

# THE ROLE OF INDIANA'S STATE AND FEDERAL COURTS IN LEGISLATIVE REDISTRICTING, 1962-2003

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## INTRODUCTION

Legislative redistricting, or reapportionment as it is called in some circumstances, holds a number of interests for constitutional scholars and political junkies alike: feuding political parties; separation-of-powers concerns; developing constitutional theories; the intersection of law and statistics; the conflation of Rorschach testing and cartography; and in Texas, where everything is bigger, legislative flight to escape the state's arrest power.<sup>1</sup> But beyond providing interesting theoretical and rhetorical fodder for lawyers and wags, modern congressional reapportionment efforts across the country, for example, have led to fewer and fewer competitive races. In turn, the major political parties have become increasingly partisan as more and more candidates are required to "play to the partisan base," out-of-step with the conventional wisdom that the majority of voters in America are not rabid partisans on either side, but are constituents of a great moderate middle.<sup>2</sup>

Redistricting disputes began to be constitutionalized in 1962. Like many issues that blossomed in the civil rights era of the Twentieth Century, one gets the feeling that, despite continuing trips to the U.S. Supreme Court for elaboration, the great redistricting cases are behind us. State and local governments now largely possess the rules that govern their line-drawing. Unlike ideological "wedge issues" such as abortion and gay marriage that remain to be debated constitutionally and socially in the Twenty-first Century, modern redistricting disputes are almost purely *political*; that is, they are about protecting or wresting control of Congress or state houses, not about resisting craven efforts to disenfranchise citizens based on their race or class.<sup>3</sup> Indeed, in any era, the

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1. Throughout 2003, Democrats in the Texas legislature fought to avoid a Republican congressional reapportionment plan that has been forecasted to create a net gain of three to five seats for Republicans, though there is serious question that such a result would be justified based on current majority-party voting strength among Texans. Natalie Gott, *Texas Senate Gives Tentative Approval to New Congressional Map*, ASSOCIATED PRESS, Sept. 24, 2003; Don Peck & Caitlin Casey, *Packing, Cracking, and Kidnapping*, ATLANTIC, Jan./Feb. 2004, at 50-51. The Texas Democrats twice fled the state to prevent the presence of a quorum for the reapportionment vote. In May, Texas House Democrats fled to Oklahoma, and in July, Senate Democrats fled to New Mexico where they stayed for forty-five days. Gott, *supra*; Rachel Graves & R.G. Ratcliffe, *11 Dems in Exile Wary of Arrest/Want to Know Status of Round 3*, HOUSTON CHRON., Aug. 26, 2003.

2. Peck & Casey, *supra* note 1. In 1962, there were 178 competitive seats out of the 435 total seats in the U.S. House of Representatives. A competitive seat had a victory margin of less than 20% for the successful candidate. In 1982, that number shrank to 138 and to just seventy-nine in 2002. *Id.*

3. See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial*

redistricting process is one of the essential components of politics. It is, after all, perhaps the only governmental function about which elected officials can admit their political motives and public employees are required, instead of forbidden, to work on political matters on government time.<sup>4</sup>

In light of the focus of this symposium on Indiana legal history, this article addresses three topics. First, it briefly reviews how judges got into what we might alternatively call “this mess of redistricting” or “this critical role of causing the political branches to obey the law and constitution.” Second, it briefly discusses a number of cases that Indiana state and federal judges have decided and identifies their significances. And finally, it discusses in detail the recent case of *Peterson v. Borst*<sup>5</sup>—the Indiana Supreme Court decision that ended a fight over local legislative redistricting in Marion County, Indiana—from which several conclusions may be drawn about the judicial role in redistricting.

### I. THE BEGINNINGS

As anyone who has even casually peeked at a constitutional law text knows, the seminal case signaling the intervention of the federal judiciary in redistricting is the 1962 decision in *Baker v. Carr*.<sup>6</sup> But long before the feat of judicial activism that occasioned *Baker* and its progeny, state courts were obliged by their laws and constitutions to pick up where the political branches of government had left off.<sup>7</sup>

Well before 1962 then, many state courts had jurisdiction by constitutional or legislative direction to resolve redistricting disputes and, in some cases, the obligation to be part of the redistricting process itself.<sup>8</sup> Although that is still true

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*Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 651 (2002).

Recently . . . attention in the field [of the Law of Democracy] has shifted from a discussion of rights of participation and political access to an analysis of the background structures and organization of the electoral system. Most notably, the debate has revolved around the desirability of a jurisprudential shift away from rights-based analysis toward an emphasis on electoral competition.

*Id.*

4. Before the trial in *Peterson v. Borst*, discussed below, the Republican council president admitted that the Republican council redistricting plan favored his party: “Well, we’re not about to draw a map to make the Democrats have more districts.” Anna Marie Kukec, *Map Flap Endangers Primary*, INDIANAPOLIS STAR, Dec. 15, 2002, at B1.

5. 786 N.E.2d 668 (Ind. 2003).

6. 369 U.S. 186 (1962).

7. See J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 6:6 n.24 (Callaghan 1891) (collecting law review articles from late 1950s and early 1960s on remedies for legislative failures in redistricting).

8. See, e.g., *Denney v. State ex rel. Basler*, 42 N.E. 929 (Ind. 1896) (holding Indiana apportionment act of 1895 unconstitutional as violative of the six-year reapportionment period and collecting contemporary cases in which state high courts had exercised jurisdiction over apportionment acts).

today, the state-court decisions rendered before *Baker v. Carr* are better viewed as a collection of idiosyncrasies than an illustration of jurisprudence. To be sure, those cases dealt with questions of malapportionment and equality of representation, as well as other redistricting issues. But despite the established legal role of state courts in legislative redistricting, state courts could also be viewed as part of the problem as opposed to being part of the solution.

