discourages redistricting efforts between censuses.

The Concentration Gerrymander. A concentration gerrymander consolidates a political party's strength in a district, or in a few districts, normally to minimize representation for opposition voters. With opposition concentrated in a minimum number of districts, the other districts become less competitive or, in other words, dominated by the party doing the redistricting. The principle of the concentration gerrymander can best be illustrated by a hypothetical situation (See Chart 1). In the extreme form Party B's majority vote could be deprived of its majority by judicious concentration of its strength in the one district. In a concrete example, the 1951 Republication legislature in California created concentration gerrymanders of profound effect on the representation of Democrats in Los Angeles County.⁴¹ Los Angeles Democratic voters were concentrated in large congressional districts of about 425,000 each, while Republican areas were carved into districts of 225,000 each. Over the decade this provided the Democrats with four of twelve Congressmen representing Los Angeles County. Although in elections the Democratic vote was approximately fifty percent of the total vote, Democrats were unable to elect six of the twelve congressmen because their strength was heavily concentrated

40. All references to "districts" are to Congressional districts unless otherwise specified.

41. *Reapportionment of 1951*, *supra* note 29 at 249-77, 404-08.

in four districts. In 1958, when the Democratic percentage of the total vote went up to nearly 60%, the Democrats were able to obtain only five of the twelve congressmen or 41.66% of the representation.

In 1961 the Democrats, a majority in the state legislature, accomplished a reversal of the 1951 Republican concentration effort. Republicans in 1962, 1964, and even 1966 with a Republican surge, received less representation than their proportion of the vote (e.g. 1962 48.2% of the vote, 34.2% of the representation; in 1964 47.0% of the vote, 39.5% of the representation; in 1966 53.7% of the vote, 44.7% of the representation).⁴² Both parties, thus, employed the concentration to gerrymander efficiently, but a subtle difference can be noted. The Republicans in the 1951 reapportionment used the concentration of population *and* of Democratic voters to accomplish their aims. In 1961 the Democrats created relatively equally populated districts with one exception, but Republican voters were heavily concentrated in only a few districts.⁴³

Although the concentration variety of the gerrymander usually applies the technique to the opposition party, occasions may exist when the redistricters concentrate themselves. While Republicans in California were concentrating Democrats in 1951, Republicans in New York were consolidating their own strength in Brooklyn to insure the election of one Republican in the overwhelming Democratic area.⁴⁴ The result was the "silk-stocking" 12th district in New York. It is difficult to determine whether the term "stocking" is meant to describe its weird shape or the type of wealthier citizen that populated the district.

The different purposes for the consolidation of voters suggests that concentration gerrymanders could be sub-divided into two categories: the concentration-of-you gerrymander and the concentration-of-us gerrymander. In terms of techniques a

42. D. ALLEN, SR., *supra* note 9 at 30, surveys the statewide disparities between 1952-1964. The 1966 percentages were computed independently.

43. REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON ELECTIONS AND REAPPORTIONMENT, 1961 at 29 (1961).

44. Roberts, *The Donkey, the Elephant, and the Gerrymander*, 7 THE REPORTER, Sept. 16, 1952 at 30-33; and Tyler and Wells, *supra* note 34 at 224. The Republican dilemma in the inner cities is reflected in the necessity of using the same technique in Queens to save a Republican seat in 1961; see New York Times, February 28, 1968.

distinction could be drawn between the concentration of population and the concentration of opposition vote. In the former the disparities of population accomplish the purpose, while in the latter the districts are relatively equal in population but the voters of one party are stacked in a few districts.

Ethnic politics of the 1960s and 1970s have brought about another sub-specie of the concentration gerrymander: the minority concentration gerrymander.⁴⁵ The evolution of this sub-specie is a reflection of American politics in the post-war World War II era. The California situation is a graphic portrayal of the problems and issues. In 1951 Recubicans concentrated Negro voters in a small number of districts, but in only a very few districts did their numbers encourage the election of Negroes. In Los Angeles the Negro population was subdivided to prevent the election of a Negro congressman. The Republican action was branded as "ghettoization" and deplored as contrary to American ideals and the dreams of an integrated society. Negro spokesmen proclaimed desires to vote for "the man" rather than for minority representation.⁴⁶ By the 1961 reapportionment Negro spokesmen had organized a "two-four" committee (two congressmen and four assemblymen) to actively demand Negro representation.⁴⁷ By 1971 the Mexican-American voters were in on the action, calling for representation to correspond with their 15% of the total population. In the two latter reapportionments, and two in between, minority leaders were calling for their concentration to obtain representation.⁴⁸

The expectation that people would vote for the "man" regardless of whether he was black, chicano or white, had yielded to the acceptance of the political reality that concentration of ethnic minorities probably was a more realistic approach to their political aspirations. The demands created serious problems for the Democratic Party, in whose coalition the minorities were often included. If minority strength was concentrated, the Democratic strength in other districts was weakened. The concentration-of-us had dangerous potentials. At the same time the

45. For a recent example of this phenomenon, see, *United Jewish Organization of Williamsburg, Inc. v. Carey*, — S. Ct. — (1977).

46. HOUSE COMM. ON THE JUDICIARY, HEARINGS BEFORE SPECIAL SUBCOMMITTEE ON REAPPORTIONMENT, REPORT ON ESTABLISHMENT OF CONGRESSIONAL DISTRICTS, 439 (1960).

47. Way, *California: 'Brutal Butchery of the Two-Party System'?*, in *THE POLITICS OF REAPPORTIONMENT*, 254 (M. Jewell ed. 1962).

48. *Sacramento Bee*, September 29, 1971; *Sacramento Legal Press*, November 8, 1971; *Los Angeles Daily Journal*, November 8, 1971; *Sacramento Union*, November 9, 1971; and *Santa Cruz Sentinel*, October 27, 1971.

concentration of minority strength had further implications for minorities themselves. Did the desire for a few blacks in the legislature (national or state) and the need to concentrate black voters to accomplish that goal, outweigh the advantage of having several white congressmen in the legislature whose partial black constituency would require their attention to black issues? Whatever the merits of the latter viewpoint, the dilemma has been resolved in metropolitan areas of many parts of the nation by the creation of districts which concentrate minorities. Whether such districts are unnatural, arbitrary, or unfair depends on the viewer's perspective.

The Elongated or Shoe-String Gerrymander. Such a district implies that the boundaries of the constituency are long and rambling, with narrow connections. If such a district is created for a political purpose—hence, properly called a gerrymander—it usually is done to concentrate voters. The Republicans in 1951 did this in the California 26th District and the New York 12th District. The same technique could be used to disperse strength or to eliminate it, but the more common purpose is to concentrate, and the party membership concentrated reveals the political purpose.

Shoestring districts, however, are probably the most confusing and misinterpreted. Their odd shapes almost immediately elicit the term gerrymander. Often the district is not a gerrymander, but the configuration may prompt that characterization, as in the "saddlebag" and "belt line" districts in Illinois, the "dumb-bell" in Pennsylvania, the "staircase" in Indiana, or "hammer" in Missouri.⁴⁹ An extended narrow district hemmed in by mountains, or consisting of a long valley, may be natural and far from arbitrary even when not compact on a map. In a colorful speech, a California legislator deplored the inclusion of Santa Catalina and San Clemente Islands in his district.⁵⁰ The islands had insignificant population but were part of Los

49. P. REINSCH, *AMERICAN LEGISLATURES AND LEGISLATIVE METHODS*, 202 (1913); J. BRYCE, 1 *THE AMERICAN COMMONWEALTH*, 124 (New York: Macmillan and Co., 1895). The "galloping horse" and the "lop-eared rabbit" have been located in a recent Delaware case that includes an extensive analysis of gerrymandering practices *Sincock v. Gately*, 262 F. Supp. 739 (D. Del. 1967).

50. *Inglewood Daily News*, March 21, 1951; *Los Angeles Examiner*, March 28, 1951, *Hollywood Citizen News*, March 28, 1951; and Hardy personal memorabilia re: 1951 reapportionment.

Angeles County and had to be attached to one of the Los Angeles districts. He said he only wanted a district not an empire. He begged the redistricters to return the goats and sheep and give him back his constituents "who split their infinitives and dangled their participles." Again, the key is intent.

