1985 WL 670030 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Susan J. DAVIS, et al., Appellants,
v.
Irwin C. BANDEMER, et al., Appellees.

No. 84-1244.
October Term, 1984.
June 17, 1985.

On Appeal from the United States District Court for the Southern District of Indiana

Brief Amicus Curiae of the Republican National Committee in Support of Appellees

Roger Allan Moore [*], E. Mark Braden, Michael A. Hess, 310 First Street, S.E., Washington, D.C. 20003, (202) 863-8638, James R. Parrinello, Marguerite Mary Leoni, Nielsen, Hodgson, Parrinello & Mueller, Suite 2650, 650 California Street, San Francisco, CA 94108, Attorneys for Amicus Curiae, Republican National Committee

***i** TABLE OF CONTENTS

*iii TABLE OF AUTHORITIES

CASES

***1** The Republican National Committee submits this brief as *Amicus Curiae* in support of Appellees' claim that the judgment of the United States District Court for the Southern District of Indiana, entered on December 13, 1984, should be affirmed. Pursuant to Rule 36.2, all parties to this appeal have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS

The Republican National Committee argues in support of the Democratic Appellees because gerrymandering is a two-edged sword with which members of a political party may either carve or be carved. It is the belief of the Republican National Committee that egregious partisan gerrymandering in several states dilutes the opportunities ***2** for Republican candidates for Congress and state legislatures. Of course, as in the instant case, the tables can be turned.

The National Republican Party and its adherents, represented by the Republican National Committee, enjoy a constitutionally protected right of political association. The Republican National Committee seeks fair redistricting procedures nationwide because grossly partisan gerrymandering infringes on that right.

SUMMARY OF THE ARGUMENT

Partisan gerrymandering is an issue ripe for this Court's consideration. Twenty-three years after the Court provided relief from malapportioned redistrictings, millions of voters are denied fair and effective representation in their state legislatures and in the U.S. House of Representatives. Increasingly sophisticated computer technology makes equipopulous gerrymandering simple and effective.

Partisan gerrymandering affects not only individual voting rights, but by diluting the effectiveness of political parties in the electoral process, violates the right of free association of political party members. By restricting competition between political parties, gerrymandering insulates legislators from part of their constituency, thus undermining a basis of our democracy.

The fundamental importance of this issue compels the need for the Court, in light of its prior redistricting decisions, to establish a general framework to assess such claims. The history of the United States has seen a continuing expansion of suffrage, and the courts have applied a manageable, case-by-case standard of review of claims of diminution of voting strength.

Partisan gerrymandering is readily identifiable, as are the victims of gerrymandering, those who support a particular political party. While there may be no one indicium of unconstitutional gerrymandering, there exist a ***3** variety of

neutral criteria which, when considered in totality, may raise a rebuttable presumption of gerrymandering. Legitimate state policies are not threatened by application of this standard since such interests may be used to justify a challenged redistricting.

The Republican National Committee agrees with the analysis of the district court that partisan gerrymandering violates the equal protection clause of the fourteenth amendment, but also believes this practice violates the political association and speech rights of the Republican party and its supporters as protected by the first amendment.

ARGUMENT

I. A REQUIREMENT OF POPULATION EQUALITY DOES NOT ALONE PROTECT AGAINST VOTE DILUTION

A. The Pursuit of Equipopulous Districts Is By Itself Insufficient to Safeguard the Rights of Voters to Enforce Their Will

The requirement of equipopulous legislative and congressional districts provides one protection against the impairment of an individual's right to vote. However, as the Court noted in *Karcher v. Daggett,* 462 U.S. 725 (1983): "[B]eyond requiring States to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, *Kirkpatrick [v. Preisler,* 394 U.S. 526 (1969) requiring a good-faith effort to achieve absolute equality in congressional districts] does little to prevent what is known as gerrymandering." 462 U.S. 725, 734 n.6 (1983). In fact, "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort." *Karcher,* 462 U.S. at 752 (Stevens, J., concurring), quoting *Wells v. Rockefeller,* 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); *see also Karcher,* 462 U.S. at 776 (White, J., dissenting). [1]

***4** The law of redistricting is being outpaced by the technology of redistricting. This Court's prior redistricting cases dealt with the problems at hand-districts unequal in population or which discriminate racially. These cases established the primary framework for all current redistrictings. That framework, however, is, by itself, insufficient to safeguard the very rights it was intended to protect-"fair and effective representation." Computer technology has dramatically changed the nature of the process, just as it has changed the contours of many states' redistricting maps along with the character of those states' legislative and congressional representation. [2] Not only do computers make possible equipopulous gerrymanders, they allow for a choice among an almost infinite variety of options. As Justice Stevens has noted: "Computers now make it possible to generate a large number of alternative plans, consistent with equal population guidelines and various other criteria, in a relatively short period of time, and to analyze the political characteristics ***5** of each one in considerable detail." *Karcher,* 462 U.S. at 752 n.10 (Stevens, J., concurring). *See also id.* at 776 (White, J., dissenting). [3]

In this case, the districting plan was drawn with the aid of a sophisticated partisan polling and computer firm. (Br. of Appellants 53). As is the increasing practice in many states, "reapportionment maps and the district lines could not be determined until the computer information was available" on magnetic tape provided by the United States Bureau of the Census. *Id.*

B. Computer Draftsmen Can Thwart the Will of the American Voter

The new technology available to redistricters provides those in the majority with a very tempting means of discriminating against any minority, political or otherwise. They can thereby control the outcome of elections without regard to the

will of the voters. This was illustrated in the 1984 congressional elections in California. Democrats were elected to 27 of California's 45 seats-60 percent of the seats-even though Republican congressional candidates actually received more votes than Democratic candidates (49.4 percent Republican to 48.3 percent Democratic). [4]

***6** On a national scale, gerrymandering thwarts the will of the American voters. Nationwide, in 1984, in contested congressional races, Republican candidates won nearly 500,000 more votes than their Democratic counterparts, but they won 31 fewer contested seats than the Democrats. [5] These results stand in contrast to this Court's observation in *Reynolds v. Sims,* 377 U.S. 533, 565 (1964) that: "Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators."