Turning to *Baker v. Carr* on this point, the fact that the Tennessee courts had not acted to cure significant voter malapportionment caused by population increases and shifts that had been left legislatively unaddressed for 60 years made the state courts part of the problem.<sup>9</sup> A vote in one Tennessee county could carry as much weight as a eleven votes in another county.<sup>10</sup> Justice Brennan's opinion for the Court held that an equal protection claim under the Fourteenth Amendment could lie in such a case and rejected arguments that legislative reapportionment cases amounted to political questions that were non-justiciable.<sup>11</sup> While dissenting Justices Frankfurter and Harlan were incredulous that federal courts were treading where state courts had not,<sup>12</sup> concurring Justice Clark wanted to go further than Justice Brennan's majority opinion allowed and decide the merits of the equal protection claim on the record before the Supreme Court.<sup>13</sup>

To be fanciful, we might rename *Baker v. Carr* as "Genie v. Bottle" and note that Genie won. Such a characterization seems to support the Supreme Court's decision in *Reynolds v. Sims* two years later.<sup>14</sup> *Reynolds* arose from Alabama, where, like in the Tennessee legislature, districts were malapportioned. The Alabama Supreme Court admitted as much, but would not act to correct it.<sup>15</sup> Thus, under the authority of *Baker v. Carr*, the plaintiffs in *Reynolds* sought federal judicial intervention to require population-based reapportionment. In noting that legislators represent people, and not trees or acres, Chief Justice Warren announced the one-person, one-vote standard as applicable to equal protection challenges to state legislative reapportionment plans.<sup>16</sup> The Chief Justice made clear, however, that the Court was not considering the difficult question of the proper remedy to address the unconstitutional malapportionment.<sup>17</sup> Subsequent malapportionment cases have dealt largely with the formulas and statistical evidence necessary to demonstrate the degree of population difference that is justifiable as a *de minimis* deviation from the unreachable standard of exact equality of voting strength.<sup>18</sup>

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9. 369 U.S. at 191.

10. *Id.* at 255-56 (Clark, J., concurring).

11. *Id.* at 237.

12. *Id.* at 330 (Harlan, J., dissenting).

13. *Id.* at 261 (Clark, J., concurring).

14. 377 U.S. 533 (1964).

15. *Id.* at 540-41.

16. *Id.* at 558, 562.

17. *Id.* at 585.

18. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (affirming district court's

Fast forward in time and concept to gerrymandering. Following *Baker* and *Reynolds*, the Supreme Court decided many cases in the area of racial gerrymandering even where there was no significant population deviation among legislative districts. The notion was that the Equal Protection Clause embraced claims that voters, at least demographically and statistically speaking, had been placed into districts according to their races. Unlike in *Baker* and *Reynolds*, which had been decided under the framework of the general civil rights statute,<sup>19</sup> as a vehicle for bringing an equal protection claim, the Voting Rights Act of 1965<sup>20</sup> vested specific authority in federal courts to determine whether apportionment schemes based on race abridge the right of a class of citizens to elect candidates of their choice. From this line of cases we have the *Gingles* test,<sup>21</sup> which asks judges to determine whether minority voting strength has been impermissibly diluted by reapportionment processes, and we have the rule in *Shaw v. Reno*<sup>22</sup> dealing a certain practical blow to the creation of some majority-minority voting districts—which those on the political left think of as the creation of a “reverse-discrimination claim” in the reapportionment context.<sup>23</sup> And the Court’s decision last term in *Georgia v. Ashcroft* appears to have introduced an additional uncertainty in determining whether a new redistricting plan causes “retrogression” in majority-minority districts.<sup>24</sup>

Perhaps the most interesting gerrymandering case from a political science perspective is the Court’s decision in *Davis v. Bandemer*.<sup>25</sup> At issue in *Bandemer* was not the basic right of persons to have their vote be weighted equally with fellow citizens or to be free from having their voting rights politically segregated based on race. Rather, the question was whether the Equal Protection Clause embraced a claim of political gerrymandering. The implication was that

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congressional redistricting plan with total deviation of 0.35% and stating that a “court-ordered plan should ‘ordinarily achieve the goal of population equality with little more than *de minimis* variation’”) (citation omitted); *Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993) (remanding state legislative redistricting case to consider whether state policy that favored preserving county boundaries justified total deviation greater than 10%); *Mahan v. Howell*, 410 U.S. 315, 325-30 (1973) (upholding legislative plan with total deviation of over 16%).

19. 42 U.S.C. § 1983 (2003).

20. *Id.* § 1973.

21. See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

22. 509 U.S. 630 (1993).

23. See Conference, *The Supreme Court, Racial Politics, and the Right to Vote: Shaw v. Reno and the Future of the Voting Rights Act*, 44 AM. U. L. REV. 1 (1994) (Professor Allan J. Lichtman arguing that the “Republican Party . . . was a party in the *Shaw v. Reno* decision attacking the very majority-minority districts in North Carolina that in their formation the Republican Party had been instrumental in creating”).

24. 123 S. Ct. 2498, 2611 (2003). Justice O’Connor’s majority opinion remanded the Georgia Senate redistricting plan back to the district court, because, *inter alia*, the lower court’s analysis under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts. *Id.*

25. 478 U.S. 109 (1986).

apportionment schemes that dilute votes of persons based on political affiliation may be unconstitutional. The Court's holding that such claims were justiciable<sup>26</sup> brought some familiar refrains about the judicial role. Justice O'Connor's opinion opposing justiciability argued that federal intervention in these cases would "inject the courts into the most heated partisan issues" and could only lead to "political instability and judicial malaise."<sup>27</sup> In 2004, the jury may still be out on the prescience of Justice O'Connor's claim.<sup>28</sup>

This summary of redistricting law is painfully simplistic. But the recent history suggests that what began as a controversial and untethered federal entrée into legislative redistricting in 1962 has, by the beginning of the Twenty-first Century, become—if not "old hat"—at least one of the central things we expect judges to do.<sup>29</sup> In a quantum leap from the route formerly taken by the Tennessee and Alabama Supreme Courts, and further glossing over the irony of states-rights concerns, the federal redistricting cases are now viewed as persuasive precedents for justifying even state judicial intervention in other legislative arenas. This was demonstrated in Indiana jurisprudence last year, when Indiana Supreme Court Justice Theodore R. Boehm's majority opinion based a judicial constraint on geographically special legislation in part on the well worn legal theories that permitted judges to supersede legislative will (or inaction) in the redistricting cases.<sup>30</sup>

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26. *Id.* at 113.

