The Gerrymander: a Journalistic Catch-word or Constitutional Principle? the Case in Maryland

Paul V. Niemeyer
Essay

THE GERRYMANDER: A JOURNALISTIC CATCH-WORD OR CONSTITUTIONAL PRINCIPLE? THE CASE IN MARYLAND

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The following paper, delivered to the Wednesday Law Club and the Lawyers Round Table in Baltimore,1 revisits a model for a constitutional analysis of the gerrymander under Article I, Section 2, in connection with congressional redistricting.2 The historical interpretation of that provision mandates that congressional representation be direct and equal, precluding any classification of the population in drawing congressional district lines. Prohibited from making such classification, the states would be left with a method of redistricting that looks only at population numbers and natural and political boundaries when drawing lines. Any classification by race, religion, income, party registration, or other criterion would, under the model, be found to violate Article I.3


1. Address at the Wednesday Law Club (Nov. 4, 1992); address at the Lawyers' Round Table (Dec. 21, 1992).

2. The text reads in relevant part: “The House of Representatives shall be composed by the People of the several states . . . .” U.S. CONST. art. I, § 2, cl. 1 (emphasis added); compare with “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . . .” Id. § 3, cl. 1, amended by U.S. CONST. amend. XVII, § 1 (emphasis added).

3. In Shaw v. Reno, 113 S. Ct. 2816 (1993), the Supreme Court held that a racial gerrymander in North Carolina congressional redistricting, created to give effect to Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973p (1988), was subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Id. at 2825. Commenting on Congressional Districts 1 and 12 in North Carolina as their boundaries were then drawn, the Court stated: “A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.” Id. at 2827. The Court left open the question of whether a gerrymander for reasons other than race “always gives rise to an equal protection claim.” Id. at 2828. Yet, over the years, various decisions of the Court have expressed the view that political gerrymanders can be unconstitutional under the Equal Protection Clause. See, e.g., Davis v. Bandemer, 478 U.S. 109 (1986) (concluding that political gerrymandering was justiciable under the Equal Protection Clause). The level of scrutiny applied in an analysis under the Equal Protection Clause may not be consistent, however, with the public’s view that gerrymanders for any reason are pernicious in that they classify the voters on non-relevant bases.

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Since 1812, the "gerrymander" or "to gerrymander" has been used frequently on editorial pages to characterize pejoratively a form of political conduct in establishing election districts. Commenting on a proposed version of a congressional redistricting plan for Maryland, an editorial of the *Baltimore Sun* found the term yet inadequate for its purposes:

The gerrymander is a staple of American political history, but the Governor's Redistricting Advisory Committee plan to redraw congressional district lines in Maryland is so outrageously partisan, silly and illogical that it would make even Elbridge Gerry turn over in his grave. State Republican leaders have already said that they intend to challenge this plan in court if it becomes law. They should. They would win. The plan is not only goofy, it is unconstitutional. 4

This was but one of the ongoing media attacks against Maryland's redistricting efforts following the 1990 decennial census. Newspapers characterized the messy process as, "political backbiting and shrill argument, time-consuming stalemates, and puzzling maps on the Maryland page of *The Sun.*" 5 Headlines that appeared throughout the central Maryland area read: *The Gang That Couldn't Draw Straight: The Real Story Behind the Redistricting Fiasco,* 6 Maryland's Political Power Brokers Decide Where to Put Congressman Tom McMillen; 7 "People's Plan" for Maryland Congressional Districts Makes Some People Angry; 8 and Md. Congressional Redistricting Plan Sets Off Bipartisan Furor. 9 Nathan Landow, Chairman of the Maryland Democratic Party—and sometimes adversary of Democratic Governor William Donald Schaefer, who openly supported Republican Congresswoman Helen Bentley—acknowledged the politics of the process: "To say this is a non-partisan issue is ridiculous. . . . We're interested in protecting our Democrats and get-

for the purpose of manipulating the outcome of elections. Consequently, this Article reexamines earlier constitutional analyses of gerrymandering outside the context of the Fourteenth Amendment. Considering the historical interpretation of Article I, Section 2, of the Constitution offered below, a case can be made for the unconstitutionality of gerrymandering that meets most intuitive reservations about it under a lesser level of scrutiny than required when applying the Equal Protection Clause.