C. Legislators Should Not Be Allowed to Do Indirectly What They Could Not Do Directly

As this Court noted in *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964), "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

The right to vote can be undermined in many ways, directly or indirectly, sophisticatedly or simply, innocuously or invidiously. If a state legislature passed a law prohibiting members of a particular political party from voting, that law would be clearly unconstitutional. If the majority party passed a law that allowed minority party votes to be counted at only two-thirds their value, or which allowed minority party members a limited percentage of legislative seats at issue, the result would be the same. Likewise, if a political majority overtly passed a law stating that minority party members in a particular city were not entitled to have their votes counted, the constitutional violation would be clear. *United States v.* ***7** *Mosely,* 238 U.S. 383 (1915); *United States v. Classic,* 313 U.S. 299 (1940). [6]

What would be impermissible if done overtly can, and does, occur covertly with the aid of the modern computer. The equipopulous gerrymander thus achieved should be just as unconstitutional as the less sophisticated, blatant equivalents.

Under the present state of the law, it is the draftsmen, not the voters, who determine legislative majorities. The appended exhibits at pp. 1a-2a, *infra,* demonstrate this. One need only recast the legislative district lines and superimpose 1984 vote totals on those lines. Using the 1984 Indiana Assembly vote for Marion County and its environs, it is possible to change the 12 to 3 Republican majority in Marion County's Assembly seats to an 11 to 4 Democratic majority, without changing a single vote cast. The fact that 1984 election results were used in this example, and that 1984 has to be considered a very good Republican year, strengthens the assertion that these Democratic majorities could be even stronger in a normal election situation. Of course, the ability to effect this "reverse gerrymander" is not conclusive proof that the actual districting is a gerrymander, but it does illustrate the options available to the clever cartographer. [7] A similar ***8** result can be obtained by applying the 1984 congressional vote in California to new lines which would give Republicans a majority of that state's 45 congressional seats, again without changing a single vote.

Political gerrymandering removes control of legislative bodies from the hands of the electorate. In a very real sense, the underlying issue in this case is whether the American voters, or clever draftsmen and computer technicians, will decide the composition of America's legislative bodies. It is for this Court, addressing the problem now at hand, to act against the computer-generated gerrymander and protect against single-party domination of state legislatures and congressional districts, as it acted against rural domination two decades ago.

If the Court does not act to address this problem, the equipopulous gerrymander, as represented in the current California congressional redistricting plan, will flourish. Such plans will become the model, rather than an aberration.

II. PARTISAN GERRYMANDERING IMPERMISSIBLY BURDENS THE FIRST AMENDMENT RIGHTS OF POLITICAL PARTIES AND THEIR MEMBERS

A. The Adverse Impact on Political Parties Demands Their Inclusion in the Analysis of "Fair and Effective Representation"

The *amicus* supports the determination of the district court that partisan gerrymandering offends the equal protection clause of the fourteenth amendment. (Juris. St. at A-24.) Gerrymandering is a classic case of the discrimination that the equal protection clause forbids. The discrimination is in respect of the right of political association of those whose votes and voices are made to count for less by the gerrymander. That right is an "inseparable" ***9** aspect of the liberty guaranteed by the fourteenth amendment. It is the means by which an individual's political freedom is exercised. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1957). The gerrymander can also fairly be seen as infringing directly on the right of political association without the mediation of equal protection. The case is thus a first amendment as well as an equal protection case. A first amendment analysis provides an effective means of balancing the constitutional interests of political parties and their members, in light of the legitimate interests of the state.

Robert Dixon viewed the relationship of the first amendment to redistricting cases thus: "Apportionment and districting arrangements have a more than casual impact on effective competition in the market place of political ideas. For without a fair opportunity to elect representatives, freedom of political association yields no policy fruits." Thus, he concluded, "First Amendment freedom of speech and of association, as well as Fourteenth Amendment interests, may be thwarted by discriminatory districting systems." R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 499 (1968).

B. This Court Has Recognized the Special Role of Political Parties in Our Political System

There is "no America without democracy, no democracy without politics, and no politics without parties. . . ." C. Rossiter, *Parties and Politics in America* 1 (1960). Political parties, and the candidate choices they offer voters, provide the single most important mechanism for incorporating voter preferences into decisions on public policy.

As a result, political parties and their adherents "enjoy a constitutionally protected right of political association." *Cousins v. Wigoda,* 419 U.S. 477, 487 (1975). *See* Scalia, *The Legal Framework for Reform,* 4 Commonsense 40, 44-45 (1981); Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of* ***10** *Party Nominating Methods,* 57 So. Cal. L. Rev. 213 (1984). "This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State." *Democratic Party of the United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 121 (1981) (citations omitted). The constitutional protection accorded to political speech is at the core of the first amendment political activity. It "is more than self-expression; it is the essence of self-government." Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 Harv. L. Rev. 1, 18 (1965); *see e.g., Reynolds v. Sims, supra.*

Just as "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents," *Sweezy v. New Hampshire,* 354 U.S. 234, 250 (1957), any interference with the freedom of party adherents on the basis of their party affiliation or electoral tendencies interferes with the freedom of the party itself. That is why partisan gerrymandering is, in fact, "a major concern . . . only in a political system dominated by party politics." Backstrom, *et al., Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota,* 62 Minn. L. Rev. 1121, 1122 n.9 (1978).

This Court has long recognized that "the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds v. Sims, supra,* at 562 (1964). Competition in the marketplace of ideas is the center of the electoral process and of the first amendment freedoms. *Williams v. Rhodes,* 393 U.S. 23, 32 (1968). Once these freedoms are implicated, the state must demonstrate a "compelling" interest if the restriction is to survive judicial scrutiny. *NAACP v. Button,* 371 U.S. 415, 438 (1963).