27. *Id.* at 145, 147 (O'Connor, J., dissenting).

28. The 2003-04 term of the U.S. Supreme Court has embraced a significant case claiming that a Pennsylvania federal district court's analysis nullifies the Court's decision in *Davis v. Bandemer*. *Vieth v. Jubelirer*, No. 02-1580, was argued on December 10, 2003, and awaits decision. See *Veith v. Pennsylvania*, 67 Fed. Appx. 95, 2003 WL 21040593 (3d Cir. 2003) (unpublished decision below).

29. See Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 528 (2003) ("passive regulation of the political thicket [has given] way to judicial control of reapportionment questions").

30. See *Mun. South Bend v. Kimsey*, 781 N.E.2d 683, 696 n.11 (Ind. 2003).

*Baker v. Carr* and *Reynolds v. Sims* were regarded as muscular exercises of judicial power forty years ago, but in retrospect are widely accepted as necessary checks on legislative discretion for the very reason that the normal incentives of the legislature to act in the overall public interest are disabled if each individual legislator is benefited by the status quo.

*Id.* (internal citations omitted). Justice Boehm's experience in this area might be suggestive of his progressive view. He was a law clerk for Chief Justice Earl Warren at the time *Reynolds v. Sims* was decided. Twenty-two years later, he argued the position of the plaintiffs before the Court in *Davis v. Bandemer*. Today, he is a member of the Indiana Supreme Court whose *per curiam* opinion in *Peterson v. Borst* has defined the judicial role in reviewing partisan-initiated redistricting plans in Indiana.

## II. INDIANA STATE AND FEDERAL REDISTRICTING DECISIONS

If the cases discussed above loosely establish the legal universe in redistricting, how have our state and federal courts in Indiana traversed it? The leading Indiana state case, or the latest in any case, *Peterson v. Borst*, should be treated separately. Before the Indiana Supreme Court was invited to the wrestling match, the United States District Court for the Southern District of Indiana had been asked on many occasions to consider redistricting challenges as waves of such cases splashed around the country following the U.S. Supreme Court's decisions in this area. In two instances, *Davis v. Bandemer*, most notably, Indiana politics provided the Court's water.

*Bandemer v. Davis* is perhaps the most famous redistricting case in Indiana history.<sup>31</sup> *Bandemer* dealt with a Democratic challenge to Indiana's 1981 reapportionment of senate and house districts.<sup>32</sup> A three-judge panel, consisting of District Judges James E. Noland and Gene E. Brooks from the Southern District and Senior Circuit Judge Wilbur F. Pell, heard the case.<sup>33</sup> In a split decision, the two district judges found that political gerrymandering claims were justiciable under the Fourteenth Amendment's Equal Protection Clause and that such claims were proved by intentional discrimination and the lack of proportional representation for an identifiable political group.<sup>34</sup> Judge Pell was more cautious, leaving aside the justiciability question and finding that additional evidence, such as resort to examining partisan baseline races should be required to prove such a claim.<sup>35</sup> The U.S. Supreme Court agreed with Judges Noland and Brooks on the justiciability issue, but found more evidence of vote dilution.<sup>36</sup> The Court's decision in *Davis v. Bandemer* is oft cited and the subject of considerable scholarly comment.<sup>37</sup>

Although perhaps the most known, *Davis v. Bandemer* is not the only Indiana redistricting case to have reached the U.S. Supreme Court. In *Chavis v. Whitcomb*, another three-judge panel, consisting of Southern District Judges Noland and William E. Steckler and Circuit Judge Otto Kerner, Jr., presided over a race-based equal protection claim involving the Indiana General Assembly.<sup>38</sup>

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31. 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd*, *Davis v. Bandemer*, 478 U.S. 109 (1986).

32. *Id.* at 1483.

33. *Id.* at 1481.

34. *Id.* at 1489-96.

35. *Id.* at 1500-04 (Pell, J., concurring).

36. 478 U.S. at 113.

37. See, e.g., Fuentes-Rohwer, *supra* note 29; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Michelle H. Browdy, Note, *Computer Models and Post-Bandemer Redistricting*, 99 YALE L.J. 1379 (1990).

38. 305 F. Supp. 1364, 1366 (S.D. Ind. 1969). The *Chavis v. Whitcomb* court was operating with the background of yet another three-judge court in the Southern District having held a 1965 Indiana reapportionment unconstitutional. See *Stout v. Bottorff*, 249 F. Supp. 488 (S.D. Ind. 1965) (per curiam) (Circuit Judge Roger J. Kiley, and Chief District Judges William E. Steckler and Robert A. Grant) (upholding house and senate reapportionment plans).

In *Chavis*, several plaintiffs with distinct legal theories argued that Indiana's Senate and House multi-member district that elected eight state senators and fifteen representatives in Marion County violated the Equal Protection Clause.<sup>39</sup> The Marion County plaintiffs alleged that the multi-member district diluted voting strength for black and poor residents. Specifically, the plaintiffs argued that if Marion County were divided into single-member districts, voters would be able to elect several candidates of choice in the geographic area in which a critical mass of black and poor voters lived; however, as it stood, the Marion County plaintiffs argued, they had greatly diminished political power.<sup>40</sup> A black Lake County, Indiana voter, who resided in a multi-member district with fewer representatives but a black population similar to Marion County's, alleged his vote was diluted in relation to black voters in Marion County, because the Marion County voters had opportunities to elect more representatives.<sup>41</sup>

After trial, the three-judge court essentially accepted the Marion County vote dilution argument, rejected the Lake County vote dilution argument (for lack of actual as opposed to theoretical vote dilution), and ordered that Marion County be subdivided into single-member districts.<sup>42</sup> In fashioning a remedy, the court, on its own motion, found the whole State of Indiana to be unconstitutionally apportioned due to population inequalities among districts and ordered uniform single-member redistricting state-wide.<sup>43</sup>

The Supreme Court reversed the three-judge panel's principal legal conclusions, holding that there was insufficient reason to believe the plaintiffs lacked effective representational choice and that a uniform districting scheme was not constitutionally required.<sup>44</sup> The Court left in place the three-judge court's decision to require a new state-wide reapportionment based on the evidence of significant population deviation.<sup>45</sup> In the midst of the Supreme Court's consideration of the case, Indiana passed a new reapportionment scheme that provided for single-member districts state-wide, including in Marion County.<sup>46</sup>

Many cases have presented issues involving the city-county council districts in Marion County, Indiana. In *Baird v. City of Indianapolis*, District Judge Sarah Evans Barker was confronted with redistricting and voting rights litigation

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39. 305 F. Supp. at 1367-69; *Whitcomb v. Chavis*, 403 U.S. 124, 127-31 (1971).