In the 1940 *Life* article some fascinating examples of peculiar-shaped districts with animated features made up the "political zoo," but an analysis of those districts would reveal that the geographical features shaped some of them and thus do not necessarily constitute gerrymanders. In Professor Brunn's book a figure entitled "Gerrymandered Congressional Districts"⁵¹ includes three of the four California districts that hardly qualify as gerrymanders though their shape may be odd. The indentations and extensions reflect whole counties whose integrity was respected as well as the peculiar population concentrations that required jumping mountain ranges somewhere. Similarly, it is inaccurate to term the California 2nd District (1951, 1961) a gerrymander.⁵² The 350-mile-long district, involving nineteen counties may look like a gerrymander because of its sprawling nature, but when the sparsely populated counties of similar rural interests are acknowledged to be a large geographical unit and defined as such by the Census Bureau, the gerrymander features become minimal. Even the frequently cited California 28th District (1961) (which probably made more textbooks than any other district since Gerry's vintage piece) can be defined as a grouping of independent coastal cities with common interests that warrant special consideration.

A helpful insight into judging the nature of elongated districts which are as frequently in urban as in rural areas, relates to the demographic origins. Often a review of earlier districts reveals compact districts in the core sections of a metropolitan area. Gradually the districts become elongated. The explanation is partly demographic and partly related to the redistricters. Incumbents, who are usually the redistricters and the ones who vote on the proposals, are naturally interested in perpetuating their positions. As population moves outward to the suburbs and represents a larger percentage of the total area, population adjustments warrant consolidation of central districts (if the total number of legislators remains the same) and creation of new districts in the outlying areas. But each new district in the suburbs may mean one less seat in the inner city that currently

51. S. BRUNN, *supra* note 28 at 169.

52. This example was the favorite, but erroneous, example of the late Peter Odegard.

has a representative with a vote on the redistricting proposals which logically may liquidate his district. A happier solution is the elongated district. Incumbents residing in the core area can continue their districts, which are declining in relationship to total population by extending their political boundaries into the suburbs by elongation, and thereby acquire sufficient population to justify the continuation of their position. Often unnatural districts are the result of the natural inclination of politicians to perpetuate themselves.

An alternative to the elongation rearrangement is the consolidation of the inner city districts and the creation of new districts in the suburbs with the incumbent of the former district transferring his political base to a new area whose population may be more friendly to his perpetuation aspirations. This is especially true of white politicians in areas of minority influx.

The efforts of core area politicians to perpetuate themselves might be termed an urban elongation gerrymander. The potential of the technique in reverse has not been ignored by rural interests. Rural districts scheduled for liquidation can be continued by insertion into the metropolitan core area to attain sufficient population for their justification. The rural elongation gerrymander is demonstrated by the congressional districting in the Dallas and Fort Worth area. The result of the urban or rural elongation gerrymander denies the growing areas (suburban or urban) their own representation, while the areas of decline (the core and rural) continue their power. The rationale of dividing the core area can extend to local level of government. Supervisorial districts often divide the metropolitan center to minimize its impact.

An interim arrangement between the elongated district and the new district dilemma is the slinky district. Like the toy from which the name is derived, the incumbent gives up a portion of his original district and picks up population compensation by a slight expansion of his district outward. In the next redistricting he gives up more of his original base and compensates by further extensions, and so on. A prime example of this technique is the evolution of the California 57th Assembly District (1951, 1961, 1965, 1967).

The elongation district may be a gerrymander or it may not

be. Its purpose is the key which requires more than superficial analysis. The map configuration may be very misleading as to whether an elongation gerrymander exists.

The Dispersal Gerrymander. A dispersal gerrymander is the reverse of the concentration gerrymander. As the name implies, rather than concentrating voters in one district, or in a few districts, an effort is made to divide one party's strength and to overwhelm it by the more dominant vote of the other party.

If carefully arranged, the dispersal gerrymander can maximize political potential. Theoretically, a party of relatively equal strength could be completely denied representation if its strength could be equally dispersed to make it a minority in all districts. More usually the dispersal technique is combined with a concentration arrangement in a minimum number of districts. The party which is competitive in the total vote may become a distant second party in terms of representation. If the dominant party maintains its majorities, which is likely in view of the original redistricting, it can perpetuate its political base by further redistricting, or it can simply refuse to enact new redistricting legislation. It is the latter approach that allowed rural legislators (usually Republicans in the North and Democrats in the South) to continue their power into the 1960s. It is also the method by which Ohio and Michigan Republicans have benefited from reapportionment practices.

If the New York Democrats had been in control of redistricting in the 1950s, and had the Republicans created the 12th district to work with, the easy solution would have been to disperse the Republicans among the Democratic districts and gain another Democratic seat in the process. In terms of concrete examples of the dispersal techniques, the famous North Carolina "bacon-strip" districts are instructive.⁵³ Republican strength in North Carolina had been concentrated in the western mountain sections, where similar social and economic interests prevail. If those counties were combined into congressional districts, Republican congressmen would be elected. Democrats have chosen the dispersal alternative. A few Republican counties are grouped with Democratic counties in the central section of the state. The effect created one-county-wide congressional districts that run horizontally across the state, creating what

53. D. Orr, Jr., *Congressional Redistricting: The North Carolina Experience*, (unpublished Ph.D. dissertation, University of North Carolina, Chapel Hill, 1969); D. Orr, Jr., *The Persistence of the Gerrymander in North Carolina Congressional Redistricting*, 9 SOUTHEASTERN GEOGRAPHER 29-54 (1969); and P. EDSALL, *North Carolina: 'This Bill or Nothing'*, in *THE POLITICS OF REAPPORTIONMENT*, at 191-203 (M. Jewell ed., 1962).

some have called bacon strips. Although the technique has paid off for decades the adjustments in the 1960s backfired as a result of public rejection of the infamous practices.⁵⁴

From a political viewpoint the dispersal gerrymander is the most desirable, for by such means an opponent can be weakened significantly beyond his true strength. It is, however, a dangerous technique. As David Mayhew observes:

The reason is that parties with absolute control over districting tend to be very greedy. A controlling party normally concedes a minimum of very safe districts to the opposition and then tries to salvage as many as possible for its own adherents. In this latter effort there is a tendency to spread electoral resources too thinly.⁵⁵

Numerous examples can be cited. For example, in California the 25th and 21st Congressional Districts (1961) were created to satisfy the personal ambitions of state legislators for congressional careers. Both districts were marginally Democratic and fell to Republicans in the 1966 landslide. In Indiana redistricting for the 1970s the effective dispersals with the political data of national operatives won seven of the eleven seats in 1972, aided potentially by the Nixon landslide of that year. In the reversal trend in 1974, the Democrats captured nine of the eleven seats. Similar results can be noted in Iowa during the same period. Even more revealing is the long record of the Missouri congressional districts (1901-1931) where the Democrats dominated the representation by dispersal gerrymanders, but in the Republican landslide years (1904, 1918, 1920, and 1928) the Republicans gained substantially. Similarly, in 1942 and 1946 the Republicans swept the Democratic dispersals of the 1930s and 1940s.

These lessons are not lost to politicians. The safe district is, of course, preferable. Dispersal gerrymanders are dangerous, especially in years of political change. Redistricting measures are passed by incumbents upon whom the lesson of dispersal dangers are most pressing. Those who favor redistricting proposals, seeking widespread support among their colleagues with whom they will work in the next decade, are aware of the desire (continuation in office) and fear (defeat). Such conditions

54. D. Orr, Jr., *supra* note 53 at 29-37.

55. D. Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970'S, 277 (N. Polsby ed. 1971).

favor what Mayhew has termed the bipartisan gerrymander and the individual gerrymander.⁵⁶ With strong party organizations equally balanced, one party dominating one house and the other party the second house, or with one party controlling the executive and the other party regulating the legislature, the party leaders work out mutually satisfying redistricting proposals. These typically produce concentrated gerrymanders, with a few marginal districts, in order to avoid jeopardizing the balance. With weak party organizations, or in one-party states, the negotiations tend to be on an individual basis, hence the term "individual gerrymander."