In *Anderson v. Celebrezze,* 103 S. Ct. 1564, 1570 (1983), the Court rejected a judicial "litmus-paper test" ***11** to determine valid and invalid restrictions. Rather, the Court recognized the need to identify and weigh the legitimacy and strength of all relevant interests and to consider the necessity of burdening the plaintiff's first amendment rights. *Id.* A court must then determine whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity. *Lubin v. Parish,* 415 U.S. 709, 716 (1974). [8]

***12 C. Partisan Gerrymandering Impairs the Right of Free Association**

Partisan gerrymandering seriously restricts first amendment rights by placing burdens on the freedoms of expression and association. An unrestrained legislature can manipulate district lines to such a degree as to provide one party a virtual monopoly in the marketplace of ideas. In *Williams,* the Court held that Ohio's ballot access laws were repugnant to the first amendment because the electoral process gave a decided advantage to some political parties over others. The state laws burdened "two different, although overlapping, kinds of rights-the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." 393 U.S. at 30. The complete, partisan monopoly in Ohio offended the first amendment by placing unequal burdens on *both* the right to vote and the right to associate.

Partisan gerrymandering is even more starkly offensive to the first amendment because district lines are drawn specifically to negate the effect of the votes of members of certain parties. Although there is no right to the *most* effective speech possible, *San Antonio School District v. Rodriguez,* 411 U.S. 1, 36 (1972), the right to cast effective votes ranks "among our most precious freedoms," *Williams,* 393 U.S. at 30. When voters are identified on the basis of party affiliation and are relegated to a district designed to eliminate their ability to affect the outcome of an election, the denial is not one of the "most effective" speech, but an elimination of the right to participate in the electoral process.

In *Anderson v. Celebrezze,* 103 S. Ct. 1564, 1572 (1983), the Court found unconstitutional Ohio's early ***13** campaign filing deadline because it threatened "to reduce diversity and competition in the marketplace of ideas." The deadline discriminated against voters with a particular political orientation and thereby contravened the associational freedoms of the first amendment. As the Court noted, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference . . . ." *Id.* at 1572 (footnote omitted). However, it is precisely for the purpose of imposing such restrictions on political parties that gerrymandered district lines are drawn.

Gerrymandering infringes on first amendment associational rights because it dilutes the impact of voters with a particular partisan association or view. It is "a fundamental tenet of American democracy that a representative government must be responsive to the changing will of the electorate." Grofman, *Criteria for Districting,* in Electoral Laws and Their Political Consequences 31 (B. Grofman & A. Lijphart, eds., 1985 forthcoming). [9] Districtings that are largely insensitive to electoral changes because they lock in "a particular partisan imbalance ***14** through the use of dispersal and concentration techniques of gerrymandering," Grofman, *id.,* thwart the very purpose of political association.

Partisan gerrymanders "are designed to limit the effectiveness of organized political activity, and for that reason strike at the rights of free speech and free association guaranteed by the First Amendment." Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket,* 1 J. L. & Pol. 357, 373 (1984). By impairing the ability of the voters to change their representatives on election day, the gerrymander "limits use of political processes that the First Amendment is intended to protect." *Id.* [10]

Where, as here, an enactment affects fundamental rights of speech and association, it is subject to the "closest scrutiny." *Buckley v. Valeo,* 424 U.S. 1, 25 (1975) (quoting *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1956); *accord, First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978); *Federal Election Commission v. National Conservative Political Action Committee,* 105 S. Ct. 1459 (1985).

Whenever limitations are placed upon first amendment rights, particularly those involving speech and political association, the state may prevail only upon a convincing demonstration of a compelling governmental interest. *NAACP v. Button,* 371 U.S. at 438-39. Furthermore, "the burden is on the government to show the existence of such an interest." *Elrod v. Burns,* 427 U.S. 347, 362 (1976). In the absence of a substantial and ***15** compelling state interest, the impairment of those first amendment rights should be struck down. [11]

D. Gerrymandering Limits Competition in the Political Process

Partisan gerrymandering, because it destroys the competitive nature of our political process, eliminates any serious discussion of political issues in many congressional and legislative districts across our country. Individual voters, simply because of their party affiliation, are assigned to electoral districts were their votes are, by design, rendered without effect. Naturally, the activity of individuals in the political process is severely discouraged by grossly gerrymandered districts, which make the advocacy of particular candidates, or parties, a fruitless civic exercise.

"Rotten boroughs," the diseased fruit of the partisan gerrymander, *cf.* ***16** *Brown v. Thomson,* 462 U.S. 835, 856 (1983) (Brennan, J., dissenting), citing *Reynolds,* 377 U.S. at 567-68; *Baker,* 369 U.S. 302-07 (Frankfurter, J., dissenting), simply demand no discussion of issues by their representatives. Many gerrymandered districts go uncontested, or are not seriously contested, so speech is not just diminished, it is eliminated. *See* Baker, *Representation and Apportionment,* III Encyclopedia of American Political History 1118, 1128 (J. Greene ed. 1984). Since the electoral process is, through clever computer-assisted cartography, foreordained, the marketplace of ideas is foreclosed to those whose party did not control the redistricting process.

The House of Representatives, the institution of our national government designed to be most responsive to the changing will of the electorate, has been substantially isolated from partisan change through increasingly sophisticated gerrymandering. A transient political majority now can effectively limit the ability of the electorate to change its representatives in any legislative body without extraordinary majorities. This insulation of legislators from the will of the electorate violates fundamental notions of our democracy:

> As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.

The Federalist No. 51, at 329 (J. Madison or A. Hamilton) (Henry Cabot Lodge ed. 1892).

A Congress, or legislature, elected in districts cleverly gerrymandered, is neither immediately dependent upon nor in intimate sympathy with the voters, for the ability of voters to change control of the legislatures has been severely attenuated. Recent electoral patterns show that the Senate has a more volatile membership than the House of Representatives. Price, *Bringing Back the Parties,* CQ Press 59 (1984). The House of Representatives ***17** is now, in the opinion of many observers, increasingly immutable to the changes in the political views of the people.