40. *Chavis*, 305 F. Supp. at 1367-68.

41. *Id.* at 1368.

42. *Id.* at 1399-1400.

43. *Id.* at 1387-88, 1391-92.

44. *Whitcomb*, 403 U.S. at 159-63.

45. *Id.* at 161-62.

46. *Id.* at 140; see also *Chavis v. Whitcomb*, 57 F.R.D. 32 (S.D. Ind. 1972) (three-judge court) (declining to extend jurisdiction to 1971 redistricting plan). In 1982, the Indiana Supreme Court decided a less sweeping case involving state statutes providing for multi-member county commission and county council districts and setting differential processes for redistricting counties. See also *State Election Bd. v. Bartolomei*, 434 N.E.2d 74 (Ind. 1982) (holding that statutes were not unconstitutional local or special laws).

involving the council that spanned about six years, between 1987-1993.<sup>47</sup> When the plaintiffs alleged that the number of single-member majority-minority districts was insufficient to be proportional, the court got the parties to enter a consent decree that permitted the council to draw a new map.<sup>48</sup> Judge Barker stated in a later decision that it had been her hope that the parties would draw a new map that would add majority African-American districts and that the new map, having done so, was entitled to deference.<sup>49</sup> The plaintiffs also challenged the existence of the four at-large council seats, which they argued, as multi-member districts in a majority white County, failed to permit African-Americans to elect a candidate of choice.<sup>50</sup> Judge Barker's rejection of the plaintiffs' theory and decision to include the at-large seats in an overall county-wide consideration of proportional minority representation was affirmed by the Seventh Circuit.<sup>51</sup>

In 1993, as Judge Barker was disposing of the fee petition in *Baird*,<sup>52</sup> District Judge John D. Tinder was deciding the case of *Vigo County Republican Central Committee v. Vigo County Commissioners*.<sup>53</sup> The plaintiffs in this case brought a malapportionment challenge to the four single-member county council districts in Vigo county. The total population deviation between the most and least populous districts was 37%.<sup>54</sup> The filing of the lawsuit prompted the county commissioners to adopt a new redistricting plan that reduced that total deviation to 8.41%.<sup>55</sup> Even though this was a fairly straightforward case that Judge Tinder readily acknowledged required judicial intervention, the introduction to his written decision on the merits is noteworthy for its conspicuous reflection on the principles of federalism and separation of powers that counsel for care in judicial involvement in reapportionment cases.<sup>56</sup> Ultimately, the judge rejected several

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47. See *Baird v. Consol. Indianapolis*, No. IP87-111C1, 1991 WL 557613 (S.D. Ind., April 25, 1991) (denying preliminary injunction); 1991 WL 423980 (S.D. Ind., Oct. 23, 1991) (granting summary judgment), *aff'd*, 976 F.2d 357 (7th Cir. 1992); 830 F. Supp. 1183 (S.D. Ind. 1993) (awarding attorneys fees to plaintiffs).

48. *Baird*, 1991 WL 557613, at \*11.

49. *Id.*

50. *Baird*, 1991 WL 423980, at \*1.

51. *Id.* at \*5, *aff'd*, 976 F.2d 357 (7th Cir. 1992).

52. 830 F. Supp. 1183 (S.D. Ind. 1993).

53. 834 F. Supp. 1080 (S.D. Ind. 1993).

54. *Id.* at 1083.

55. *Id.*

56. *Id.* at 1082.

The United States Constitution and various laws of the State of Indiana seek to insure that each person's vote has equal weight. Unfortunately, this noble and democratic concept is often strained in practice. This case illustrates how the reality of political pragmatism, if unchecked, can endanger this fundamental concept of equality. This court treads carefully into this arena, given the principles of federalism and the separation of powers on which our republican form of government is founded. Nonetheless, this court must adjudicate the case and controversy before it. If this court failed to act, some of the voters of Vigo County, Indiana would be in danger of losing

attempts by the defendants to winnow down the population deviation in favor of the plaintiffs' plan that permitted a deviation of less than one-half of one percent.<sup>57</sup>

A few years earlier, District Judge Larry J. McKinney was faced with perhaps a more challenging set of facts in *Dickinson v. Indiana State Election Board*.<sup>58</sup> In *Dickinson*, several voters and candidates for Indiana House of Representatives seats brought a Voting Rights Act challenge regarding two multi-member districts in Indianapolis.<sup>59</sup> The claim was that African-American voting strength was diluted by packing African-Americans into one district south of 38th Street in Indianapolis, and excluding them from another district north of 38th Street.<sup>60</sup> Judge McKinney faced several issues that seem even more problematic than the substantive law in redistricting cases, including timing and adequacy of remedy. Of special concern was that the Indiana General Assembly seemed the only party to effect a change in districts if a voting rights act violation were found, but the legislature was not a party in the case.<sup>61</sup> Thus, the court dismissed the case under the doctrine of laches, because the case had been brought in 1990 to challenge a 1981 apportionment scheme.<sup>62</sup> In the end, the Court of Appeals for the Seventh Circuit reversed the district court in part, holding that the necessary parties to effect remedy could come in later if and when a voting rights act violation were found.<sup>63</sup> Most important to Indiana redistricting history, however, the court agreed with Judge McKinney that it was important to give the Indiana General Assembly the opportunity to finish its decennial reapportionment, which after all could obviate the problem if there were one.<sup>64</sup>

As in *Baird*, Judge Barker once again had the opportunity in *Sexson v. SerVaas* to consider legal claims surrounding the 1991 redistricting of the Indianapolis-Marion County City-County Council.<sup>65</sup> In *Sexson*, the defendant city councilors and the mayor removed to federal court a lawsuit based on the state redistricting statute, arguing that any refusal to comply with state law in creating seven majority-minority districts was based on the requirements of

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the equality of voting promised to them by law.