Without quibbling about Mayhew's terminology at this point, it may be said that the dangers of the dispersal and the prevalent bipartisan and individual practices, point to one of the major misconceptions about gerrymandering. Though the dispersal technique can be highly effective, the inclinations of politicians move in opposite directions. Though the redistricting process and its malfunctioning in the form of gerrymanders may be conceived as a partisan exercise in which the actors can manipulate unchecked for the party's advantage, the bipartisan and club-like legislative atmosphere presents powerful deterrents to effective partisan action. Again the reality of the process, lack of knowledge of the political actualities in shaping a redistricting measure, or the tendency of academicians to judge on the basis of normative thinking rather than empirical practices, perpetuate redistricting and gerrymander misconceptions.

The Elimination Gerrymander. Dispersal and concentration techniques are also employed to create a fifth major type of gerrymander. The elimination gerrymander is designed for the purpose of eliminating an incumbent by isolating him from his base of support so that he will find re-election difficult.

A classic example of this technique occurred in three San Francisco assembly districts in 1951.⁵⁷ The loss of two seats in San Francisco required a complete reorganization of the districts. In the process three Democratic assemblymen found themselves in three entirely different districts, with their former neighbors each having substantial portions of another's district. In the same redistricting, the two San Francisco congressional districts shifted axis, making re-election of Congressman Franck R. Havenner difficult. In a similar effort against another

56. *Id.* at 277-84.

57. *Reapportionment of 1951*, *supra* note 29 at 134-53, 155-59, and map on 393.

liberal Democrat, the Republicans, in 1951, stripped the California 18th District (1941) of the northern Democratic sections which had assured Congressman Clyde Doyle of his victories in 1944 and 1948. Fortunately for Congressman Doyle a new district was available into which he moved and won.⁵⁸ Congressman Havenner was not so fortunate.

The generally successful purging of the liberal Democratic ranks in 1951 was not forgotten by the Democrats in 1961. In the latter year the Democrats reconstructed the districts of two members of the John Birch Society to make their re-elections difficult. A third Republican also found his district altered to deny him re-election.⁵⁹ As a political ploy two other Republican congressmen and four assemblymen in the same locality were threatened with extinction by the same technique. Compromises in the final bills modified the proposals and won several Republican votes for the Democratic reapportionment plans.

The elimination gerrymander requires careful analysis to determine the nature of the action. When a state loses a seat, or seats, obviously some district will have to be eliminated and its incumbent is not necessarily gerrymandered out of office. On the other hand when the political entity retains the same number of districts and one of the incumbents is not reelected, an elimination gerrymander may be a factor. When an entity gains representation, such as Los Angeles County did in 1951 and 1961, and one or more of the incumbents finds his district eliminated or re-organized to his detriment an elimination gerrymander exists. The elimination gerrymander may also be used against a non-member of the legislature. If an incumbent anticipates a potential opponent in the next primary or general election, the legislator may attempt to draw him out of the new district. In 1951 a former assemblyman residing in the City of Hawthorne was an incumbent's potential opponent. When the lines were redrawn, the City of Hawthorne was removed from

58. *Id.* at 255-58; concerning the Havenner problem see the Holtville Tribune, March 8, 1951 and the San Francisco Sun Reporter, March 21, 1951.

59. These observations are drawn from personal experiences as consultant to the California Assembly in the 1961 redistricting. The purging of liberal Democrats in 1951 and conservative Republicans in 1961 suggests that the morality gerrymander may be subspecies of the elimination gerrymander. The technique is used to eliminate individuals whose political morality does not correspond to that of the redistricters.

the district and a potential bid by a rival was thereby rendered unlikely.⁶⁰

When a state loses a seat, or seats, and someone has to go, it is sometimes surprising how readily incumbents can agree on who it should be—first, anyone but me, and, second, the member who generally bothers his colleagues for one reason or another. Often the agreement is bipartisan. In more fortunate circumstances, at least for the incumbents, one of the members may decide to retire. In 1971 the retirement of an incumbent eased loss of one seat in Ohio.⁶¹ If the seniority of the older member is deemed valuable, the youngest freshman may be the sacrificial lamb. Often the hand of death may settle the issue. Alabama, faced with the loss of one seat in 1971, found the Democratic legislators considering the elimination of the seat of Republican William L. Dickinson. The question was in which Democratic district should his base be placed, the 3rd or the 4th. Incumbent George W. Andrews of the 3rd died, and the dilemma was solved.⁶²

The Projection Gerrymander. Often related to the elimination specie is the projection gerrymander—a district designed to fulfill the political ambitions of an individual. Often the individual is a member of the legislature. He will have a vote on the redistricting legislation. During a redistricting action the capitol rumors will abound in speculation about who wants to go to congress, especially when new seats are available. Outsiders friendly to the dominant party may have ambitions for the congressional seats, or for the state legislature itself, and the redistricters may respond to such desires. Sometimes the managers of the redistricting legislation will use the projection gerrymander to elevate their internal rivals to federal posts, thus removing them from the state legislature. A district designed specifically for an individual would qualify as a projection gerrymander, which in some cases may also be the elimination gerrymander of another.

One of the most fascinating projection gerrymanders of the 1970's centered on the California 38th District (1971).⁶³ The ultimate new 38th District was one of five new congressional districts California was entitled to in 1971. It had the potential of

60. *Reapportionment of 1951*, *supra* note 29 at 230.

61. CONGRESSIONAL QUARTERLY INC., CONGRESSIONAL DISTRICTS IN THE 1970's 147 (1973).

62. *Id.* at 9.

63. These observations are drawn from personal experiences as consultant to the California congressional delegation, 1970-1972.

being one of the two Democratic districts in the bipartisan program to split the gain of five: 2 Democratic, 2 Republican and one party-neutral. Among the Democrats interested in the district were four prominent contenders—the son of a political “fat-cat”, a former congressman whose seat was now occupied, a leader in the local Mexican-American community, and the former congressional candidate in the local area who had been just barely defeated in 1970. As the legislation wandered through the legislative process, the lines of the proposed 38th changed daily, and toward the end, hourly. Each of the contenders had his supporters for various reasons—the struggle was a microcosm of Democratic coalition politics. Ideological liberals fought for their champion, labor leaders for their candidate, Mexican-Americans for theirs, with Negroes supporting each element from time to time. With a Democratic majority of one in the state senate and two in the Assembly, each element had its veto, and the lines shifted accordingly—the liberal out, the Mexican-American in with his local area, the former candidate in and out. In the final bill, all the contenders were in and all fought for the primary nomination.

Unfortunately for the analysis of elimination and projection gerrymanders the motivations of the participants cannot easily be assessed. Few individuals will openly talk of their plans in advance on the record for fear that constituents from the old district may feel neglected, or rejected, or consider their representative too ambitious. On the other hand, the ultimate redistricting action may force a state legislator to look elsewhere for his political future. One state legislator in 1951 reported that his state assembly district was made so difficult for him that the new congressional district was more appealing than certain defeat in his current legislative district.⁶⁴

Fortunately, courts do not have to deal with elimination or projection gerrymanders, and they are included in the classification system only for completeness. Redistricting is not an act for the perpetuation of incumbents, or for the ambition of bystanders. Redistricting is a process by which representation of the electorate is assured through periodic adjustments to new

64. Personal interview with Congressman-elect Robert Condon, December, 1952.

circumstances and notable demographic shifts in the context of the one man one vote ideal. Courts would not, presumably, take jurisdiction over a complaint that so-and-so had been denied his seat. However, the courts may face decisions about the gerrymander in general, in which case an awareness of the political element in all its facets is important.

3) Analysis: What a Gerrymander is Not

A classification system of gerrymanders may be further clarified by the question: What is not a gerrymander? Although any district line has political implications and in some manner provides an advantage to one party or another, such a generalization implies that all districts are gerrymanders.