6. *Id.*
7. *Id.* at 60.
ting rid of every Republican, including Mrs. Bentley." From my reading of the media accounts, I think it is fair to characterize the summer of 1991 as a domestic Democratic free-for-all in which Republican Congresswoman Bentley joined. The conflict was resolved by an old-fashioned, back room political caucus of a few to favor the incumbencies of Congressman Steny Hoyer (D. 5th), Congressman Ben Cardin (D. 3d) and Congresswoman Helen Bentley (R. 2d), and to exclude Congressman Tom McMillen (D. 4th). Let me begin by providing a few highlights of the historical events.

I

The 1990 census data for Maryland revealed that the State would not gain or lose any of its eight congressional seats. Although the state’s population increased modestly, there were no remarkable population shifts, except one. The African-American population in Congressman Steny Hoyer’s Fifth District surrounding Washington, D.C. to the northeast had become a substantial majority, creating the real possibility that the district might wish to have an African-American representative. This likelihood threatened the re-election of Hoyer. Hoyer was the fourth most powerful member of the U.S. House of Representatives. Almost all Democratic Party interests recognized not only that carving out a substantially African-American district from Steny Hoyer’s Fifth District would serve the Congressman, but also that the new district could be justified publicly by alluding to purported requirements of the Voting Rights Act of 1965. No evidence has ever surfaced, however, to suggest that Hoyer’s original Fifth District with its new African-American majority did not already satisfy the requirements of the Act. The realpolitik was revealed starkly, as The Sun reported:

In the very beginning of the Maryland process, Democratic party leaders made it very clear their priority was to protect Rep. Steny H. Hoyer, D-Md.-5th. “Protect” in this case means the cunning manipulation of district lines. Mr. Hoyer . . . had attained so much seniority and clout he could not be left wholly vulnerable to the winds of voter sentiment.

Once it was concluded that an African-American district would be created in the Prince George’s County area and that Steny Hoyer

11. Bowman & Smith, supra note 9, at 4A.
12. Smith, supra note 8, at 5G.
Taking care of one's party at the expense of the weaker one is as traditional as stuffing the ballot box in American politics.

The tools of the debate were computers loaded with data about the location of every citizen in Maryland, including his or her political affiliation, voting record, race, and other census information. As proposed district lines were drawn on the computer screen, printouts could provide data from which a candidate could predict his or her chances of re-election. A story described potential African-American

14. Id. (reporting the results of a Maxon-Dixon Opinion Research poll).
candidates for the new seat in Prince George's County working at the elbow of computer operators with telephones in hand.\textsuperscript{15} Boundary lines were adjusted depending on precinct support determined by contemporaneous telephone calls.\textsuperscript{16}

In the end, Maryland House Bill 10 was finalized and adopted.\textsuperscript{17} Congresswoman Bentley, because of Governor Schaefer's intervention, was protected with a Second District electorate that favored her interests; Congressman Cardin was given an essentially white district in the shape of a large, backwards "C" that began in Baltimore County and ended beyond Columbia in Howard County; an African-American district was created in suburban Washington; and Hoyer was provided a safe, white district that extended from Southern Maryland, wrapping around the African-American district, to the Montgomery County line. The victim of this political maneuvering, Anne Arundel County, was divided into four portions, dismembering the old Fourth District, and squeezing out Congressman Tom McMillen.

The congressional redistricting map of central Maryland had thus become a hodge-podge of lines bearing no relationship to traditional political or natural boundaries. As established by House Bill 10, the First District on the Eastern Shore leaps across the Chesapeake Bay to include Annapolis and a portion of Anne Arundel County on the western shore, rather than following the contour of the bay and the state's northern border into Harford County. The Second District likewise leaps from Baltimore County across the mouth of the Patapsco River into Anne Arundel County to pick up 45,000 residents who can only travel by boat if they wish to remain in the district and visit their representative. The Third District, described on the floor of the Maryland House as the "splitting amoeba,"\textsuperscript{18} consists of one ill-defined portion in the north artistically weaving in and out of Baltimore County and Baltimore City, connected by a thin strip in East Baltimore to another ill-defined portion in the south covering portions of Baltimore City, Baltimore County, Anne Arundel County, and Howard County. The new African-American Fourth District is rooted in Prince George's County but snakes into Montgomery County selectively to pick up black neighborhoods. The Fifth District reaches from Southern Mary-

\textsuperscript{15} Kiger, \textit{supra} note 5, at 63, 101.
\textsuperscript{16} Id.
land through Anne Arundel County into eastern Prince George’s County and over to Montgomery County.