*Id.*

57. *Id.* at 1088.

58. 740 F. Supp. 1376 (S.D. Ind. 1990).

59. *Id.* at 1378.

60. *Id.* at 1379.

61. In finding that the Indiana Election Board had no redistricting powers that were helpful in this regard, Judge McKinney relied in part on the 1962 case of *State ex rel. Welsh v. Marion Superior Court Room No. 5*, 185 N.E.2d 18 (Ind. 1962) (recognizing the Board's lack of redistricting power when one of the Board's members was future Southern District Judge James E. Noland). See *Dickinson*, 740 F. Supp. at 1380.

62. *Id.* at 1386-91.

63. *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991).

64. *Id.*

65. 844 F. Supp. 471 (S.D. Ind. 1994).

federal law, or more specifically, on the Voting Rights Act.<sup>66</sup> The *Sexson* court found that the defendants had abandoned their affirmative defense based on the Voting Rights Act, and that the case should thus be remanded to state court to decide the original state claim.<sup>67</sup> The defendants worked tirelessly to keep the case in federal court by filing post-trial motions with Judge Barker and ultimately taking an appeal to the Seventh Circuit.<sup>68</sup> Frequently mentioning that the role of the federal court was to avoid judicial intervention in purely state-law questions, Judge Barker was affirmed by the Seventh Circuit and once again remanded the case to state court.<sup>69</sup>

The most recent reapportionment case, decided by District Judge David F. Hamilton in the Southern District, is *Williams v. Jeffersonville City Council*,<sup>70</sup> which presented a classic malapportionment claim: five Jeffersonville City Council districts contained a total population deviation judicially described to be a “whopping 69.9 percent.”<sup>71</sup> The council had considered four redistricting plans but none had achieved majority support for passage. The question for Judge Hamilton, as presented in part by the parties, was whether to adopt one of the proposed plans or to devise his own.<sup>72</sup> The case presented several issues common to local government redistricting cases: competing plans with differential population deviations; challenges to compactness and contiguity, such as observance of precinct boundaries; and, of course, the pressure to maintain racial composition in districts against assertions of retrogression.<sup>73</sup> In the end, the court chose the proposed plan with the lowest population deviation which was at 3.4%.<sup>74</sup> Judge Hamilton retained jurisdiction to assist candidates and local election officials in dealing with filing deadlines, which is a critical practicality in redistricting cases decided shortly before elections.<sup>75</sup>

### III. *PETERSON V. BORST*

The first part of this article was a summary explanation of the general rules in redistricting: how our redistricting jurisprudence came to be. The second part was a catalogue of how Indiana state and federal jurists have coped with, and in some instances blazed a trail toward, the U.S. Supreme Court’s redistricting decisions. The third and final part speaks to the practical reality of a redistricting case in the Twenty-first Century’s politically polarized climate. It is a story that at least hints at the bawdy nature of a redistricting fight and the stress it can place

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66. *Id.* at 472.

67. *Id.* at 475.

68. *Id.* (denying motion to reconsider in most relevant part).

69. *Id.* at 477, *aff’d*, 33 F.3d 799 (7th Cir. 1994).

70. No. 4:03-CV-002-DFH, 2003 WL 1562565 (S.D. Ind., Feb. 19, 2003).

71. *Id.* at \*5.

72. *Id.* at \*8.

73. *Id.* at \*8-9.

74. *Id.* at \*9.

75. *Id.* at \*10.

on the judiciary.

*A. The Tale*<sup>76</sup>

Municipal political boundaries in Indiana are obliged to be redistricted after the census every ten years, following reapportionment for congressional, state senate, and state representative seats.<sup>77</sup> Although this is true state-wide, for purposes of this discussion, the focus is on Marion County, which presently contains Indiana's only consolidated city.<sup>78</sup> Under the UniGov statute,<sup>79</sup> there are twenty-five single-member council districts in the county.<sup>80</sup> Those districts were to have been redrawn by local government by the end of 2002 for the 2003 primary and general elections.<sup>81</sup> The process only started before conflict arose.

The City-County Council in Marion County was in 2002 divided by the closest of margins—fifteen Republicans and fourteen Democrats—and, in controversial matters, that division was usually the split of the vote.<sup>82</sup> The mayor, a Democrat, has the right to veto most enactments of the council, including redistricting ordinances.<sup>83</sup> Thus, Marion County has had a truly divided government.

In the spring of 2002, each political caucus of the council began to develop its proposed redistricting maps. Experts and lawyers were hired, decisional processes were set, and public hearings were held. However, despite the procedural formalities, there was little doubt of the outcome: (1) the Republicans would generate a map that helped Republicans, the Democrats would generate a map that would help Democrats; (2) in October of 2003, the Republicans would pass their map in the council by a party-line vote of 15-14; and (3) the mayor would veto it. And, true to form, that is exactly what happened.

The next historical account was also predicted far in advance. Under the

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76. Telling the tale requires two caveats. First, the author served as lead counsel for Mayor Peterson in the discussed litigation. Although the experience provides the author with an ability to give a first-hand account of the background, proceedings, and certain strategy elements, the reader should also be aware that those perspectives come from one of the advocates in the case. Second, to the extent statements in this part constitute opinion or commentary, they are those of the author solely.

77. IND. CODE § 36-4-6-3 (1993).

78. IND. CODE § 36-4-1-1 (2004) (first class city has 600,000 or more residents); IND. CODE § 36-3-1-4 (1980) (when city reaches first class city classification, it becomes a consolidated city). The new requirement became law on March 17, 2004. 2004 Ind. Acts 64.