Incumbents in the House enjoy a significant advantage. Not only are more incumbents running than ever, but incumbents are winning by increasing margins. *Id.* at 58. In 1984, there were more incumbent candidates running for "safe" seats than in previous election cycles; 315 incumbent candidates won with 60 percent or more of the vote, while another 48 incumbents won 55 percent to 59 percent of the vote. In addition, there were "an unusually small number of House seats in which the incumbent did not run for re-election." [12] This House imperviousness and Senate volatility are exactly the opposite of the express intent of the framers of our Constitution. A substantial reason for this phenomenon is gross partisan gerrymandering. If the Court fails to recognize this errant and arrogant abuse of our political process, the ossification of the House of Representatives and numerous legislatures-and the attendant distortion of our system-will only accelerate.

III. PARTISAN GERRYMANDERING IS A JUSTICIABLE ISSUE

A. Justiciability Is an Evolving Concept

The arguments raised against the justiciability of egregious political gerrymadering harken back to those voices raised in opposition to this Court's decision in *Baker v. Carr,* 369 U.S. 186 (1962). The Court accurately observed that "[m]uch confusion results from the capacity of the 'political question' label to obscure the need for a case-by-case inquiry," *id.* at 210-11.

The history of the United States "has seen a continuing expansion of the scope of the right of suffrage in this country." ***18** *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). [13] The political system and the Court have, for the most part, accommodated this expansion. Justiciability, like suffrage itself, is an evolving concept as reflected in the history of the judicial review of claims of diluted voting rights. In concluding that "[c]ourts ought not to enter [the] political thicket" of redistricting in *Colegrove v. Green,* 328 U.S. 549, 556 (1946), the Court suggested that the "remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." *Id.* Recourse to the legislatures was futile since the condition of inequality complained of benefitted the very officials asked to change it.

Increasingly malapportioned legislative and congressional districts, together with legislative intransigence, provided a different result in the 1960's. In *Baker,* this Court insisted on "the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." *Baker,* 369 U.S. at 217.

Rejecting arguments of judicial incapacity, this Court concluded in *Baker* that there were judicially manageable standards by which an allegedly unconstitutional redistricting could be identified and remedied:

> Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

Id. at 226.

As this Court recognized in *Baker,* the federal district courts are fully equipped to resolve redistricting cases in ***19** a manageable and thoughtful manner, consistent with the facts presented by each case. In *Baker,* the question of relief was left to the district court, because the Court had "no cause . . . to doubt the District Court will be able to fashion relief if violations of constitutional rights are found . . . ." *Id.* at 198. *See also Reynolds v. Sims,* 377 U.S. at 556. There is no reason to believe that the district courts are only less equipped in gerrymandering cases than in any other redistricting cases to draw and implement legislative or congressional plans applying neutral criteria. As Justice Douglas noted in his concurrence in *Baker,* "The justiciability of the present claims being established, any relief accorded can be fashioned in light of well-known principles of equity." *Baker,* 369 U.S. at 250 (Douglas, J., concurring).

In *Baker,* the circumstances called for equitable relief, and the Court responded by giving the plaintiffs the opportunity for such relief. That a case involves gerrymandering fails to provide any lesser basis for deciding the controversy. Indeed, to refrain from decision would be to reach the remarkable conclusion that a legislative majority, by the happenstance of its presence when the day for redistricting arrives, entrenches its party in power, free of any effective concern for the rights accorded voters by the first and fourteenth amendments.

B. The Court Should Provide a General Framework for Litigation of Such Claims

This Court noted, in 1964, that protection of the fundamental right to vote requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964). The same year, in *Reynolds v. Sims,* 377 U.S. 533 (1964), this Court held that "an honest and good faith effort" to construct equipopulous districts is required. *Id.* at 577.

Rather than imposing a rigid framework upon the district courts by which they must measure claims of vote dilution in legislative and congressional cases, this Court ***20** has wisely insisted that the district courts review the specific circumstances of each case. In *Kirkpatrick v. Preisler,* 394 U.S. 526, 530 (1969), the Court refused to adopt a fixed numerical standard for measuring population variances between congressional districts "without regard to the circumstances of each particular case." Likewise, in a state legislative case, the Court concluded that when reviewing population-based representation, "the proper judicial approach is to ascertain whether, *under the particular circumstances existing in the individual State* whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation. . . ." *Roman v. Sincock,* 377 U.S. 695, 710 (1964) (emphasis added).

Through three redistricting cycles over two decades, federal district courts-and state courts applying federal constitutional principles-have methodically reviewed the scores of redistricting plans brought before them and, as a result, the legislative and congressional districts of virtually every state are relatively equipopulous.

However, even as population disparities among districts have dwindled, the underlying problem this Court sought to address in *Baker, Wesberry,* and *Reynolds*-the dilution of a citizen's right to vote-continues to plague our electoral system. Criteria for recognizing the gerrymander (and eliminating it) are set forth in the following section. These criteria offer a workable framework for litigation of such claims.

IV. PARTISAN GERRYMANDERING IS IDENTIFIABLE

A. The "Totality of the Circumstances" Analogy

Partisan gerrymandering persists and is very effective. *See supra* § I(B). It is sufficiently widespread to affect numerous congressional and legislative races, yet there are objective, quantifiable standards by which to assess a partisan gerrymander. The Court need not rely solely on Justice Stewart's definition of obscenity-"I ***21** know it when I see it," *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964)-to determine that a redistricting plan is a gerrymander.