In the present context it should be emphasized that the equity of a redistricting cannot be judged on the basis of statewide registration figures. Not every district can be created with a 50-50 registration, especially in a state where the registration figures are 60-40, or 70-30. In any state certain areas will have preponderant registrations in one direction or another, e.g., black areas may have 90-10 Democratic registrations, Chicano areas 70-30, while wealthy foothill communities, or ocean front properties may have a 30-70 ratio in favor of the Republicans. If the total state or county registration were 58% Democratic and 42% Republican, districts reflecting the overall ratio could be created only by dividing the natural community areas to link overwhelmingly Democratic areas with overwhelming Republican areas. The district lines to create such a condition would be rambling, extended, and probably narrow. Natural communities would be split by unnatural lines to achieve a theoretical norm that in the name of the concept (e.g., representative government) would destroy the concept (by creation of unnatural areas impossible to represent or to understand). It would be comparable to the person who demands proportional representation from a single-member district system. In order to create proportional representation, gerrymanders would have to be created to alleviate the system that itself has been called a gerrymander. Furthermore, it is obvious that a gerrymander cannot be judged simply on the basis of numbers and unusual cartography. The mania for mathematical exactitude is preposterous, especially in view of the imprecise nature of census figures which are nonetheless the best figures available. When the 1960 figures must be used for actions in the late 1960s, when the population variations are substantial but exactitude of old figures is demanded, the numerical analysis reaches the ridicu-

lous. Similarly, the automatic naming of peculiar shapes on the map as gerrymanders is not appropriate.

Prior to the revolutionary cases of the 1960s, the term gerrymander was frequently used to cover a multitude of sins. In particular, it was common to describe representative systems based on the little federal plan as gerrymanders because of the great numerical disparities between districts based on counties with equal representation and those with larger population. The apportionment system may have been inequitable and unfair to the interests concentrated in the resultant districts, but until the court entered the picture, the apportionment system was the legal framework upon which the government system was built. In many cases the assumed inequitable and unfair apportionment system that was inappropriately called a gerrymander had been approved by popular vote. In California, for example, in two of three elections the people of Los Angeles County voted for representative patterns that were to their numerical disadvantage.⁶⁵ However, until the courts ruled otherwise, notably in *Lucas v. Colorado*,⁶⁶ the constitutional apportionment systems in many states called for county representation. Among the typical requirements were the grouping of whole counties and limitations on the percentage of representatives from any one county.

By way of illustration, the California constitution required no more than three counties to be grouped together to form a state senatorial district and no county could have more than one state senator. The Los Angeles senatorial district had 6,380,711 people in 1960 and the smallest senatorial district had 14,294. They were not gerrymanders. The constitution provided a system of apportionment that was inequitable, and it was ultimately ruled by the courts to be unconstitutional, but a manipulation of district lines was not involved.⁶⁷ In the lower house, assembly districts could not cross county lines.⁶⁸ Inequities existed as a result. For example, Imperial County boxed in by Riverside and San Diego Counties had to have one representative for 62,512 people, while its neighbor Riverside had one representative for

65. D. ALLEN, SR., *supra* note 9 at 30-31.

66. 377 U.S. 713 (1964).

67. *Reapportionment of 1951*, *supra* note 29 at 55-56, 84-85, 108-110.

68. CAL. CONST. art. 4, § 6 (West 1954).

169,392 people.⁶⁹ Again district lines were not being manipulated. Lines dividing Riverside County to include part of the county with Imperial County could simply not be drawn because of the constitutional provision. In relation to congressional districts, whole assembly districts had to be the building blocks in the creation of national legislative districts. Assuming that the assembly districts within a county could not be divided, if the county had 31 assembly districts and 12 congressional districts, some congressional districts would have two assembly districts and others would have three. Assuming that the assembly districts were equal in population (e.g., 150,000) a congressional district having three assembly districts would have 450,000, while one having two assembly districts would have 300,000. If the constitutional stipulations were followed and the disparities existed, the district would not be a gerrymander but an apportionment system with undemocratic features, to be corrected only by constitutional changes.

On the other hand, when the Republicans in 1951 created assembly districts that varied in size from 115,000 to 150,000 and proceeded to group two small districts into one congressional district and three large districts into another, the resultant congressional disparities ranged from 228,712 to 451,322 within the same county.⁷⁰ Although the redistricters blamed the disparities on the constitution, the constitution had been manipulated for partisan advantage and gerrymanders were established in some of the districts. In 1961 the Democrats equalized the assembly districts, and fourteen of the congressional districts consisted of two assembly districts (the high being 423,282 people in the 23rd District and the low 369,983 in the 27th District both potential Democratic districts). The 28th Congressional District, however, was given three assembly districts, and the range became 591,822 to 369,983.⁷¹ If the constitution had been used in its normative sense (districts shall be as nearly equal in population "as may be") the disparities would not have been so great but would still have been substantial. At the same time, aside from the constitutional problems the resultant districts in many cases, both congressional and assembly, were gerrymanders. The point is that the districts were gerrymanders not because of the constitution, but because of other factors.

69. *Reapportionment of 1951*, *supra* note 29 at 55-56.

70. REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON ELECTIONS AND REAPPORTIONMENT, 1951 at 74-75 (1951).

71. REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON ELECTIONS AND REAPPORTIONMENT, 1961 at 28-29 (1961).

Court decisions on the federal level⁷² and on the state level⁷³ in 1964 and 1965 have in effect negated the constitutional rules relative to the grouping of whole counties and (in California) the grouping of whole assembly districts. Such negation was the only means by which equality of population could be achieved. Ironically, more equitable districts have been created to the pleasure of "number-counters", but the opportunity for gerrymandering has increased—and has been utilized.⁷⁴ As Justice White has observed:

Today's decision on the one hand requires precise adherence to admittedly inexact census figures, and on the other downgrades a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect. I see little merit in such a confusion of priorities.⁷⁵

4) *The Incumbent Factor*

A final consideration that has been implicit in earlier remarks but which warrants special attention to clarify the nature of the gerrymander is the motivation of the redistricters, in most cases, legislators. A study of the Illinois reapportionment practices concluded that districts were created with the following interests in mind: (a) individual preservation, i.e., the creation of a "safe" district for incumbents; (b) mutual preservation between incumbents, frequently cutting across party lines; or, in other words, a preservation of the "club" made up of incumbents of both parties; (c) the preservation of political power by the majority party; and (d) preservation of blocs (such as the "farm bloc" or the "rural bloc") in the legislature without regard for party lines.⁷⁶

Thomas Page, in a study of Kansas reapportionment, noted

72. *Reynolds v. Sims*, 377 U.S. 695 (1964) and companion cases; *Wesberry v. Sims*, 376 U.S. 1 (1964).

73. *Silver v. Jordan*, 241 F. Supp. 576 (S.D. Cal. 1964).

74. An interesting analysis of the potentials for gerrymandering is found in S. Slingsby, *The Gerrymander: Its Rise, Use and Potential* (unpublished Ph.D. dissertation, Claremont Graduate School 1967).

75. *Wells v. Rockefeller*, 397 U.S. 542 (1969).

76. G. STEINER and S. GOVE, *THE LEGISLATURE REDISTRICTS ILLINOIS*, 7 (1956).

that the shaping of Congressional districts kept the metropolitan centers separate, preserved incumbency, and disturbed as few political boundaries as possible.⁷⁷ Charles Young, in his study of political redistricting, lists the following factors in the redistricting process (in order of importance): (1) mutual self-protection (2) protection of incumbents in other legislative bodies (such as congressmen or state senators), (3) protection of regional interests, (4) maintenance of rural dominance, (5) preservation of localism, (6) recognition of geographical barriers and demographic data, and (7) manipulation of districts for the advantage of political parties.⁷⁸

Contrary to the usual generalizations about gerrymanders as a technique for achieving partisan advantage, it is significant that manipulation of districts for the advantage of political parties is last on Young's list, and is not outstanding in the two others. A perusal of recent literature and the *Congressional Quarterly* accounts of congressional redistricting in the 1960s and 1970s does not suggest a need to alter the system of priorities.⁷⁹ Incumbency is an important—if not *the* important—element in district creation, where gerrymanders are spawned. State legislators are in an advantageous position in the process—they normally vote on their future districts. Congressmen also attempt, with varying degrees of success, to protect their incumbency with only secondary concern for the party interests as such.⁸⁰ Thus a congressman with a heavy registration of his party can give surplus party voters to marginal districts for party advantage. Most congressmen profess such willingness, but their actions often are not convincing. Frequently they are motivated by the following description:

Every politician and office-holder dreads change; his particular obsession is an overhauling and revision of political boundaries which may endanger re-election prospects or necessitate more active cultivation of altered districts. It requires only a few years for even second-rate congressmen to establish contacts with mothers, babies, and "the boys" to build up an organization and catalogue his district so that keeping it happy and safe is an easy job; others do it for him, as a rule. The addition of another ward, or even a few blocs, is as perilous as a leap in the dark. It means making new friends, subsidizing new political hangers-on and a lot of doorbell-ringing and hand shaking that is most distasteful . . . they are in no mood to exert themselves. Mainte-

77. T. PAGE, *LEGISLATIVE APPORTIONMENT IN KANSAS*, 51 (1952).

78. C. Young, *The Politics of Political Boundary Making*, 369-88 (unpublished Ph.D. dissertation, University of California, Los Angeles 1959).

