

Mapmaking at the Grassroots: The Legal and Political Issues of Local Redistricting

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MOST EXISTING REDISTRICTING CASE LAW and political science research focuses on the United States Congress and state legislatures.¹ On the one hand, emphasis on these legislative bodies makes sense, since they operate in the top tiers of American federalism. On the other hand, a narrow focus on congressional and state legislative district creation ignores the vast majority of redistricting activity, which unfolds in the more numerous city, county and special district arenas. There are thousands of local jurisdictions in the United States as compared to only fifty state legislatures and one national legislature. That we know so little and write so infrequently about these numerous local districting changes partly attests to the relative invisibility of cities, counties and special districts generally. But we might also commonly assume that redistricting issues at the lower levels of government are completely derivative of those at the higher ones, that is, that there is nothing unique or interesting to study about them.

At a very basic level, all redistricting is similar in important ways. The purpose of drawing new boundaries is to adjust the demographic imbalances revealed in a new census to the constitutional expectations of "one person, one vote."² Overpopulated districts are forced to shed excess population and under-

populated ones to accept new areas in order to bring the districts within some conventionally accepted margin (usually less than plus or minus 5% of an ideal figure).³ Since *Avery v. Midland County*,⁴ the courts have treated cities, counties and special districts as comparable to state legislatures, applying the same population standard for both. In the words of Justice White: "We . . . see little difference, in terms of the application of the Equal Protection Clause and of the principles of *Reynolds v. Sims*, between the exercise of state power through the legislatures and its exercise by elected officials in the cities, towns and counties."⁵ In addition,

¹ Indeed, there is a paucity of literature which treats local redistricting as a process distinct from that conducted at the state level. See Richard Briffault, "Who Rules at Home?: One Person/One Vote and Local Governments," *University of Chicago Law Review* 60 (Spring 1993), pp. 339-424, for a history of the judicial application of the *Reynolds v. Sims* equal-population mandate to local governments of all types, as well as a thoughtful discussion of its important consequences.

² David Butler and Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* (New York: Macmillan, 1992); Robert G. Dixon, *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford University Press, 1968).

³ Though the Supreme Court has declined to specify a universal standard for acceptable district population deviations for state and local legislatures, this "ten percent rule" has become the dominant benchmark. It is derived from *White v. Regester*, 412 U.S. 755 (1973), in which the Court ruled that a 9.9% deviation between the most and least populous district in a Texas state legislative plan (calculated as a percentage of the average, or ideal, district population) did not require justification by the state. Congressional districts, of course, are held to a much stricter standard of population equality; see *Karcher v. Daggett*, 426 U.S. 725 (1983).

⁴ 390 U.S. 474 (1968).

⁵ *Avery v. Midland County*, 390 U.S. at 481 (White, J., opinion of the Court).

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provisions of the Voting Rights Act intended to prevent racially discriminatory districting apply equally at the federal, state and local levels.⁶

But we maintain that important differences remain between local and state legislatures—distinctions which become particularly relevant when analyzing the redistricting process from a legal perspective, as courts must do when district plans attract lawsuits from dissatisfied parties. In particular, there are four distinguishing features of local redistricting that may be significant. First, they are often nonpartisan. In such instances, candidates are not allowed to run for office under a party label, and voters must rely on other cues to make their decisions. The three standard forms of “lockup” in the literature which, when they occur, represent failures of the “political market” and invite potential judicial intervention are, in the case of redistricting, the bipartisan (often mistakenly conflated with incumbent protection), partisan, and racial gerrymanders.⁷ But when elections are nonpartisan, the first two are by definition ruled out. Does this mean that the only type of possible gerrymander at the local level is racial, or do we need to expand our categories somewhat to account for other kinds of political motivations?

A second difference is in the processes used to make boundary decisions. Local governments often operate under relatively strict open meeting laws, requiring that important deliberations and decisions be made in public with advance notifications and preset agendas.⁸ Ordinary citizens therefore have ample opportunity to comment at many points during the hearings. Whereas members of Congress and state legislators can often negotiate in private, local district lines frequently must be fashioned in public or risk violating the provisions of sunshine ordinances. Combined with the new, affordable redistricting software now available that permits many outside groups and individuals to submit their own plans, local redistricting can be a chaotic free-for-all. What should the courts look for in this setting?

Thirdly, whether redistricting authority rests in the hands of a citizen commission or local officials themselves, the actors are generally much less experienced and sophisticated than

their counterparts at higher levels of government.⁹ How well do they understand the constitutional and legal requirements? Which issues are hardest for them to comprehend?