In his classic work on the law of reapportionment, Robert Dixon suggested: "Gerrymandering is discriminatory districting. It equally covers squiggles, multi-member districting, or simple non-action, when the result is racial or political malrepresentation." R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 460 (1968). In other words, gerrymandering exists when votes are not accorded the same weight on the basis of party affiliation. This is a reasonable and manageable definition. To determine the relative weight of the votes of a political group, the cumulative effect of a number of factors provides a proper framework for analysis on a case-by-case basis. In similar manner, the Congress intended, and the courts successfully apply, a "totality of the circumstances" test to claims of racial vote dilution under Section 2 of the Voting Rights Act of 1965, as amended. The Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1965), *as amended by* the Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973(b) (1982); Senate Comm. on the Judiciary, Report on the Voting Rights Act Extension, S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177 (hereinafter "Senate Report.") [14]

***22** In Voting Rights Act cases, the courts must assess the cumulative or total effect of circumstances giving rise to a claim of racial vote dilution, since any one of the relevant measures alone may be insufficient to support a claim under the statute. This type of analysis would be effective and not particularly novel for the courts to use when considering gross partisan gerrymandering claims. [15]

In fact, in *Williams v. Rhodes,* in which the Court rejected an Ohio law limiting ballot access by new political parties, this Court looked to the "totality of the Ohio restrictive laws taken as a whole. . . ." 393 U.S. 23, 34 (1968). The Court concluded that, in their totality, the ***23** laws imposed an unconstitutional burden on voting and associational rights. *Id.*

B. Standards for Measuring a Gerrymander

A partisan gerrymander may be found to be constitutionally repugnant when the technique is used to minimize or cancel out the voting strength of political elements of the voting population in violation of the first amendment, or when one political party has been discriminated against in such a fashion that its supporters have been denied an equal opportunity to participate in the political process and elect candidates of their choice.

While numerous measures have been suggested to determine whether or not a gerrymander has occurred, one should always begin with the oldest of such measures-the vote. Although the *amicus* acknowledges this Court's repeated admonition that no group is entitled to representation in proportion to its strength in the population, *City of Mobile v. Bolden,* 446 U.S. 55 (1980), the proportion of congressional or legislative seats won to the number of votes cast for a party's candidate serves, at least, as an objective measure of the impact of a challenged districting plan. [16] Proportions of votes to seats are simply one available, easily definable, measure. When, for example, a party wins the majority of votes but a minority of the seats, something is surely amiss. Whenever a party's seats are seriously less in proportion than that party's share of the vote, reason for careful scrutiny almost surely exists.

Political and social scientists recognize a variety of neutral criteria by which gerrymandering can be demonstrated. One author has identified "Twelve Prima Facie Indicators of Gerrymandering" and three "Warning ***24** Flags" of probable gerrymandering, which he, as an expert witness, used to analyze California's congressional plan in *Badham v. Eu,* 568 F. Supp. 156 (N.D. Calif. 1983). These fifteen factors are set out in Grofman, *Criteria for Redistricting, supra,* at 35-37.

Each of the gerrymandering techniques or indicators discussed *infra* is based on one, or more, of Professor Grofman's fifteen factors or warning flags.

(1) ***Unnecessarily disregarding compactness standards in drawing district lines.***

There exist measures of compactness with a meaningful starting point and unambiguous measures of deviation from that point. Depending on the configuration of the district, compactness can be measured by summing the length of aggregate boundaries [17], computing the absolute value of the difference between the length and width of the district [18], calculating the ratio of the area of a district to the area of the smallest possible circumscribing circle [19], or by a combination of these and other methods. In *Karcher,* Justice Stevens, quoting Professor Dixon, warns "against *defining* gerrymandering in terms of odd shapes." 462 U.S. at 755 n.15 (Stevens, J., concurring). But, he said, dramatic "departures from compactness are a signal that something may be amiss." *Id.* at 758. *See also*: R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 460 (1968); B. ***25** Grofman, *Criteria for Districting,* at 12. [20] Justice Stevens was undeniably correct.

(2) ***Unnecessarily disregarding city, town, county, and geographic boundaries in drawing district lines.***

As the Court indicated in *Reynolds v. Sims,* and Justice Stevens noted in *Karcher,* "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Karcher v. Daggett,* 462 U.S. at 758 (quoting *Reynolds v. Sims,* 377 U.S. at 578-79) (footnote omitted). City or town and county boundaries were also recognized by this Court in *Brown v. Thomson,* 462 U.S. 835 (1983), as playing an important role in state and federal government administrations. Accordingly, "[e]xtensive deviation from established political boundaries is another possible basis for a prima facie showing a gerrymandering." *Karcher,* 462 U.S. at 758 (Stevens, J., concurring).

(3) ***Unnecessarily disregarding communities of interest in drawing district lines.***

While less explicit than local government jurisdictional boundaries, "historical" boundaries or those dividing "communities of interest" are often discernible, and, in some states, have very explicit, determinable boundaries that have been used by state and federal courts in the redistricting process. [California: *Legislature v. Reinecke,* 10 Cal. 3d 396, 110 Cal. Rptr. 718, 516 P.2d 6 (1973); ***26** Colorado: *Carstens v. Lamm,* 543 F. Supp. 68 (D. Colo. 1982); New York: *Flateau v. Anderson,* 537 F. Supp. 257 (S.D.N.Y. 1982)]

(4) ***Packing, fragmenting, or submerging the voting strength of political parties.***

Packing the voting strength of a party into particular districts insures that much of its voting strength is wasted in districts that are won by lopsided margins. Conversely, fragmenting or submerging the voting strength of a party among several districts helps turn that party into a near certain minority.

Just as these factors have been recognized by Congress, *see "Senate Report,"* and this Court as one of the "circumstances" that may indicate illegal racial vote dilution, so also can they operate to dilute the vote of a political minority.

(5) ***Differential treatment of the majority party's and the minority party's incumbents.***

A redistricting plan can impact on the reelection likelihood of a particular party's representatives by altering district boundaries to put two or more representatives from the same party into the same district, or by reducing the reelection likelihood of a party's representatives by cutting up old districts, or otherwise altering district boundaries so as to make

it impossible for those representatives to continue to represent the bulk of their former constituents.[21] One of the defenders of the California gerrymander argues that "the displacement of incumbents is perhaps even more important to the outcome of the ***27** first post-districting election than are many changes in the underlying partisan composition caused by redistricting." B. Cain, *Assessing the Partisan Effects of Redistricting* 15, presented at the Annual Meeting of the American Political Science Association, Chicago (Sept. 1-4, 1983).