79. See CONGRESSIONAL QUARTERLY INC., *CONGRESSIONAL REDISTRICTING* WASHINGTON, D.C. (1966); CONGRESSIONAL QUARTERLY INC., *CONGRESSIONAL DISTRICTS IN THE 1970's*, *passim* (1973).

80. Hardy, *Congressional Redistricting in California, 1965-67: The Quilting Bee and Crazy Quilts*, 10 SAN DIEGO L. REV. 757-92 (1973).

nance of the established order, the usual majorities—these are the things which delight a congressman's bulging heart.

Then again, enlargement of a man's district may pit him against a popular and ambitious foe, either for nomination or re-election.⁸¹

When evaluating gerrymanders, the self-interest must always be kept in mind. Often it reveals the reason for the redistricting boundaries, e.g., the incumbent's home may be at the edge of the district or his potential opponent just outside the line. Of course, many of the reasons are lost in the mysteries of politics, but others are evident. The citizen and the scholar are frequently surprised by the trivial reasons for the creation of a line.⁸² A few examples may be noted: desire to dispense with a certain local dedicated precinct worker ("she loses more votes than she gains"), to retain a mother's residence in the district ("at least I can count on her vote"—the district was overwhelmingly of his party), to keep his home (or potential home) in the new district, or the confidence of camaraderie ("they love me down there"—so much so that they ousted him in the next primary).

Studies suggest that the usual allusion to gerrymandering as a process which political parties use to bolster their power may be a gross oversimplification. It assumes a strong political party organization to implement the party will. Legislators who do the redistricting are not prone to commit political harikari but rather are motivated by self-preservation. Only secondarily is their political party's welfare considered. Because congressional redistricting is one step removed from the state legislators it is not surprising that a party's interests can better be handled when congressional districts are involved.⁸³

Although politicians are in a gambling game, the solid bets are favored. Thus, though dispersal gerrymanders would probably maximize the party's strength, concentration gerrymanders are favored by the incumbents. Experience in California, in the 1951 and 1961 and subsequent redistrictings, as well as in other states, establishes the primary interests of the incumbents in their own preservation. California incumbents, especially in the

81. Tucker, *Our Delinquent Congress* 47 NEW REPUBLIC 13 (May 26, 1926).

82. Hardy, *supra* note 80 at 785-88. Factors involved in the preparation of the 1965 redistricting legislation are discussed in Hardy and Sohner, *supra* note 38.

83. Hardy, *supra* note 80 at 789-90.

State Assembly in 1951 and 1961, voted for state legislative districts favorable to their re-election and, in turn, bound themselves to vote for overpopulated congressional districts. In each case, when Democrats voted for Republican measures in 1951 and Republicans voted for Democratic proposals in 1961, their citizens were proportionately disenfranchised, and in some cases their political party was jeopardized.

Again the courts are not called upon to judge whether a redistricting protects or destroys incumbency. Redistricting exists to provide representation in line with the normative values of the society, not to provide positions for politicians who might otherwise not be able to fulfill their ambitions. However, the court evaluating a redistricting for gerrymanders must be aware of the nature of motivation that often creates unnatural and arbitrary lines. Even when the court's agents do the redistricting, the criteria of judgment is helpful to reveal gerrymandering practices that presumably would not exist in a court ordered plan.

5) Guidelines

Detection of the presence of this predator of representative government is assisted by the acknowledgement of the distinctive features of the principal specie of gerrymander and their sub-specie. Some forms are quickly recognized. If a state (or any other political entity that is to be subdivided into districts) has not been redistricted for several years (with at least one census intervening) and the population changes are significant, a silent gerrymander has come into existence. The reapportioners have chosen not to correct inequities for political reasons—to deny new groups representation, to perpetuate the power of declining groups, or to avoid elimination of incumbents who would be replaced by representatives from newly populated regions. The principle has been the same whether the reluctant actors resided in rotten boroughs in 18th century England, the rural districts in early 20th century America, or the metropolitan ghettos of the late 20th century.

When a few districts give overwhelming votes, varying from the state norms, to one party and the remaining districts go to the competing party with less significant opposition, the concentration gerrymander exists. When the vote between the two parties is relatively equal and one of the parties wins all the seats, or a significant proportion, the dispersal gerrymander has been employed. Superficially, when a congressman does not

return after a redistricting, it is easy to assume an elimination gerrymander may have been created. Likewise, if a quick perusal of a map reveals long narrow districts that string across an entire state or community, the term gerrymander may come quickly to mind. True though all the situations may be, the detection of gerrymanders especially the less apparent ones, requires a more detailed investigation.

The generalizations point to two difficulties which complicate gerrymander detection: first, the simplification of the problem into numbers and shapes; second, the obfuscation between electoral systems and district practices. Though the literature on reapportionment, gerrymanders, and redistricting is extensive⁸⁴ the articles often stop with an analysis—sometimes esoteric—of numbers. During the 1950s arguments were waged over the proper statistics to accurately reflect malapportionment. Among the principal schemes were population variance ratios, minimum control of population to dominate the legislative body, and deviations from a population norm.⁸⁵ The American Political Science Association Committee on Congress urged a maximum deviation of 15 per cent.⁸⁶ Even more ingenious were the geographical schemes to judge compactness.⁸⁷ Unfortunately, the numerical and shape criteria only touched the surface of analysis. The key element in a gerrymander is its political intent or purpose, which the previous classification reflects. The numerical disparity or the shape may be indicative, but the gerrymander's essence is its politics.

Similarly, a careful distinction must be made between the

84. R. Silva and J. Boyd, *Selected Bibliography on Legislative Apportionment and Districting* (1968).

85. Among the principal schemes are: Dauer and Kelsay, *Unrepresentative States*, 44 NAT'L MUN. REV. 571-75, 587 (Dec. 1955); P. DAVID and R. Eisenberg, *Devaluation of the Urban and Suburban Vote* (1961); Schubert and Press, *Measuring Malapportionment*, 58 AM. POLITICAL SCI. REV. 302-27 (1964); Clem, *Measuring Legislative Malapportionment*, 7 MIDWEST J. POLITICAL SCI. 125-44 (1963); see also Clem, *Problems of Measuring and Achieving Equality of Representation in State Legislatures*, 42 NEB. L. REV. 622-43 (1963).

86. Chafee and Holcombe, *The Reapportionment of Congress*, 45 AM. POLITICAL SCI. REV. 153-57 (1951).

87. Reock, *Measuring 'Compactness' as a Requirement of Legislative Apportionment*, 5 MIDWEST J. POLITICAL SCI. 70-74 (1961); Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of Compactness*, 50 MINN. L. REV. 443-52 (1966).

disparity of votes received and representation obtained on the basis of the electoral system and inequities caused by redistricting manipulation of the electoral system.