Anne Arundel County was divided into four parts, and each part became a small adjunct of a congressional district oriented to other geographical areas. The county therefore had no unified representation. Anne Arundel County citizens and both political parties filed suit in federal court to challenge the constitutionality of the new redistricting law. The case was assigned to a three-judge court on which I served as the circuit judge and Judges Frederic N. Smalkin and Frank A. Kaufman served as the district judges. I must tell you at the outset that I was outvoted and the Supreme Court affirmed summarily. The majority approved the congressional redistricting enacted by Maryland House Bill 10, relying essentially on the fact that each Maryland district contained substantially the same number of people. Therefore, my views in that case—that the court’s analysis of a redistricting plan cannot end with the examination of numbers alone when the plan was based on other factors—might rightfully be characterized as “sour grapes.” This I leave for your judgment.

In its brief, the State of Maryland surprisingly conceded that district lines were drawn for the personal political purposes of a few. In particular, the State recognized that the old Fifth District of Steny Hoyer could not be left in its original configuration because it put Hoyer, a white incumbent, in a majority African-American district. The State argued that while a plan based on the original configuration “may have survived a legal challenge, [it] increase[d] the probability that the State could lose one of its most senior and powerful congressmen.”

Are we offended by a redistricting process that so crassly serves the personal political fortunes of a few? And should we be? More importantly, does it constitute gerrymandering, and is gerrymandering proscribed by the Constitution? After I discuss briefly what gerry-

20. 28 U.S.C. § 2284(a) provides: “A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the appointment of any statewide legislative body.”
mandering is understood to be, I will suggest that it may raise a serious constitutional issue.

II

"Gerrymander" is generally defined as the intentional alteration of established political boundaries or the creation of artificial "communities" by the grouping of political units to form temporary election districts for the purpose of effecting an election outcome.24 Although the gerrymandered district can take an infinite variety of shapes, the techniques used to accomplish the political purpose of a gerrymander are relatively uniform. In a single-member election district, any votes for the winning candidate in excess of fifty percent plus one are considered "wasted," from the perspective of the candidate's political party.25 Since the aim of the party creating the gerrymander is "to make its votes count the most in the election and the vote of the opposition as little as possible,"26 the gerrymanderer attempts to draw district lines which "pack" (or "stack") into as few a number of districts as possible the projected votes in favor of the opposition. Simultaneously, the map-maker spreads out his party's vote by "cracking," that is by drawing the remaining districts in such a way as to maintain a small but safe majority.27

Almost ninety years ago, Professor Elmer C. Griffith wrote:

The gerrymander is a political device of far-reaching effect. It sets aside the will of the popular majority. It is a species of fraud, deception, and trickery which menaces the perpetuity of the Republic of the United States more threateningly than does, perhaps, the injustice of unjust taxation, for it deals more fundamentally with representative government.28


27. Id. at 21. Griffith's observation that the anti-majoritarian character of gerrymandering is subversive of republican principles is not novel. See Polsby & Popper, supra note 25, at 303-04.

As early as 1789, Virginians characterized a perceived gerrymander attempt "as a violation of the rights of a free people due to 'party spirit or to the overgrown influence of individuals.'" In his third annual message to Congress in December 1891, President Benjamin Harrison declared: "If I were called upon to declare wherein our chief national danger lies, I would say without hesitation, in the overthrow of majority control by the suppression or perversion of the popular suffrage." And today, too, it is widely accepted that gerrymandering undermines the American republican institution.

The practice of drawing district lines to commandeer elections has existed in America since the colonial period. The advent of the term "gerrymander" coincided with the initial popularity of the practice in Massachusetts during the spring of 1812. While the Federalist Party had controlled the Massachusetts legislature in the early 1800s, the Republicans had gained control of all three branches of the state's government as a result of the election of 1810. The election of 1810 was characterized not only by an apathetic electorate, but by rhetoric and hyperbole sufficient to show that the "mud slinging" which is seemingly characteristic of modern political campaigning is by no means of recent vintage.