In assessing the impact of gerrymandering on incumbents, Cain acknowledges: "The key then to the partisan gerrymander is that incumbents in the party controlling redistricting will be treated differently from those in the party that does not." Cain at 35. Thus, a combination of "partisan reconstruction" (i.e., changes in the distribution of partisan registration across districts) and the "artful removal of inconveniently placed incumbents" can be used to alter the seat distribution and make the majority party more "efficiently distributed" than the minority party. *Id.*

(6) *Creating Partisan Advantage in Open Seats*.

A political majority, especially where the number of seats increases in a reapportionment, may take advantage of open seats by creating "safe" seats for candidates of their own party. Once the seat is captured, the benefits of incumbency are also gained.[22] The first post-districting congressional election sets in place almost all the incumbents, and thereafter, defeat of congressional incumbents who run for reelection is very rare. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals,* 6 Polity 295 (1974). A consistent pattern of using new or open seats to favor the majority party's candidates is a valid indicium of partisan gerrymandering.

***28 (7) *Abusing the Process*.**

Finally, just as a truncated or irregular process in the enactment of a redistricting plan has been found to require explanation in other vote dilution cases so, too, is a procedural standard useful in partisan gerrymandering cases. A procedure such as that described in *Karcher v. Daggett* is the sort that might be suspect, where a legislature "swiftly" passed a redistricting bill that was signed by the outgoing governor just before a governor of the opposing party took office.

V. LEGITIMATE STATE POLICY INTERESTS MAY BE RECOGNIZED IN ARTICULATING THE CONSTITUTIONAL PRINCIPLES THAT LIMIT PARTISAN GERRYMANDERING

The *amicus* does not suggest that every plan that adversely impacts members of a political party or its candidates is constitutionally defective. Like any other right guarantee by the Constitution, political association is not absolute, and can be qualified if it conflicts with an important state interest. *United States Civil Service Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 567 (1973); *Democratic Party of the United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 124-25 (1981). The *amicus* recognizes that redistricting is, and should remain, a political process. However, an articulated and compelling governmental interest may justify some abridgement of the associational rights affected by redistricting. As Justice Stevens observed in his concurrence in *Karcher:*

> Although a scheme in fact worsens the voting position of a particular group, and though its geographic configuration or genesis is sufficiently irregular to violate one or more [neutral criteria], it will nevertheless be valid if the State can demonstrate that the plan as a whole embodies acceptable, neutral objectives.

462 U.S. at 725-26 (Stevens, J., concurring) (footnote omitted).

***29** This principle provides sufficient protection to a state from excessive intrusion into its political affairs and policy judgments. Only after plaintiffs challenging a plan as a political gerrymander establish a prima facie case must a state justify its actions.

The Court has recently affirmed the use of such a rule in districting cases. *Karcher,* 462 U.S. at 730-31. There the majority emphasized its willingness "to defer to state legislative policies, so long as they are consistent with constitutional norms . . . ." All the state need show is that the legislative policies invoked to justify some deviation from perfect equality are "consistently applied" and relate to the plan "with some specificity." The showing required is "flexible," and requires "case-by-case attention." *Id.* at 750-41. *See also, Brown v. Thomson,* 462 U.S. at 848-49 (O'Connor, J., concurring).

While a fourteenth amendment analysis accommodates this view, challenges to a redistricting plan founded on a claim of first amendment violation can be analyzed by considering the character and magnitude of the injury to the right, the state's justifications for the burden, and the legitimacy and strength of the justifications in relation to the necessity of the burden. *Anderson v. Celebrezze,* 103 S. Ct. 1564, 1569-70 (1983). The balancing of interests which occurs in a first amendment context readily accommodates the conflicting interests present in a partisan gerrymandering case, with the first amendment merely giving weight to the right allegedly infringed, and then placing the burden on the state to justify the infringement. Note, *Anderson v. Celebrezze: The Ascendancy of the First Amendment in Ballot Access Cases,* 15 U. Tol. L. Rev. 385, 387 (1983).

***30 CONCLUSION**

Significant partisan gerrymandering exists in this nation and is effective in limiting and chilling the exercise of first amendment rights. Computer technology has now advanced to the stage that the voting rights of members of political parties can be severely truncated in a manner consistent with population equality and racial equity. By limiting competition in the electoral process, gerrymandering inhibits voters from exercising, through collective action, their right to change their elected officials. The vitality of America's political parties-and the integrity of our representational government-are at stake. The judgment of the district court should be affirmed.
Respectfully submitted,

ROGER ALLAN MOORE

E. MARK BRADEN

MICHAEL A. HESS

310 First Street, S.E.

Washington, D.C. 20003

(202) 863-8638

JAMES R. PARRINELLO

MARGUERITE MARY LEONI

NIELSEN, HODGSON, PARRINELLO & MUELLER

Suite 2650

650 California Street

San Francisco, CA 94108

Attorneys for Amicus Curiae Republican National Committee

June 17, 1985

APPENDIX

*1a HYPOTHETICAL DEMOCRATIC GERRYMANDER MARION COUNTY, INDIANA (AND ENVIRONS) ASSEMBLY DISTRICTS

2613

*2a EXISTING LEGISLATIVE DISTRICTS MARION COUNTY, INDIANA (AND ENVIRONS) STATE ASSEMBLY DISTRICTS

2613

Footnotes

* Counsel of Record

1 In the introduction to its analysis of the current congressional districts nationwide, the editors of *Congressional Quarterly* noted: "The nobly aimed 'one-man, one-vote' principle is coming into increasing use as a weapon for state legislators bent on partisan gerrymandering." Congressional Quarterly, *State Politics and Redistricting* at 1 (1982).

2 In 1980, the National Conference of State Legislators noted that since "computer technology has come of age . . . the changing technology will have profound implications . . . in the 1980's redistricting activities of the state's Legislatures." *Reapportionment: Law and Technology* at 53. This report highlights the explosive growth of computer technology in the redistricting arena and notes three new dimensions this growth injects into the process: speed, numerous alternative plans and precision.