79. IND. CODE § 36-3-1-1 (1980).

80. *Id.* § 36-3-4-3(a).

81. *Id.*

82. In addition to the twenty-five single-member council districts, there are four at-large representatives elected on a county-wide basis. IND. CODE § 36-3-4-3(c) (1988). These are the seats that were at issue in *Baird v. Consolidated Indianapolis*, No. IP87-111C1, 1991 WL 423980 (S.D. Ind., Oct. 23, 1991), *aff'd* 976 F.2d 357 (7th Cir. 1992).

83. IND. CODE § 36-3-4-14 (1980).

UniGov law, if Marion County fails to complete its council redistricting on or before November 8, 2002, the entire matter was required to be thrown into the Marion Superior Court sitting *en banc*.<sup>84</sup> Under that court's enabling statute, thirty-two superior court judges would hear the case together.<sup>85</sup> The political-party split among those judges was, and continues to be, seventeen Republicans and fifteen Democrats. It was believed by many that a majority Republican court would be sympathetic to a Republican-initiated map-drawing process in litigation. Interestingly, approximately one year earlier, the major political parties in Marion County were so jealous about the political make-up of the Marion Superior Court, that there was much gnashing of teeth when the Democratic Party sued the Marion County Election Board in early 2002 to reconfigure voting machines for the fall 2002 election to permit judges to be part of straight-ticket voting. The political rumor mill held that the Republicans feared that the Democrats might just get enough votes with the changed machine configuration to cause a 16-16 tie in the Marion Superior Court, which would lead to uncertain judicial review over the upcoming redistricting fight. As it happens, the Democrats won the party-lever lawsuit, but lost the judicial election, and the party split on the court remained 17-15 in favor of Republicans.<sup>86</sup>

And what of those predictions about how things would occur in the superior court? They turned out to be accurate with the exception of one important deviation. The court did not draw its own map, as the statute plainly contemplates it may do,<sup>87</sup> but rather the court adopted wholesale the exact map that the Republicans had developed and passed 15-14 in the council. This was the same map the mayor had vetoed, and that was a dead letter, at least legally speaking, before the first petition was filed with the superior court to redistrict

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84. IND. CODE § 36-3-4-3(d) (1988).

85. *Id.* § 33-5.1-2-1.

86. The "judges party-lever" lawsuit was the second in a string of four proceedings that framed the 2003 municipal elections in Marion County. See Vic Ryckaert, *Judicial Race Could Hinge on Rule Change*, INDIANAPOLIS STAR, Nov. 3, 2002, at V16. The first was the Republicans' successful effort to stalemate the mayor's precinct redistricting plan, which would have reduced by about one-third the number of precincts in Marion County. Although both major political parties generally agree that the 917 precincts in Marion County are far too many to be administratively convenient, the Republicans were reportedly concerned that the precinct combinations would make their ideal council redistricting map more difficult to draw, because council district boundaries usually must respect existing precinct lines. See IND. CODE § 36-3-4-3(a)(3) (1980). The Indiana Election Commission vote on the mayor's reprecincting plan was 2-2—cast along party lines—and thus lacked the required third vote for approval. See John Strauss, *Council Exploring New Boundaries*, INDIANAPOLIS STAR, Feb. 8, 2002, at A2. The council redistricting fight, culminating in the Indiana Supreme Court's decision in *Peterson v. Borst*, was the third proceeding. And a Democratic Party-initiated lawsuit over the Republican-approved form of the municipal ballot served as the capstone dispute. See John Fritze, *Ballot Ruling May Delay Election; in a Victory for Democrats, Judge Orders a Redesign Before Nov. 4*, INDIANAPOLIS STAR, Oct. 9, 2003, at A1.

87. IND. CODE § 36-3-4-3(d) (1980) ("The court sitting en banc may appoint a master to assist in its determination and may draw proper district boundaries if necessary.").

the county. That one deviation, however, turns out to be a critical factor in this tale and in understanding the role of the Indiana judiciary in redistricting cases.

A whole discussion could be undertaken concerning the trial of the redistricting case itself. Arguing a case to thirty-two judges in the same chamber is not an everyday feat. Most of the judges met—fittingly, in the city-county council’s legislative assembly room—in two *en banc* sessions: a first session to hear preliminary motions, and then a second session in which to hear the trial on the merits. The entire trial was judicially confined to a total of three hours for all parties.<sup>88</sup> For the purpose of the present discussion, the highlights from the pretrial and trial processes include the following:

- (1) Before the trial, the attorney representing the council Democrats moved to recuse two Republican judges, one because he was the brother of one of the local election board member-defendants to the lawsuit, and the other because he was the brother of a Republican council member who was running for reelection.<sup>89</sup>
- (2) Similarly, the lawyer representing the council Republicans moved to recuse one Democratic judge, because she was the wife of the county Democratic party chair.<sup>90</sup>
- (3) In response to those recusal motions, the Republican election board member resigned from the board, eliminating the issue of his brother’s putative conflict in the case. In addition, the Democratic judge recused herself. Finally, the Republican judge, who was the brother of the Republican council member, denied the recusal motion and, because he had become the Marion Superior Court’s presiding judge during the pendency of the case, also became the presiding judge in the case.<sup>91</sup>
- (4) After the trial, the lawyer for the council Republicans moved to recuse another Democratic judge, arguing that the judge had demonstrated bias in the questions he had asked during the *en banc* trial.<sup>92</sup>

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88. Peterson v. Borst, No. 49S02-0302-CV-71, Appellants’ Appendix at 539-41.

89. *Id.* at 331-33.

90. *Id.* at 7, 16.

91. *Id.* at 10, 16, 516, 520.