29. Id. at 41 (quoting The Virginia Herald and Fredericksburg Advertiser, Jan. 15, 1789).
30. Id. at 10 (quoting Messages and Papers of the Presidents 208-11 (James D. Richardson ed., 1897)).
31. See Martin Shapiro, Gerrymandering, Fairness, and the Supreme Court, 33 UCLA L. Rev. 227, 239 (1985) (describing gerrymandering as a "pathology of democracy"); Polsby & Popper, supra note 25, at 304-07 (contrasting the threat posed by gerrymandering to a "Madisonian version of constitutional democracy"); see also Davis v. Bandemer, 478 U.S. 109, 177 (1986) ("Intelligent voters, regardless of party affiliation, resent this sort of political manipulation of the electorate for no public purpose.") (Powell, J., concurring).
33. Id. at 16-17.
34. George A. Billias, Elbridge Gerry, Founding Father and Republican Statesman 316 (1976).
35. Id. at 315.
36. For example, the Federalist candidate in 1810 was the incumbent governor, Christopher Gore. The Federalists portrayed Gore as "a true American divested of foreign influence and undue partialities." Billias, supra note 34, at 313 (quoting Mass. Spy, Feb. 14, 1810, and Mar. 14, 1810). The Republicans, on the other hand, accused Gore of being a Tory who venerated the British constitution and was conspireing to create a "Northern Confederacy" among Britain and the other New England states. Id. (quoting Nat'l Aegis, Jan. 31, 1810; Feb. 7, 1810; Feb. 28, 1810; and Mar. 28, 1810).

The Republican candidate was Elbridge Gerry, who his party touted as the "Veteran of the Revolution, the sage of '76, the friend and confidant of the important Washington, of Adams, of Jefferson, and of Madison, and the calm and considerate patriot." Id. at 313 (quoting Nat'l Aegis, Feb. 21, 1810). According to the Federalists, however, Gerry was a "French partizan" whose faction had destroyed American commerce, slashed state reve-
Elbridge Gerry won the 1810 Massachusetts gubernatorial race.\textsuperscript{37} Gerry was an early advocate of American independence, a prominent member of the Continental Congress, and a principal supplier of the Continental Army during the Revolutionary War.\textsuperscript{38} He was also a delegate to the Constitutional Convention, which created a document that he found himself unable, or unwilling to sign.\textsuperscript{39} Nevertheless, after ratification of the Constitution, he lent his full support to the new government and served as a congressman from Massachusetts.\textsuperscript{40} In 1810, he won a bid for governor of Massachusetts.\textsuperscript{41} Later Gerry went on to serve as Vice-President of the United States under President James Madison.\textsuperscript{42} Gerry’s reputation was as an anti-federalist,\textsuperscript{43} anti-militarist\textsuperscript{44} and, for much of his life (at least until he became governor), an anti-political party man.\textsuperscript{45} Gerry, however, believed that the Federalists desired military rule, or even a return to monarchy, and that they acted as agents of the English in an effort to achieve that end.\textsuperscript{46} In a letter to Thomas Jefferson, Gerry depicted an America

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ues by two-thirds, making necessary the levy of new taxes and who, if elected, would work to create an alliance with France and a war with England. \textit{Id. at 313} (quoting Mass. Spy, Feb. 14, 1810, Feb. 28, 1810; and Mar. 28, 1810).

37. \textit{Id. at 313}.
38. \textit{Id. at 153}.

39. Gerry stated eleven objections to the proposed national constitution, but stated that he could accept the document “if the rights of the Citizens had not been rendered insecure” by three powers that he listed:

1. By the general power of the Legislature to make what laws they may please to call necessary and proper.
2. [To] raise armies and money without limit.
3. [To] establish a tribunal without injuries, which will be a Star-chamber as to Civil cases.

\textit{Id. at 199} (quoting Madison’s Notes (Sept. 15, 1787), in \textit{2 The Records of the Federal Convention of 1787}, 633 (Max Farrand ed., 1911)).