The United States has generally employed a single-member district electoral system rather than multi-member districts with a proportional representation electoral system. Each electoral system has its advantages and disadvantages. In particular, the relationship of the single-member district electoral system to a two-party system is important.⁸⁸ Given a single-member district system the results will not be proportional. Yet many critics argue as if a single-member electoral system should produce proportional representation. For example, among the frequent demands made by Mexican-Americans in recent California redistricting controversies were for six congressmen, twelve assemblymen, and six state senators to correspond to their 15% of the state's population.⁸⁹ Given the dispersal of Mexican-Americans in California, single-member districts could under no circumstance produce the 15% representation in any category. The spokesmen for such groups are either merely creating political rhetoric, or they do not understand the nature of the representative system of which they are a part. Californians do not have, and never have had, a proportional representation system. If the advantages of the latter system are sought, the solution is the adoption of the system through constitutional means.

The single-member electoral system has also built in the "cube-law" which means that the victor receives substantially more representation than the actual vote.⁹⁰ This may be undesirable, but the remedy depends on changing the electoral system, not necessarily its redistricting practices. The only method to mitigate the effects of the single-member district system would be to resort to weird shaped districts that would destroy natural communities by unnatural boundary lines. The asserted injustice of the electoral system would be corrected by redistricting the inequities out of existence. Changes in the electoral system

88. Especially useful in this context is S. Lipset, *Party Systems and the Representation of Social Groups*, in *POLITICAL PARTIES: CONTEMPORARY TRENDS AND IDEAS*, 40-74 (R. Macridis ed. 1967).

89. *Hearings on Political Participation of Mexican Americans in California*, The California State Advisory Committee to the United States Commission on Civil Rights, 25 (August 1971).

90. Kendall and Stuart, *Cubic Proportion in Electoral Results*, 1 *BRITISH J. SOCIOLOGY* 183 (1950). See also Hermens, *Electoral Systems and Political Systems: Recent Developments in Britain*, 29 *PARLIAMENTARY AFFAIRS* 47-59 (Winter 1976).

should be arrived at as a result of a careful examination of all implications of the method.

Both impediments (confusion of numbers and shapes and the electoral system with redistricting practices) to understanding gerrymanders divert analysis from the essence. Though the political nature of the gerrymander is deemed revealed by the numerical and configuration analysis, or checked by the detailed stipulation of procedures,⁹¹ the essential political nature is neglected.

Political analysis is necessary to obtain an understanding of gerrymanders. The important numbers are votes, not people. For that reason a study of voting behavior is required. With computers and a sufficient number of key-punch operators and time, the analysis can be carried far, but the basic needs are limited. First, voting patterns must be determined for the major units within the state (e.g., counties first, then subunits, such as cities, or townships, and ultimately precincts within divided urban areas). One typical election may suffice, but a series of elections is preferable to minimize the influence of exceptional deviations (because of incumbency, poorly financed opposition, weak opponents, etc.)

To assess voting behavior, one party's vote should be chosen and graduated. Democrats prefer to think in terms of Democratic percentages, and Republicans the reverse. A six-fold breakdown of party strength is desirable; for example, Strong Democratic—more than 60%; Democratic—55-59.9%; Leans Democratic—50-54.9%; Leans Republican—45-49.9% Democratic; Republican—40-44.9% Democratic; and Strong Republican—less than 40% Democratic. An eight-fold graduation can be accommodated with provision for a Safe Democratic category for more than 67%, and Safe Republican where the Democratic vote is less than 33%. Each category is then assigned a color, such as dark blue for Strong Democratic, medium blue for Democratic; light blue for Leans Democratic; light red for Leans Republican; medium red for Republican, and dark red for Strong Republican. A symbol in the dark blue and dark red units can indicate the safe categories in the respective extremes.

If each district is colored according to its vote percentage, the

91. Two such criteria are summarized in G. Baker, *supra* note 8, at 205-206.

coloring may graphically reveal the nature of the redistricting practices. If the total vote of all districts is relatively close—e.g., 50% for Party A and 50% for Party B—and most of the districts are colored in the leaning B category, a dispersal technique has been implemented. Or if the same closeness prevails, but one or two of the districts are heavily in A category (e.g., strong or safe for A), a concentration technique has been employed. The initial district revelations can be supplemented by coloring the basic units used to create the districts (e.g., counties, or census tracts, or townships) in the same graduation scheme. Such a coloring will generally reveal concentrations of party strength, e.g., a group of Democratic or Republican counties.⁹² If the district lines are drawn around the concentrations of one party, the ultimate product is a concentration gerrymander. If the concentration of one party is dispersed, the result is a dispersal pattern. Moreover, if the district lines between neighboring districts are analyzed, the cut edge may be revealing. If on one side of the line the counties are of one color, while on the other side the counties are of another color, a concentration is suggested. If the district goes down the middle between counties of the same color, a dispersal technique is being utilized. When counties are split, color differences between the county parts located in different districts may show the political purpose. Analysis of district extremities may also be revealing. If one end, especially in the case of the elongated districts, is of one party color and the other end of the opposite color, a dispersal method has been employed. Or if the district is predominantly of one color, with an occasional patch of the opposite color, a dispersal method has been used. In contrast, a consistence of color, or slight variations of the same color, reveals the concentration pattern. When such districts are compared to neighboring districts, the purpose or the technique may become even more graphic; e.g., one district of one color, in the midst of a sea of districts of the opposite, reveals concentration either to ensure the redistricting party's representation, (New York 12th congressional district, 1951), or to minimize the opposite party's power by its concentration, (California's 26th congressional district, 1951).

Determination of Democratic and Republican areas and an analysis of the overlay of district lines on the voting behavior maps often graphically discloses the types of gerrymanders employed. Also useful for analysis may be the district "family-tree." By plotting the evolution of districts over a period of time,

92. See Missouri example, *infra* p. 275.

and comparing to the period before the reapportionment to the immediate aftermath, elimination gerrymanders and redistricting designed to weaken the political strength of certain segments of the population (e.g. partisan, minority groups, etc.) can be detected. The "family-tree" technique may not be as useful for the immediate problems that a court faces, but it is helpful in substantiating the classifications here developed.

It can be argued legitimately that the suggested analysis is more pertinent to determinations after the fact, or for the purposes of long-term analysis. A court often faces the problem of determining the effect of a redistricting that has not yet been tested, for example, before an election has been held. Awareness of the analytical possibilities, however, can allow the court to project the effects on the basis of past voting behavior, which is the basis upon which redistricters operate. Voting statistics of immediate past elections can hypothetically be constructed on the basis of the new district lines to assess probable results.

6) Redistricting Practices

Before dealing with the crucial question of how much politics is too much politics and how much is remedial, the utility of the classification scheme needs to be tested in a practical situation. Congressional districts in Missouri have been selected for illustration because of its reputation for gerrymandering, the available literature on redistricting practices and voting behavior,⁹³ additional convenient voting data, court actions,⁹⁴ and one long period of redistricting stability (1901-1931).

Analysis requires a preliminary statement about the political

93. Among the better sources are: Crisler, *Republican Areas in Missouri*, 42 MO. HIST. REV. 299-309 (1948) and *Missouri's Little Dixie*, 42 MO. HIST. REV. 130-139 (1948); Harris, *Political Trends in Missouri, 1900-1954: A Study of Local, Regional, and Statewide Political Trends in Missouri Since 1900* (unpublished M.A. thesis, University of Missouri, 1956); R. KARSCH, *THE GOVERNMENT OF MISSOURI* (12th ed. 1974) (the chapter on political parties in each edition of this work is helpful and provides political analysis over various periods); Kostbade, *Geography and Politics in Missouri* (unpublished Ph.D. dissertation, University of Missouri, 1957); and Sauer, *Geography and the Gerrymander*, 12 AM. POLITICAL SCI. REV. 403-26 (1918). Good general overviews are included in J. FENTON, *POLITICS IN THE BORDER STATES*, Chs. 6-7 (1957); and N. PEIRCE, *THE GREAT PLAINS STATES OF AMERICA*, 29-78 (1973).