92. *Id.* at 13, 358-66. Clearly, as seems to occur routinely in redistricting cases, the politically-charged atmosphere brought a number of allegations of conflict and requests for recusal. Later, the council Republicans would even move to recuse one of the members of the Indiana Supreme Court in the case, Justice Theodore Boehm. That motion came *after* the oral argument in the case, ostensibly not because of anything that happened during the argument, but because the lawyer for the Republicans alleged he only later learned that the justice was the mayor’s unpaid appointee to a local cultural tourism commission. Justice Boehm did not recuse himself, in part citing Judge Sarah Evans Barker’s decision in *Sexson v. SerVaas*, 830 F. Supp. 475, 478 (S.D. Ind. 1993), in which she had decided not to recuse under similar circumstances. *See* Peterson v. Borst, 784 N.E.2d 934, 937 (Ind. 2003) (Boehm, J.) (denying motion to recuse). *Cf.* Williams v. City of Jeffersonville, 2003 WL 1562565 (S.D. Ind., Feb. 19, 2003) (granting motion to realign city as party-plaintiff despite claim by defendant city council that attorney had conflict in representing city executive and city council).

- (5) In the end, the court adopted the Republican map by a party line vote of 16-13, which corresponded to sixteen Republican judges voting for the Republican plan, and thirteen Democratic judges voting against the Republican plan. Three judges did not participate for various reasons.<sup>93</sup>
- (6) There were four dissenting opinions, all authored by Democrats. One dissenting opinion called the trial a “disorderly and bewildering spectacle” and a “procedural calamity,” and called the adopted map a “political gerrymander.”<sup>94</sup>
- (7) One Republican judge even moved to strike one of the dissenting judges’ opinions.

### *B. The Appeal*

It is against the concededly convoluted background at the trial level that the Indiana Supreme Court accepted jurisdiction of the case, completely bypassing the court of appeals because of the civic importance of the case and the need for swift resolution.<sup>95</sup> A swift resolution was indeed realized. The span of time from the filing of the transfer petition to the court’s decision in the case, including oral argument, was *five weeks*.

Although there were several issues briefed and argued to the court, including separation of powers<sup>96</sup> and due process claims,<sup>97</sup> the principal issue, and the one the court found dispositive, was that of the proper role of the superior court. As the Indiana Supreme Court framed the issue, the question was “whether the Superior Court violated its duty of neutrality by adopting a redistricting plan developed by one political party.”<sup>98</sup>

The court recognized that it was embroiled in a spirited partisan redistricting dispute and that it was writing on a clean slate regarding the role of Indiana

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93. *Peterson*, Appellants’ Appendix at 17-28, 29-72; *Peterson*, 786 N.E.2d at 671.

94. *Peterson*, Appellants’ Appendix at 93-104 (Dreyer, J., dissenting), 73-87 (Hawkins, J., dissenting), 88-92 (Magnus-Stinson, J., dissenting), 105 (Stoner, J., joining dissenting opinions).

95. IND. CODE § 36-3-4-3(d) (1980) (“An appeal from the court’s judgment must be taken within thirty (30) days, directly to the supreme court, in the same manner as appeals from other actions.”).

96. The Council Republicans argued throughout the council consideration of the redistricting plans as well as during the *en banc* trial that the mayor lacked the power to veto the narrowly-passed ordinance containing the plan, despite the fact that prior councils had uniformly presented such ordinances to prior Republican mayors for signature or veto. In the supreme court, that argument was presented in terms of a required deference to the council-passed plan, without regard to the fact that it had been vetoed, and thus, not enacted.

97. This claim related to many aspects of the *en banc* proceeding, including that it was not clear that there was even a majority decision in the case. Less than a majority of the Marion Superior Court had signed the judgment (sixteen out of thirty-two court members), and the court had never established rules governing *en banc* proceedings.

98. *Peterson v. Borst*, 786 N.E.2d 668, 671 (Ind. 2003) (per curiam).

courts in such cases.<sup>99</sup> In defining the role of the judiciary in redistricting cases, the court (1) noted the judicial canons that required judicial impartiality,<sup>100</sup> (2) discussed the court's structural role as neutral arbiter of disputes between the political branches of government,<sup>101</sup> and (3) cited cases from other jurisdictions, including both state and federal, that had required judicial blindness to the political consequences of a redistricting plan.<sup>102</sup> The court drew support from a three-judge court decision in *Prosser v. Elections Board*.<sup>103</sup>

A court called upon to draw a map on a clean slate should do so with both the appearance and fact of scrupulous neutrality. A number of courts, federal and state, have taken that view. "Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so."<sup>104</sup>

The court next focused its articulated role on the question of the trial court's wholesale adoption of an indisputably partisan plan. While the court held that not every partisan initiated plan must be rejected in a court-ordered redistricting case,<sup>105</sup> the plan the trial court had adopted represented one political party's idea of how district boundaries should be drawn and therefore could not conform with the principle of judicial independence.<sup>106</sup> Accordingly, the court unanimously reversed the trial court's split decision.<sup>107</sup>

The court then did something even more interesting. In fashioning a remedy, the court refused to remand the case to the trial court or to appoint a special master to draw a new map (the suggestion of the council Democrats). Rather,

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99. *Id.* at 671-72 (citing *Colgrove v. Green*, 328 U.S. 549 (1946)).

100. *Id.* at 672.

101. *Id.*

102. *Id.* at 673-75.

103. 793 F. Supp. 859 (W.D. Wis. 1992) (three-judge district court adopting its own redistricting plan that combined features of two best plans submitted).

104. *Peterson*, 786 N.E.2d at 673 (quoting *Prosser*, 793 F. Supp. at 867).

105. The court recognized that courts in redistricting cases have done both. *See id.* at 674-75. *Cf.* *Beauprez v. Avalos*, 42 P.3d 642, 647 (Colo. 2002) (adopting a plan proposed by plaintiffs representing the interests of a partisan after legislature and governor failed to agree on plan); *Burling v. Chandler*, 148 N.H. 143, 804 A.2d 471, 474, 483-84 (2002) (drawing its own redistricting plan because it lacked a principled way to choose among partisan-proposed plans).

106. *Peterson*, 786 N.E.2d at 673 ("We conclude . . . that the court's approval of the [Republican] Plan in the circumstances of this particular case unavoidably introduced the appearance if not the fact of political considerations into this judicial process and thus makes redrawing the boundaries necessary."); *id.* ("We conclude that the Superior Court's decision to adopt the [Republican] Plan, which was uniformly endorsed by members of one party and uniformly rejected by members of the other, does not conform to applicable principles of judicial independence and neutrality.").