40. See generally \textit{Id. at 218-35}.
41. See \textit{id. at 308-09}.
42. Griffith, supra note 24, at 19.
43. See generally Billias, supra note 34, at 152-205.
44. Billias portrays Gerry’s fear of the establishment of a military government, or worse, a return to monarchy in the United States as a primary driving force in Gerry’s life. Because Gerry saw the Federalist Party as an organization bent on militarism and monarchy, Billias argues that Gerry was forced to compromise his dislike for political parties, which he also saw as a threat to republicanism. Billias, supra note 34, at 221; see also Griffith, supra note 24, at 31-41 (describing an alleged gerrymander attempt by Patrick Henry to prevent Samuel Madison from acquiring a seat in the First Congress). Gerry’s reluctant affiliation with the Republicans was unnecessary to combat the greater threat posed by Federalist control of the government. \textit{See id. at 308-14}.
45. See, e.g., Billias, supra note 34, at 221 (describing Gerry’s mistrust of political parties).
46. \textit{Id. at 310}.
\end{verbatim}
"menaced from without and within." The mission of Gerry and the Republicans became to insulate the Federalists from power.

To accomplish this end, the Republicans consolidated control over the Massachusetts government. They removed the Federalists from government positions and installed party members in both newly created executive branch positions and patronage jobs in the state court system. The Republicans established a new circuit court of common pleas, giving Gerry the power to appoint sheriffs and clerks of court. The "gerrymander" of 1812 arose in this context, with the express goal of "mak[ing] the state Senate a Republican bastion not only to pass legislation but to help elect Republicans to the national Senate."

The Massachusetts Republicans devised a redistricting plan that created a new "Essex" district which cut back and forth across county lines, split towns, isolated towns from their proper counties, and managed to pick up numerous Jeffersonians. Opponents attacked the plan almost from its inception. Even before its passage, newspapers described the plan as "cutting up counties and carving out districts." Before 1812, the practice in Massachusetts was to elect state senators as representatives of entire counties, and thus no deviation from established county lines was required to establish senatorial districts. Had that practice been followed in the election of 1812, the Essex County voters would have chosen a solid block of five Federalist state senators. However, with the Republicans' redistricting plan in place, three Republican senators were elected.

Almost immediately after the plan's enactment, the Federalists claimed that the plan "would defeat the will of the majority by arbitrary means, and thereby undermine the safety of republican institutions." On March 6, 1812, Nathan Hale, an editor of the Boston

47. Id.
48. See id. at 316.
49. See id. at 916-17.
50. Id. at 316.
51. Id.
52. GRIFFITH, supra note 24, at 17; see also BILLIAS, supra note 34, at 317 ("Essex County provided a good example of gerrymandering.").
53. GRIFFITH, supra note 24, at 20 (quoting SALEMA GAZETTE, Mar. 27, 1812).
54. BILLIAS, supra note 34, at 316-17.
55. Id. at 317.
56. Id. The Republican redistricting plan was enacted on February 11, 1812. Id.
57. Id. Ironically, as Billias points out, it was the security of the safety of republican institutions from the Federalist danger that prompted the method of redistricting in the first instance. Id.
THE GERRY-MANDER.

A new species of Monster, which appeared in Essex South District in Jan. 1812.

"O generation of Vipers! who hath warned you of the wrath to come?"

BOSTON GAZETTE, Mar. 26, 1812.
Weekly Messenger, published a map depicting the new Essex district.  
A comment about the map was made at a Boston dinner party that  
"the outer district but needed wings to resemble a pre-historic mon-  
ster," which inspired Elkanah Tisdale, an artist—and incidentally a  
Federalist—to depict the protean district complete with wings and  
claws. Upon seeing Tisdale's map, a guest remarked that the district  
"looks like a salamander." No, someone responded, it resembled a  
"gerrymander." The appellation stuck. It was unveiled publicly for  
the first time in the March 26, 1812, edition of the Boston Gazette, in a  
political cartoon and editorial entitled "The Gerry-mander."  