94. *State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S.W. 689 (1910); *State ex rel. Lashley v. Becker*, 290 Mo. 560, 235 S.W. 1017 (1921); *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40 (1912).

regions of Missouri.⁹⁵ Several writers agree that the Republican strength in Missouri rests in the southwestern hill country, the northern farm counties adjacent to Iowa, the German settlements south of the Missouri River in eastern Missouri, in St. Louis County, and formerly in the city of St. Louis. Conversely, Democratic sections are located in the northeast counties ("Little Dixie"), north of the Missouri River, in the area of central Missouri, and in Kansas City. Alternative methods of assessment (presidential elections since 1876, composite percentages of statewide contests since 1952, and spot checks of various local, state, and national elections since 1884) confirm the regional dispositions. County variations occur among the different studies, and alterations are being made manifest, but the historical patterns are not significantly changed. Often the Democratic molds are traced to southern (slave) settlements of the 1840s and 1850s whereas the Republican areas derive from the arrival of Tennessee mountaineers (non-slave) in southwestern Missouri and Iowa-like settlements in northern Missouri.⁹⁶

Chart 2 indicates the gradual growth and decline of Missouri's congressional representation. Redistricting actions since 1891, when the districts began to assume peculiar shapes, took place in 1891, 1901, 1934, 1950, 1960, 1966, 1971, and 1973. The first two accommodated growth, and the subsequent redistrictings dealt with population decline. The long period from 1901 to 1931 provides a stable district pattern to test the political impact over several elections. In 1931 a redistricting stalemate over the loss of three congressional seats forced at-large elections.⁹⁷

Chart 3 gives an analysis of the types of districts created in the major redistricting actions. The dominant dispersal technique contributed to overwhelming Democratic preponderance in the congressional delegation, despite the closeness of the statewide votes. Concentration gerrymanders are also apparent notably the 10th (1901-1931) and the 7th Districts (1934). Going beyond the superficial, however, the detailed district practices are instructive. The Democratic success between 1890 and 1930 is largely attributable to the judicious dispersal of the southwestern Republican strength among four districts, (6th, 7th, 14th, and 16th) and the division of the northern Republican areas between three districts (1st, 2nd, and 3rd). The German Republican concentrations in eastern Missouri were cautiously divided

95. Especially useful are the works by Crisler, Harris, and Kostbade, *supra* note 93.

96. See in particular Kostbade, *supra* note 93.

97. Short, *Congressional Redistricting in Missouri*, 25 AM. POLITICAL SCI. REV. 634-49 (1931).

among Democratic districts based north of the Missouri River. Generally, the districts were vertical to allow Democratic majorities in northern counties to dip into the Republican sections with one-county-wide inserts, while a horizontal district (the 14th) followed the state boundary almost its entire length to absorb its share of the Republican Ozark counties to be counter-balanced by the Democratic nucleus in the east. It is not insignificant that the Republican proposal for adjustments in the 1920s was generally horizontal in character and proposed that Republican nucleus areas absorb Democratic counties in numbers to favor elections of Republicans.⁹⁸ Chart 3 also demonstrates that the population concentration gerrymander helped the Democratic efforts. The precise nature of the districts and the appropriate gerrymander classification clearly emerge from more detailed analysis of the county units and district lines.

From a political viewpoint another important feature of the usually efficient Democratic dispersal plan was its weakness. In the years of Republican landslides, (e.g., 1904, 1908, 1920, and 1928) or Republican presidential years, or when a Catholic Democratic presidential nominee disrupted traditional Democratic voting patterns in the Southern Baptist counties most districts went Republican. Possibly because of that circumstance, especially the regularity in the 1920s, the Republicans were concentrated in the 7th congressional district in the 1933 redistricting. Rather than risk the danger of Republican victories in several districts, the threat was consolidated in one district that Republicans could win while Democrats would normally carry the other districts. In subsequent realignments, with rare exception, the 7th congressional district remained a Republican bastion, and each redistricting stacked on additional Republican counties as Missouri continued to lose congressional representation. Dispersal districts prevailed elsewhere, with the continual vul-

98. *Id.* at 640. Mr. Short analyzed the Republican proposal in this manner: Thus by a skillful concentration of opposition voting strength in three districts, the creation of at least six rather closely divided districts, and virtual certainty of carrying all four districts in St. Louis city and county in addition to one district in each of the north-central, south-central, and south-western sections, the Republican legislative leaders had assured their party of at least seven or eight of the 16 representatives even in a Democratic year, and 13 or more in a Republican landslide such as occurred in 1920.

nerability to landslides, such as that occurred again in 1942 and 1946.

The unpredictable shifts with the dispersal patterns warrant special attention in the development of guidelines for future courts venturing into the political thicket. In particular, attention is focused on the period of 1901-1931, during which time 240 elections took place with the same Democratic created districts. (See Chart 3) Clearly the Democrats dominated, winning 161 of the contests. In 103 of the 240 contests the margin of victory was in the 47.0 to 53.0 range. When frequent vote differences were less than 2,500 votes (in other words, a shift of 1,251 votes would have altered the outcome) the closeness of the contests is even more significant. Ninety-four contests fell in the 2,500 margin category. In twelve of the sixteen districts each party won on at least two or more occasions, and such switches were frequent. Fifty one incumbents were defeated. Nine of the sixteen districts had five or more congressmen. In other words only the 2nd and 10th Districts were totally safe. In the fourteen other districts the fight was potentially close. Beneath the Democratic preponderance was a competitive system. Each congressman had to be aware of a potential landslide, or other adversity, and several paid the price. Few were safe. The best defense was attention to the district. This does not resolve the inevitable disparities between actual statewide votes and the representation obtained under the single-member district system, but it does add another dimension to the evaluation of gerrymander effects.

7) The Political Essence

As implied earlier, as the courts move deeper into the political thicket, to challenge the gerrymander monster, their decisions concerning the eradication of the predator will be facilitated by precise terminology and by clearer guidelines. A classification of gerrymanders and their subspecies has been suggested to promote more positive assessment. The procedure for political analysis by the use of maps and district lines will assist the detection. Gerrymander can be properly and accurately identified if the political nature is made clear and the obsession with numbers and configurations is supplemented with essential information. On the other hand, if significant gerrymanders do not appear and electoral disparities warrant concern, a judgment of the electoral system's inequities may be appropriate,

and another series of logical questions may be considered about the electoral system—not redistricting practices.

Unfortunately, however, when dealing with the gerrymander, the political dilemma remains. How much politics can be allowed in a process which touches the fundamental political heartbeat—survival of the representative system—as well as the survival of the political actor who is also the designer of the representation pattern? Who commits political suicide? Given the natural inclinations of politicians to ensure their own survival—with proper genuflections to representative government—when should the courts interfere? If the Missouri example is a guide, the concentration gerrymander is most detrimental to the representative system. It does not alter. On the other hand, the dispersal gerrymander, though generally disadvantageous to one party, has certain redeeming features. Dispersal districts are potentially competitive. Incumbents must be alert to the continual danger of an upset by strong and/or well financed opponents, or other elements of adversity. Lengthy incumbency may even lead some elected officials to believe they are invincible and to forget the marginality of their district which may lead to their defeat. If that perspective is accepted and the court centers its attention on the essential districting nature of the gerrymander problem, the court might establish its own guidelines to minimize concentration gerrymanders. Or if the court does the redistricting to rectify inequities it could take districts adjacent to the endangering specie, consolidate two, three, or more districts as the case warranted, and then redraw the lines in the area of gerrymander infestation to ensure more competition. To draw an analogy, the court could combine a predominantly white-corpuscle Democratic district with adjacent districts where red-corpuscle Republicans are dominant to assure balance among the three districts, and to produce three healthier electoral units.

It is the political intent that must be kept in mind in both detection and eradication. If the advantages of the concentration gerrymander are offset by its potential breakup and neutralization by the court, through consolidation with dispersal districts and re-division to achieve more competitive districts, the incentive to create the concentration gerrymander declines.

But what of the dispersal gerrymander? The long-term competitive features may prove corrective, but the court might help here as well. One possibility for state legislative seats would be to provide court appointed additional representatives after each election, to achieve a representation comparable to the statewide vote totals.⁹⁹ The incentive to create gerrymandered districts, even temporarily, would be appreciably reduced. If the additional representatives were selected from the defeated party's top runners serving as incumbents from at-large constituencies they would be potentially more effective contenders in the district where they had previously been defeated. Since the additional legislator's tenure would depend on the temporary judicial balancing act, the at-large representatives would have an incentive to push for redistricting. Besides, the district incumbents would desire to redistrict more equitably to eliminate the at-large incumbent threat.