107. *Id.* at 678.

because the primary election was drawing near, the court drew its own map and attached it to the opinion rather than remanding the case to the superior court.<sup>108</sup> Although the court did not specifically explain the technical process it went through to create the map, the court had earlier required the parties to submit electronic data to the court in the form of the software program used by both sides to draw their proposed maps.<sup>109</sup>

Compared to any map created by any party throughout the redistricting process, the court's map seemed the most geographically regular because the districts were very compact, implying the absence of gerrymandering. While the court left open the possibility that the executive and legislative branches of city-county government could produce their own compromise map quickly,<sup>110</sup> those branches did not.<sup>111</sup>

### C. Significances

At least four significant lessons may be drawn from the Indiana Supreme Court's decision in *Peterson v. Borst*.

First, the case presented an issue quite different from most other judicial interventions discussed in this article. In *Peterson*, the court was reviewing the redistricting plan adopted by an inferior court, not for strict legality, but for compliance with principles of judicial independence. This is the first time the Indiana Supreme Court has defined the role of the judiciary when it has the map-drawing function in redistricting cases, and it stated clearly that Indiana courts must be and appear to be politically neutral and must be governed solely by the legal requirements for redistricting. The court's unanimous decision and *per curiam* opinion shines the light of judicial impartiality like a beacon, and it also prevented an increasingly cynical and potentially nihilistic sentiment to take hold of officials and voters alike in Marion County.<sup>112</sup>

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108. *Id.* at 676. The council Republicans argued the Indiana Supreme Court lacked the power to draw its own map. But the court, noting its unquestioned appellate jurisdiction in the case, determined that its rule-based remedial powers were broad enough to permit the action. *Id.*

109. *Id.* at 676-77.

110. *Id.* at 678.

111. Even then, the case was not exactly concluded. The council Republicans filed a motion for rehearing in the Indiana Supreme Court arguing that the court's decision violated the Voting Rights Act, and that the court's remedy violated due process. Although the court denied the rehearing petition, *see Peterson v. Borst*, 789 N.E.2d 460 (Ind. 2003) (*per curiam*), the clear implication drawn by the lawyers for the council Democrats and the mayor was that the rehearing petition—based solely on federal issues—was a precursor to the filing of a petition for *certiorari* in the U.S. Supreme Court or an attempted federal collateral attack on the Indiana court's judgment to be brought in the Southern District. In the end, neither of those federal remedies was sought.

112. *See* Editorial, *Not Too Late for Fair Council Districts*, INDIANAPOLIS STAR, Feb. 22, 2003, at A14 (opining that "party-line voting among judges doesn't exactly inspire public confidence in judicial impartiality" and that "[b]y calling a halt to gerrymandering in Marion County, the [Indiana Supreme] court has a chance to reduce the level of cynicism that increasingly

Second, reapportionment cases historically have pitted competing ideologies about the appropriateness and desirability of judicial intervention. *Peterson* dealt with partisanship rather than ideology. While the Indiana Supreme Court clearly found itself in a political thicket, the main pressure point was in a different place. The court was not asked to invalidate an enacted apportionment on political grounds, like in a *Davis v. Bandemer* political gerrymandering case (giving rise to the usual concerns about judicial deference to the political process); rather, the court was asked to judge the role of the trial court in exercising a political function.

Third, the court's willingness to address the case quickly was indispensable to achieving a result that could be administered without delaying the primary election. In the interests of the timing of the primary election, and utilizing technology available to the court, it took the unusual step of drawing its own council map according to the statutory criteria. As a practical matter, this may have been the unique case where it was administratively easier to have the appellate court fashion a remedy, since the trial court would have had to act again on remand through the full *en banc* panel.

Finally, although the court did not say so in its opinion, it seems clear that Marion County's system of electing judges in partisan elections is not conducive to creating an atmosphere of impartiality in deciding a redistricting case. That is not to say that any judge on either side of the aisle did anything improper nor did the Indiana Supreme Court imply that.<sup>113</sup> Nevertheless, the structure of superior court itself presents unavoidable pressures and appearances of partisan allegiance. Chief Justice Randall Shepard signaled this point, albeit with a sense of humor, during the oral argument in *Peterson v. Borst*. When informed that there was no recorded reason for why one of the thirty-two superior court judges had not participated or voted in the trial, the Chief Justice quipped: "He can explain that at the next [party] slating convention."<sup>114</sup> Also during the oral argument, Justice Boehm picked up that theme by noting that the superior court was partisan by structure, that each judge owed his or her seat to the party apparatus, that each judge would likely have to recuse himself or herself but for the statutory obligation to sit in the case, and that it was "remarkable that [the division of the judges in deciding the case] turned out to be exactly along the lines of the parties that elected" them.<sup>115</sup>

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threatens the political process.").

113. *Peterson*, 786 N.E.2d at 673 ("We do not in any way intend to imply that the Superior Court or any of its judges acted with any improper motive or intentionally disregarded their duties of impartiality and independence. We do not question the earnest good faith of the judges in attempting to discharge their judicial obligations.").

114. *Indiana Judicial System, 2003 Oral Arguments Online*, at <http://www.in.gov/judiciary/webcast/archive/oao2003.html> (last visited Apr. 10, 2004).

115. *Id.*

## CONCLUSION

Neither the intensity nor the frequency of the partisan and ideological disputes of redistricting cases is likely to wane. The frequency of judicial involvement in redistricting cases and similarly politically-charged cases, both big and small, from *Bush v. Gore* to the Marion County municipal election cases, is likely to increase. Those who have opined that judicial intervention in redistricting mires courts in politics seem to be right, which seems especially true in the partisan cases, as opposed to traditional malapportionment and Voting Rights Act cases. However, when a court seems above the fray in one of these cases, it solves a seemingly insoluble morass created by the “political branches” of government and increases the esteem of the court in deciding a matter so controversial yet so central to our republican form of government—at least until the time for the next reapportionment.