It is interesting, and perhaps ironic, that the patently partisan dis-  
tricting scheme which carved and mangled Gerry's home county  
should bear his name. While it is true that, as governor, Gerry signed  
the redistricting act into law and indeed had been acting as a recently  
notorious partisan, the scholars tend to agree that Gerry was not the  
originator of the redistricting bill. Samuel Dana, who presided over  
the Massachusetts Senate at the time, has been generally credited with  
the plan's conception. One newspaper at the time suggested that  
Judge Joseph Story, who served as speaker of the House until January  
18, 1812, when he resigned to become an Associate Justice of the  
United States Supreme Court, might have been responsible. Whatever  
the origins of the Massachusetts redistricting bill of 1812, the political  
tool used to the Republicans' advantage that year un-  
doubtedly will continue to bear Elbridge Gerry's name.
Over the years, in newspapers, law review articles, and other literature written on gerrymandering—indeed, even in the individual statements of many of the Supreme Court justices who have written on it—the practice has been condemned as contrary to the fundamentals of a democratic republic. Nevertheless, the issue has a relatively short judicial history, having been scrutinized by the Supreme Court only during the last thirty years. What apparently remains unresolved, however, is the question of whether or not gerrymandering is constitutional.

III

Because the qualifications of congressional representatives and the establishment of the House of Representatives are matters indigenous to the legislative branch, the Supreme Court traditionally has kept the courts out of congressional redistricting issues. It was, as we say, thought to be a "political question." This attitude changed with the landmark decision, Baker v. Carr. In Baker, Justice Brennan, writing for the majority, determined that the claim that a Tennessee apportionment statute denied equal protection of the laws presented a justiciable question. Within two years, the Court for the first time faced similar questions about the constitutionality of congressional redistricting. In Wesberry v. Sanders, the Court concluded that the question whether Georgia congressional district lines were drawn in conformance to the requirements of Article I, Section 2 of the Constitution was likewise justiciable. The Court proceeded to hold that Article I, Section 2, requires one person one vote. The Court stated: "We hold that, construed in its historical context, the command of Art. I, Section 2, that Representatives be chosen 'by the People of the several States' means that as nearly as practicable one man's vote in a congressional election is to be worth as another's." From its historical analysis of Article I, Section 2, and the careful distinction made at the Constitutional Convention between the method for electing

66. See supra note 31 and accompanying text.
67. See, e.g., Colegrove v. Green, 328 U.S. 549, 556 (1946) ("The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately on the vigilance of the people in exercising their potential rights.").
68. 369 U.S. 186 (1962).
69. Id. at 237.
70. 376 U.S. 1 (1964).
71. Id. at 6-7.
72. Id. at 7-8.
73. Id. (quoting from U.S. Const. art. I, § 2).
House members and that for electing Senators, the Court concluded: "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."\textsuperscript{74} The Court continued, quoting approvingly from \textit{Federalist No. 57}, the words of James Madison:

Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States . . . \textsuperscript{75}

After \textit{Wesberry}, the Court proceeded to establish the requirement, under the guidance of Justice Brennan in \textit{Kirkpatrick v. Preiser}\textsuperscript{76} in 1969 and \textit{Karcher v. Daggett}\textsuperscript{77} in 1983, that Article I, Section 2, requires that the states make good-faith efforts to achieve precise mathematical equality in the population among congressional districts and that any variance would have to be justified by the state no matter how small.\textsuperscript{78} In neither \textit{Kirkpatrick} nor \textit{Karcher}, however, did the Court address whether gerrymandering was unconstitutional. In \textit{Karcher}, the majority opinion of five justices stated only that "a federal principle of population equality does not prevent any state from taking steps to inhibit gerrymandering, so long as a good faith effort is made to achieve population equality as well."\textsuperscript{79} Justice Stevens, who joined the five-justice majority, also wrote separately.\textsuperscript{80} After observing that his vote was the decisive fifth vote, he stated that "mere numerical equality is not a sufficient guarantee of equal protection. . . . [A] standard of 'absolute equality is perfectly compatible with gerrymandering of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues.'"\textsuperscript{81} Justice White, who wrote a dissenting opinion for four justices seemed to