Finally, municipal charters often include language that not only restates constitutional mandates but adds further redistricting criteria. What are some of the typical redistricting requirements specified by these charters, and how do they shape the line-drawing process in local jurisdictions?

This paper explores these questions by drawing on the authors’ experiences with local redistricting in California and New York. The evidence offered here is more qualitative than quantitative, and the observations are more conjectural than scientific. So little has been written about local redistricting processes and politics that we can only hope to open the dialogue rather than offer anything definitive. We have concluded that the courts should probably grant more leeway to local jurisdictions to follow their own paths on these mat-

⁶ Both Section 2 and Section 5 of the Voting Rights Act apply to localities as well as to state legislatures. In fact, some of the most notable court decisions involving application or interpretation of the VRA have concerned redistricting at the local level, including *Beer v. United States*, 425 U.S. 130 (1976), *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *Garza v. County of Los Angeles*, 918 F.2d 1407 (9th Cir. 1990), and *Reno v. Bossier Parish School Board I and II*, 520 U.S. 471 (1997) and 528 U.S. 320 (2000).

⁷ Samuel Issacharoff and Richard H. Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process,” *Stanford Law Review* 50 (February 1998), pp. 643–717.

⁸ In some states, including California, open meeting laws apply to local governments but not to state agencies or the legislature. See Teresa Dale Pupillo, “The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws,” *Washington University Law Quarterly* 71 (Winter 1993), pp. 1165–1187, at 1169 (note 27), 1178–1179.

⁹ In our experience, many local mapmakers who are unfamiliar with redistricting procedures, whether they are elected officials or members of a citizen commission, soon become quite surprised by the complexity of the process and the difficulty of satisfying multiple goals and constituencies. Though it has been argued that appointed commissions are more likely than legislatures to craft state-level district plans which survive judicial scrutiny (see Jeffrey C. Kubin, “The Case for Redistricting Commissions,” *Texas Law Review* 75 (March 1997), pp. 837–872), local commissions may well have fewer resources and less access to ready expertise than statewide panels do.

ters, particularly when these entities are small and amateur. Local redistricting is no less political, and sometimes every bit as intensely fought, but the value of self-defined communities of interest is higher and the level of a certain kind of public scrutiny is often greater than at the state legislative and congressional levels. As we shall see, unnecessary intervention by the courts into local redistricting disputes may only involve judges in what are essentially political controversies, even if they are not publicly presented as such.

LOCAL BOUNDARY POLITICS

Is the line-drawing process any less political in local government? From our experience, the answer is an unqualified no. It may in certain jurisdictions be less partisan, but that does not mean it is less political. For instance, California law prohibits partisan ballot designations for city, county and special district elections,¹⁰ while New York law permits them.¹¹ But in our experience, the politics of local redistricting in California is no less intense than in New York. If politics is about, as Harold Lasswell once described it, "who gets what, when, [and] how,"¹² then nonpartisan maps may be every bit as political as partisan ones.

In many cases, ostensibly nonpartisan local politics is dominated by a power struggle among two or more factions which, though they lack official recognition, perform many of the duties common to conventional political parties, such as fundraising, candidate recruitment, coordinated campaigning, and the like. Factions may be defined by clashing ideologies or policy priorities, they may reflect socioeconomic, ethnic, religious, or cultural cleavages among the population, or they may consist of competing "machines" of supporters controlled by powerful public figures. Regardless of the source of political competition, it is hardly surprising that a faction or coalition of factions in control of a local legislature's redistricting process might attempt to draw lines to its own advantage and to the detriment of its opponents' electoral prospects.

Factional divisions can explain political outcomes even in localities with partisan public of-

fices. Elections in many municipalities are dominated by a single party; fierce electoral competition, when it occurs, is thus usually limited to the prevailing party's primary, with the general election an anticlimax by comparison. If the majority party is divided into discrete and warring blocs, the redistricting process may likewise provide an opportunity for these competing factions to seek political benefit at each other's expense through clever mapmaking. Divisions among officials or commission members over redistricting issues will not follow partisan lines, but will reflect political considerations all the same.

The "who" in local redistricting varies somewhat because of the scale and scope of municipal government and the idiosyncrasies of local politics. In our experience, partisan technical operatives may get recycled into line-drawing roles for local governments, and others might provide assistance to certain incumbents or groups in formulating or evaluating alternatives, but the prevalent political culture in officially nonpartisan environments usually constrains them from being too upfront about their partisanship.