"The access of those who draw districting plans to sophisticated computerized redistricting data bases which include not just population data, but also information about party registration figures, previous election outcomes, and voting and demographic trends, makes it possible for map-makers to carry out the most sophisticated forms of gerrymandering while at the same time *perfectly* satisfying any equal population constraints that might be imposed." Grofman, *Criteria for Districting,* in Electoral Laws and Their Political Consequences 32 (Grofman & Lijphart, eds., 1985 forthcoming).

3 *Cf. Carstens v. Lamm,* 543 F. Supp. 68 (D. Colo. 1982), where the five plans considered for Colorado's six-member congressional delegation each had districts which differed from one another by fewer than 100 persons, with several plans containing districts differing by fewer than a dozen persons. These plans were the distillation of numerous computer-generated and computer-assisted plans. The Court was called upon to choose because a partisanly divided state government failed to agree on a plan, because each of the five proffered plans differed considerably in their political effect. The court correctly declined to choose from among these plans simply on the basis of lowest population deviation (but constructed a plan incorporating the features of several plans).

4 Data indicating that Republicans in New York could, at times, capture a majority of seats with a minority of the statewide legislative vote were similarly a factor in *W.M.C.A. v. Lorenzo,* 377 U.S. 633 (1964). *See W.M.C.A. v. Simon,* 208 F. Supp. 368, 3??0 (S.D. N.Y. 1962); Brief for the Appellants at 28, 36, 120-22. This disparity led some commentators to suggest that New York was "constitutionally Republican." Tyler and Wells, *New York: Constitutionally Republican* in The Politics of Reapportionment 221, 236 (M. Jewell, ed., 1962).

5 Clerk of the House of Representatives, *Statistics of the Presidential and Congressional Election of November 6, 1984* (1985).

6 One commentator has suggested the following hypothetical: "[Suppose] the post-*Reynolds* state legislature adopted a different means for the same end [and] announced that it would carefully study voting patterns, and then, intentionally, distributed urban voters into equipopulous districts so that their votes were effectively diluted by rural voters. This dilution could be achieved in several ways, but the result in all cases could be made to duplicate exactly the 'unrepresentative' proportions that existed in *Reynolds* itself, while maintaining the equipopulous districts required by the one person-one vote doctrine." Howard & Howard, *The Dilemma of the Voting Rights Act-Recognizing the Emerging Political Equality Norm,* 83 Colum. L. Rev. 1615, 1636-7 (1983).

7 Copies of the data used to generate these maps have been lodged by the *amicus* with the Clerk of this Court. The "hypothetical Democratic gerrymander" uses a combination of multi-member and single-member districts to maximize Democratic candidate victories. If the plan were limited to three-member districts, as occurs under the current plan, Democrats would win nine of the fifteen districts, a shift of six seats solely dependent on the placement of the district lines.

8 In *City of Mobile v. Bolden,* 446 U.S. 55, 122 (1980), Justice Marshall emphasized that any political minority seeking to invoke the protection of the fourteenth amendment must be sufficiently "cognizable" to be afforded relief. 446 U.S. at 122 (Marshall, J., dissenting). Justice Stevens, in his concurring opinion in *Karcher,* delineated the showing necessary to satisfy such a standard. In demonstrating that they are members of an identifiable political group whose voting strength has been diluted, "plaintiffs must show that they belong to a politically salient class . . . one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing districts." 462 U.S. at 754 (Stevens, J., concurring).

The most readily identifiable voting group is one based on political affiliation and voting patterns. *See* Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution I,* 38 (1973) (cognizable interest group with coherent and identifiable legislative policy); Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence,* 41 U. Chi. L. Rev. 398, 407-408 (1974) (clearly identifiable and stable group). The courts readily recognize the identifiability of racial voting groups, even though the basis for the identification-the United States Census-is updated only once per decade. Voting patterns, on the other hand, are identifiable at least every two years.

Voters who tend to vote for a party's candidates are reasonably identifiable and quantifiable. *See e.g.,* Niemi, *Can Fair Districting be Achieved? Political Gerrymandering in Light of Brown v. Thomson and Karcher v. Daggett* in Electoral Laws 22 (B. Grofman and A. Lijphart, eds., 1985 forthcoming). (Citations are to manuscript.)

The Court has recognized that political groups are cognizable in *Gaffney v. Cummings,* 412 U.S. 735 (1973). Furthermore, both the Congress and the federal courts have recognized that Republicans are sufficiently identifiable for purposes of relief under the post-Civil War Ku Klux Klan Act. 42 U.S.C. § 1985(3). This Court has confirmed that the statute does provide protection against certain civil rights violations on the basis of political affiliation. *United Brotherhood of Carpenters and Joiners of America v. Scott,* 103 S. Ct. 3352 (1983); *Griffin v. Breckenridge,* 403 U.S. 88 (1971).

9 The importance of political parties to the exercise of first amendment rights is part of our American political tradition. Our scheme of governance calls for majoritarian government, but through reflective representation, whereby our legislatures "reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices . . . were brought to bear on the decision-making process." (Bickel, *The Great Apportionment Case,* New Republic, Apr. 9, 1962, at 13, 14.) As a result, ours is a democracy in which parties as well as individuals are represented. *Cf. Town of Lockport v. Citizens for Community Action at the Local Level, Inc.,* 430 U.S. 259 (1977), where the Court recognized the constitutionality of a statute which required separate majorities of voters within city limits and those without for county charter referenda approval. *See also Hunter v. Erikson,* 393 U.S. 385, 393 (1969). ("The State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.")

10 *Cf.* Dixon's argument on behalf of the State of Connecticut in *Gaffney v. Cummings*: "There is a sharp distinction between good faith avoidance of known obstacles to fair expression of political opinion, and designing districts to slant the next election in favor of one element whether or not it has popular support. The former approach operates to 'free up' the political

process by creating districts intrinsically fair to all contestants; the latter approach perpetuates or creates unfair patterns of representation." Appellees' Juris. St. at 61, *Gaffney v. Cummings,* 412 U.S. 735 (1973).