\begin{itemize}
  \item \textsuperscript{74} \textit{Id.} at 17-18.
  \item \textsuperscript{75} \textit{Id.} at 18 (quoting \textit{The Federalist} No. 57 (James Madison)).
  \item \textsuperscript{76} 394 U.S. 526 (1969) (holding that a \textit{de minimis} district population variance standard is inconsistent with the "as nearly as practicable" equal representation standard commanded by Art. I, § 2).
  \item \textsuperscript{77} 462 U.S. 725 (1983) (holding that without justification no \textit{de minimis} population variances may be considered as meeting the standard of Art. I, § 2).
  \item \textsuperscript{79} \textit{Karcher}, 462 U.S. at 734 n.6.
  \item \textsuperscript{80} \textit{Id.} at 744-65 (Stevens, J., concurring).
  \item \textsuperscript{81} \textit{Id.} at 752 (Stevens, J., concurring) (quoting Wells v. Rockefeller, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting)).
\end{itemize}
agree with Stevens. White took issue with Justice Brennan’s requirement of mathematical precision and complained that such a holding does not reach the issue which is the greater threat to the equality of representation, the issue of a gerrymander. Quoting approvingly from an unidentified commentator, Justice White said, "The emphasis of one man, one vote not only permits gerrymandering, it encourages it." Thus, five justices expressed a constitutionally-based concern about the threat of gerrymandering, without directly addressing the issue.

In Anne Arundel County, the State of Maryland concluded that these dicta were inconclusive and that therefore Article I, Section 2 of the Constitution does not prohibit gerrymandering. According to the State, Article I, Section 2 would not be violated even by a district line drawn "to snake through the alleys and cul-de-sacs of twenty-three different counties in order to match two white people for each black, or two democrats for each republican, for the purpose of advancing the chances that the favored class would win an election while diluting the vote of the unfavored class." Judges Smalkin and Kaufman, who were unwilling to go so far as to accept the State’s position, said in their majority opinion that "[w]e do not . . . believe that there are no limits upon gerrymandering.

Nevertheless, the Anne Arundel County majority was unwilling to call Maryland’s plan a gerrymander because it did not go "so far beyond the pale as to be unacceptable." The majority concluded that while gerrymandering "in our federal constitutional setting is hard to define, . . . 'most of us know it when we see it.'" Thus, I am not sure that Judges Smalkin and Kaufman disagree with the conclusion of my dissent that Article I, Section 2, prohibits gerrymandering. Clearly the majority did not accept my conclusion that Maryland’s redistricting

82. Id. at 765-90 (White, J., dissenting). Justice White was joined in dissent by Chief Justice Burger, Justice Powell, and Justice Rehnquist.
83. Id. at 776 (White, J., dissenting). "Although neither a rule of absolute equality nor one of substantial equality can alone prevent deliberate partisan gerrymandering," Justice White argued, "the former offers legislatures a ready justification for disregarding geographical and political boundaries." Id. (White, J., dissenting).
84. Id. at 776 n.12 (White, J., dissenting) (quoting CONGRESSIONAL QUARTERLY, INC., STATE POLITICS AND REDISTRICTING 1-2 (1982)).
86. Id. (Niemeyer, Circuit Judge, dissenting).
87. Id. at 400.
88. Id. at n.11.
89. Id. (quoting to Justice Stewart’s comment about pornography in Jacobellis v. Ohio, 378 U.S. 184 (1964)).
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law exemplifies gerrymandering. The Maryland redistricting law concededly reflects the will of a few state legislators and congressional representatives; it adopts congressional district lines based on classifications of people; and it interposes the state legislature as an intermediate agency between the federal government and the citizenry to block the will of the people.

IV

To resolve an impasse that nearly brought the Constitutional Convention to an end during the hot summer of 1787, the Great Compromise was reached, establishing two houses in the legislative branch of government: the House to be elected by the people and the Senate to be elected by state legislatures. As William Samuel Johnson summed it up, "in one branch the people ought to be represented; in the other, the States." The distinction between the methods of selecting representatives and senators was of fundamental importance to the Founding Fathers, and it was firmly established in the Constitution. While state legislatures were entitled to elect senators, representatives were to be elected directly by the people, without any state agency involved in the election of representatives because such agency would interfere with the will of the people. The drafters thus crafted the direct election of representatives to bypass state legislatures. As Elliot's Debates reported on the Convention:

Mr. Madison considered an election of one branch at least of the Legislature by the people immediately, as a clear principle of free government and that this mode under proper regulations had the additional advantage of securing better representatives, as well as of avoiding too great an agency of the state governments in the general one.