Much of the commentary about redistricting has focused on the districting process as a means to achieve representation. It is also a method to obtain a competitive party system.¹⁰⁰ Not only must the court assess whether the gerrymander distorts the representative character of the political system but also whether the manipulation makes it non-competitive. Inadequate though political parties may be in the representation of popular will, political parties are the vehicles which express political feeling throughout the electoral system. If the political opinion of thousands of individuals (especially in trading one set of political leaders for another) is denied expression through district manipulation, there is a clear effect on the grand depository of public will and its agents. When the public will is polluted at its source the activities of political parties are made meaningless.

Conclusion

As the court edges further into the recesses of reapportionment it is essential to reconsider basic concepts and to use terms correctly, or at least consistently. If the judicial officials recognize the different dimensions of the reapportionment problem,

99. The proposed interim step might seem an unwarranted judicial interference with the electoral process, but the legislature could easily rectify the situation by a prompt redistricting to eliminate the gerrymandering effects; thus only one election need be effected by the court action. The United States Supreme Court has registered approval of similar "minor changes in a legislature's size." *See, Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 199 n.10 (1972) and cases cited therein. The proposed temporary remedy would seem no more drastic.

100. R. DIXON, JR., *supra* note 4 at 460-63.

separation of thistle and holly in the thicket may be easier. It is essential to cut through the verbiage and pontification that have contributed significantly to the confusion of issues and methods of detection. Possibly a fundamental error about gerrymandering is the failure to distinguish reapportionment from redistricting. Such words as apportionment, reapportionment, malapportionment, redistricting, and gerrymandering must be differentiated.

Apportionment is the original allocation of political power on the basis of criteria of representation established by the electoral system; reapportionment is the periodic adjustment of the criteria to new circumstance often brought on by social, economic, and demographic changes; malapportionment is a system of apportionment that does not correspond to current conditions, or a reapportionment that violates the criteria of the original apportionment formulas. In the first type of malapportionment, new normative thought may be required to determine the proper form of representation. That is, should the single member district system be replaced by a multi-member district system? Should the proportional representation system be substituted for the majority-plurality system? The second type of malapportionment needs only a redoing in accordance with the apportionment formula. Redistricting is a process by which districts are re-designed to implement the apportionment formula. Finally, gerrymandering is a manipulation of districts for political purposes (partisan, bi-partisan, individual, etc.) that creates a distortion of election results. Thus gerrymandering is a form of "maldistricting."

In short, apportionment and reapportionment are formulas; malapportionment and redistricting are processes; and gerrymandering is a technique.

The proposed classification system's emphasis on the qualifiers (silent, concentration, dispersal and elimination) focuses attention on the political technique being employed. If the court determines the existence of a gerrymander, the second step is to determine the maldistricting effect on the normative apportionment formula. Is the gerrymander distorting the apportionment system to the detriment of the system's basic tenets? If the gerrymandering problem is approached in this manner, the

court can then determine where detrimental gerrymanders exist and proceed to eradicate them. It is not necessary to declare the whole redistricting process invalid—only the specific gerrymander, or gerrymanders need be so labeled. The remedy can take the forms suggested. Additional representatives can approximately equate the electoral votes, or court orders to redraw lines among adjacent districts can correct the gerrymander by a complete redrawing of the districts.

Numerical or geographical guidelines¹⁰¹ are useful in focusing attention on potential political manipulation—that is, on where gerrymanders may be located. But to identify gerrymanders it is essential to assess the political effect. To count on arithmetic and cartography analysis as the guidelines to minimize gerrymanders is a will-o-the-wisp. Heretofore, analysis based on numerical disparities, apparent violations of compactness, or personalities, has not shown that the essence of gerrymandering is best portrayed by an emphasis on the purpose of the redistricting—controlling the opposition's voting strength. If the redistricting distorts the electoral results, the logical next question is how the strength is diluted. Reference to political data and voting behavior immediately conjures up the specter of the infamous political question. The court has traditionally stayed clear of questions involving co-equal branches and the politics of the people.¹⁰² However, within the "political thicket" the only means to clear the underbrush is to deal with political data. The classification system and analysis suggested will assist the court in an objective assessment of the problem.

The United States Supreme Court has proclaimed that one-man vote is the basis for apportionment. If the electoral system distorts the criteria, as the "little federal" plan did, then it is unconstitutional. If the district lines of the electoral system are manipulated to distort representation, it is a form of political corruption that must be checked, preferably by statutory law but otherwise by the court in the manner outlined. If the courts recognize the difference between unrepresentative electoral systems and the manipulation of an existing electoral system, it must identify the endangering specie, the gerrymander. The slaying of gerrymanders may allow luxuriant growth to transform the thicket into a rose garden.

101. G. Baker, *supra* note 8.

102. The literature on political questions is extensive; *see in particular* C. POST, *THE SUPREME COURT AND POLITICAL QUESTIONS* (1936) and P. STRUM, *THE SUPREME COURT AND "POLITICAL QUESTIONS:" A STUDY IN JUDICIAL EVASION* (1974). (The bibliography in the latter is especially helpful).

CHART 1
HYPOTHETICAL GERRYMANDERING

	Party A Controlling Re-districting	Party B Minority in Re-districting
District 1	115,000*	90,000
District 2	115,000*	100,000
District 3	50,000	203,000*
District 4	118,000*	110,000
District 5	102,000*	97,000
	500,000	600,000
% of Total Vote	45.4	54.5
% of Representation	80.0	20.0

* The winner

CHART 2
MISSOURI CONGRESSIONAL REPRESENTATION

Census	Number of Congressmen
Fourth (1820)	1
Fifth (1830)	2
Sixth (1840)	5
Seventh (1850)	7
Eighth (1860)	9
Ninth (1870)	13
Tenth (1880)	14
Eleventh (1890)	15
Twelfth (1900)	16
Thirteenth (1910)	16
Fourteenth (1920)	16*
Fifteenth (1930)	13
Sixteenth (1940)	13
Seventeenth (1950)	11
Eighteenth (1960)	10
Nineteenth (1970)	10

* No reapportionment was made in 1920

Source: The Statistical History of the United States From Colonial Times to the Present, (New York: Basic Books, Inc., Publishers, 1976), p. 1085.

CHART 3 MISSOURI CONGRESSIONAL DISTRICTS 1901-1931

District Number 1901-1931	Dominant Party	Times Other Party Wins	Elections Other Party Wins	Times No Contest	Victory Percentages				Number of Different Congressmen	Incumbents Defeated	Incumbents Returned After Defeat	Type of District
					Less Than 50%	50.- 52.9	53.- 54.9	Over 55.0				
1	D	1	'20	0	0	4	5	6	3	2	1	***Democrat
2	D	0		2	0	1	2	12	2	0	0	***Democrat
3	D	2	'04, '20	0	0	9	2	4	5	1	0	Dispersal
4	D	7	'04, '20-30	0	0	6	5	4	5	1	0	Dispersal
5	D	5	'04, '06, '20 '24, '28	0	0	8	1	6	7	6	1*	Dispersal
6	D	2	'20, '28	0	0	6	7	2	4	4	1**	***Democrat
7	D	3	'04, '20, '28	0	4	9	1	1	5	6	3**	Dispersal
8	D	2	'20, '22	0	1	7	4	3	3	2	1	Dispersal
9	D	1	'20	0	0	5	3	7	3	1	0	***Democrat
10	R	0		1	0	0	0	15	4	0	0	Republican Concentration
11	D	2	'06, '10	2	2	7	1	6	7	2	0	Dispersal
12	D	2	'02, '04	1	1	2	0	13	4	0	0	***Democrat
13	D	6	'04, '08, '18 '20, '24, '28	0	2	11	1	1	8	9	3	Dispersal
14	D	6	'04, '08, '18 '20, '24, '28	0	4	7	0	4	8	8	2	Dispersal
15	R	6	'02, '06, '10 '12, '14, '16	0	5	2	0	8	8	4	0	Dispersal
16	D	5	'04, '08, '18 '20, '28	0	1	10	2	2	6	5	2	Dispersal

* Won three separate times.

** Won two separate times.

*** District with significant population advantages for the dominant party.