11 An alternative, though related, constitutional base could be Article IV, § 4, of the Constitution-The Guarantee Clause. While the Clause has been called a "sleeping giant," Cong. Globe, 40th Cong., 1st Sess. 614 (1867) (remarks of Sen. Sumner), this Court in *Baker* and *Reynolds* appeared to qualify the notion that issues raised under the Guarantee Clause are inherently nonjusticiable. In those cases, the Court suggested only that "*some* questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards." *Reynolds,* 377 U.S. at 582; *Baker,* 369 U.S. at 217-29.

It has been suggested that the clause may have a limited contemporary role, authorizing judicia action where individual rights defined in other provisions of the Constitution are threatened by structural defects in state or local government. Note, *A Niche for the Guarantee Clause,* 94 Harv. L. Rev. 681, 682 (1981). If a legislature becomes immutable to changing voting patterns-and therefore no longer republican-that legislature has become structurally defective, while concurrently diluting the rights of individuals and the candidates they support. *Id.* at 698. *See generally,* Rosenblum, *Justiciability and Justice: Elements of Restraint and Indifference,* 15 Cath. U. L. Rev. 141 (1966); Scharpf, *Judicial Review and the Political Question: A Functional Analysis,* 75 Yale L. J. 517 (1966).

12 Source: *The FEC Reports on Financial Activity, 1983-84: U.S. Senate and House Campaigns, Interim Report No. 9* (1985).

13 As the Court suggested in *Reynolds,* the fifteenth, seventeenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth Amendments to the Federal Constitution, the civil rights legislation of 1957, 1960, and 1964 (as subsequently amended), and the Court's consistent line of decisions on voting rights all involved expansions of the right of suffrage. 377 U.S. at 554-6 & n.28.

14 These factors were derived from the analytical framework of *White v. Regester,* 412 U.S. 755 (1973), as expanded in *Zimmer v. McKeithen,* 485 F.2d 1295 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 635 (1976). In approving the 1982 amendments to the Voting Rights Act, the Senate Judiciary Committee explicitly adopted the "result standard" articulated in *White,* concluded that it was unnecessary for purposes of Section 2 of the Act to make a finding or require "proof as to the motivation or purpose behind the practice or structure in question." Senate Report at 28.

The resulting statutory language provides a possible framework for a first amendment analysis by the Court in gerrymander cases:

A violation . . . is established, if based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.

Voting Rights Act Amendments of 1982, Subchapter IA, § 1973(b).

The Congress suggested a variety of factors which, when viewed in totality, would be indicative of vote dilution. Senate Report at 28-29.

15 In rules newly proposed by the Department of Justice, the following are to be considered "relevant factors" in determining a basis for objection: "(4) The extent to which the districts created by the submitted plan needlessly depart from objective redistricting criteria such a compactness and contiguity or follow a unique configuration that inexplicably disregards prior district boundaries, boundaries of districts of other contemporaneous plans, political boundaries, prior precinct boundaries, natural boundaries, or manmade physical boundaries. (5) The extent to which the submitted plan is inconsistent with the jurisdiction's stated redistricting boundaries." Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 50 Fed. Reg. 19122, 19131 (1985) (to be codified at 23 C.F.R. § 51).

In 1984, the Department of Justice reviewed 274 redistricting changes. (Source: Section 5 Unit, Voting Section, U.S. Department of Justice). If such neutral criteria are unmanageable, why would the Department of Justice impose such a burden on its review of hundreds of redistrictings annually?

16 The *amicus* agrees with the proposition that ours is not, nor should be, a proportional system of government. The credentials of the Republican National Committee as a proponent of strong, two-party government in the United States are indisputable. The *amicus* does *not* argue that proportionality should be the goal of redistricting, but rather that it be one measure of the basic fairness of a districting plan.

17 B. Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective" Representation,* 14 Harv. J. On Legis. 825 (1977).

18 Iowa Code § 42.4(4)(b) (1983), L. Eig and M. Seitzinger, *State Constitutional and Statutory Provisions Concerning Congressional and State Legislative Redistricting,* Cong. Research Serv. 55 (1981).

19 Reock, *Measuring Compactness as a Requirement of Legislative Apportionment,* 5 Midwest J. of Pol. Sci. 70 (1971).

20 Many state constitutions contain compactness standards, at least with respect to legislative redistricting and the courts of several of these states have reviewed districting plans on this basis. *Schrage v. State Board of Elections,* 88 Ill. 2d 87 (1981); *In re Legislative Districting of General Assembly,* 193 N.W.2d 784, 791 (Ia. 1972); *Acker v. Lowe,* 178 Colo. 175, 178, 496 P.2d 75, 76 (1972); *Preisler v. Doherty,* 365 Mo. 460, 284 S.W.2d 427 (1955); *In re Livingston,* 96 Misc. 341, 160 N.Y.S. 462 (N.Y. Sup. Ct. 1916); *In re Sherill,* 188 N.Y. 185, 81 N.E. 124 (1907); *State ex rel. Barrett v. Hitchcock,* 241 Mo. 433, 146 S.W. 40 (1912).

21 In California, e.g., the 22 Democratic incumbents who ran and won in 1982 had an *average* victory margin of 66.2 percent. None of the 22 Democratic incumbents who ran in 1982 had any other incumbent placed in the same district. However, in 1982, six of the Republican incumbents were placed together in a district with a fellow Republican; one (Clausen) was put into a district which was less favorable than his old seat (in which he ran and lost) and ??

22 *See, e.g.,* Erikson, *The Advantage of Incumbency in Congressional Elections,* 3 Polity 395 1971; Mayhew, *Congressional Elections: The Case of the Vanishing Marginals,* 6 Polity 295 (1974); M. Fiorina, *Congress: Keystone of the Washington Establishment* (1977); Ferejohn, *On the Decline of Competition on Congressional Elections,* 71 Amer. Pol. Sci. Rev. 166 (1977); B. Cain, *Assessing the ?? Effects of ??* (19??).