There appears to be little doubt that the intent of the Convention, as reflected in Article I, Section 2, was to have House members elected without state legislative agency. Justice Joseph Story confirmed this in his Commentaries on the Constitution of the United States, written during the first fifty years of our Republic, before any doubt

91. Id. § 3, cl. 1.
could be introduced by the distractions of our more complex, modern jurisprudence. He stated:

[T]he house of representatives is required to be composed of representatives chosen by the people of the several states. The choice, too, is to be made immediately by them; so that the power is direct; the influence direct; and the responsibility direct. If any intermediate agency had been adopted, such as a choice through an electoral college, or by official personages, or by select and specifically qualified functionaries pro hoc vice, it is obvious, that the dependence of the representatives upon the people, and the responsibility to them, would have been far less felt, and far more obstructed.94

I cannot make this case any more forcefully. I am aware of no constitutional principle or authority disputing that the House of Representatives was established to provide (1) direct and equal representation of the people (2) without any interfering agency on the part of state legislatures. These, I submit, are the two controlling principles that are to be derived from the historical context. The Constitution, by its express language, limits the role of state legislative involvement in the election of house members to establishing the time, place, and manner of elections (subject to federal supervision), and to providing the people with districts that assure direct and equal representation.95

Thus, state legislatures, in discharging their responsibility to draw congressional district lines, can be guided only by the goal of providing direct and equal representation of the people, and not by the interests of legislators, advocacy groups, or the state itself. It is not unremarkable, therefore, that the Supreme Court in Wesberry—the first case in which the Court stated the requirements of Article I, Section 2—said: “Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right [to vote].”96

Thus, I submit that a state may not, when drawing district lines, identify voters as rich or poor, African-American or white, Democratic or Republican, persons who voted for one candidate or persons who are expected to vote for another. To do so introduces classifications, constituting “the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes.”97

96. Wesberry, 376 U.S at 17-18 (emphasis added).
While this, as we have observed, would violate the historical intent of Article I, Section 2, it is also the classic definition of a gerrymander.98

When we eliminate from consideration any classification of the people or of the voters that is designed to favor the votes of one group and dilute those of another, we are left with redistricting criteria that are essentially neutral. Districts then could be based on blind population figures, traditional political boundaries such as county and city lines, and geophysical features such as rivers, lakes, and mountains.

V

Turning to the events in Maryland during 1991, I need not dwell on them long. It readily appears that instead of looking at population, without regard to race, wealth, political party, and projected vote, the line-drawers utilized those very classifications to create a safe seat for Congressman Hoyer, to provide Congressman Cardin with Columbia voters, to leave the port population and Baltimore County intact for Congresswoman Bentley, and to remove the African-American majority from Hoyer's district in creating a new seat. As the line-drawers favored a particular group, they of necessity diluted the influence of the opposing group. Concomitantly, they ignored traditional county lines and natural barriers in order to create artificial geographical areas for temporary congressional representation. While an awkward and misshapen district does not alone create a gerrymander, it should alert a court to the possibility that the lines were drawn to distort district boundaries and populations for partisan or personal political purposes.

Consequently, I suggest for your consideration the statement I made to begin my opinion in the Anne Arundel County case:

The Maryland legislature, using data about voters' political party registrations, their past voting habits, and their race, drew congressional district lines to depict the classic gerrymander in an attempt to control the outcome of future congressional elections. Because the use of such classifications in drawing district lines favors one class and of necessity dilutes the vote of another, the people are not represented

98. I might add that the general prohibition in Article I, Section 2, against classifications expressly excepted slaves and Indians, an exception that was changed by the Civil War Amendments.
directly and equally, as required by Art. I, § 2, of the United States Constitution.99

As an epilogue, on November 3, 1992, the purpose of the Maryland gerrymander was accomplished. Congressman Hoyer was re-elected in his new district, as were Congresswoman Bentley and Congressman Cardin in theirs. Congressman McMillen, whose district was eliminated, chose to run in the First District, but was defeated by the First District Republican incumbent, Wayne Gilchrist. Albert Wynn, an African-American, was indeed elected in the new Fourth District. And the districts, in their misshapen glory, will remain established for the next four congressional elections—until the year 2000 when we will consider the issues again.