Moreover, it is important to bear in mind that redistricting consultants seek to develop plans which will enjoy sufficiently broad support to win approval. In the fluid world of local politics, this objective may require them to build coalitions that include those who are at least informally identified with another party or faction. Acting in a strictly partisan manner opens a consultant to public criticism and potentially forecloses some plan options. Finally, the fact that technical consultants are often hired by or in consultation with the city attorney's office rather than by the local legislators themselves helps set a more nonpartisan tone. City attorneys tend to measure the success of a plan less by its political merits than by the lack of lawsuits it provokes. They attend all the public hearings and review prospective plans fairly

¹⁰ California Elections Code § 13107(4)(b)(5).

¹¹ New York Election Law, Article 7, Title 1. Most school boards in New York hold nonpartisan elections.

¹² Harold D. Lasswell, *Politics: Who Gets What, When, How* (New York: St. Martin's Press, 1988 [1936]).

closely. At their best, they act as the stern parent, dampening the more outrageous ideas and pointing out the legal liabilities of various proposals. At their worst, they shade their advice to please their elected masters.

The role of the technical consultant has changed dramatically in the last two decades. In the pre-computer period, the technical consultant was one of the few, if not the only person, who knew the numbers. In the tightest redistricting operations (e.g., those directed by California's legendary Congressman Phil Burton), members and their staff saw maps and numbers solely on a "need-to-know" basis.¹³ Citizen groups were not encouraged to draw their own maps and make submissions. Members simply told the consultant what they wanted, and waited for a response a few days later. With the enhanced power of personal computers and the development of relatively easy-to-use redistricting software such as Mapitude, it is harder for consultants to control the information environment. If legislators or citizens are told that a proposed district is the best that can be drawn for them, they can now check the claim out for themselves. With the loss of information asymmetry comes a diminished ability to shape plans in a given way. For that reason, the political leanings of the consultant are somewhat less important than they used to be.

Who, then, are the other critical actors in local redistricting, aside from the city attorney and the technical consultants? Incumbents and would-be challengers are at the top of the list. Whether the local legislature or a citizen commission makes the ultimate decision, our experience demonstrates that incumbents will not be denied their say in line-drawing discussions. When the council retains the right to approve the final map, incumbent input is much like in the state legislatures. Members will speak directly to those in charge, but rarely in public unless they have lost an argument with their colleagues and hope that a last-minute protest might reverse the unwanted result. When the decision-making rests in the hands of a citizen commission, the process of influence more resembles the congressional case. Members either count on their appointees' loyalty, or put pressure on the commission members through their friends and allies. Either way, incumbent pref-

erences are powerful forces in local redistricting.

Both San Diego and San Francisco placed autonomous citizen commissions in charge of their 2001–2002 city council district boundary revisions. The high value that these commissions placed upon transparency allowed members to monitor the panels' activities by attending the hearings (or sending staff) and watching the proceedings on in-house television. In both instances, when the commissions veered in directions that upset particular incumbents, they or their aides would rush out of their offices and into the chambers to voice their objections.

Another common tactic we observed was the mobilization of supporters to testify at hearings. While local jurisdictions often limit public comment to a few minutes per person, incumbents can produce an hour or more of testimony on their behalf by bringing enough supporters to the meeting. Based on our experience, citizen commissioners are very reluctant to limit citizen input, and very uncomfortable when faced with a constant barrage of negative comments. In the San Francisco case, the successful mobilization of particular groups sometimes caused a 6 p.m. meeting to be consumed with public comment until 10 or 11 p.m., before the commission even had a chance to make a decision or draw a line. Even those who withstood the first hour of criticism often withered with fatigue by the end of the evening. As a result, the commission members tended to placate the most persistent groups, perhaps even subconsciously, so that the process could move on.

The power of negative public feedback may even be greater on citizen commissions than elected officials. This no doubt seems counterintuitive, since elected officials must regularly face the voters in order to keep their jobs while appointed commission members do not. Leaving aside the possibility that some might se-

¹³ For a description of Burton's secretive modus operandi during his single-handed development of the famous "Burton gerrymander" plan of 1982, which transformed a 22–21 Democratic edge in California's U.S. House delegation into a 28–17 advantage, see John Jacobs, *A Rage for Justice: The Passion and Politics of Phillip Burton* (Berkeley: University of California Press, 1995), pp. 425–440.

cretly (and sometimes openly) harbor political aspirations of their own, commissioners often wish to satisfy the members of the public with whom they interact. Elected officials at least understand that some voters will never support them, and that there is life after dissent; they are also experienced in gauging whether relatively high turnout at a public forum on behalf of a particular issue position represents genuine widespread concern among their constituents or the work of a vocal but small (and hence electorally insignificant) group. Citizen commissioners, however, often begin the redistricting process with the belief that there is some optimal solution that will satisfy everyone, and postpone taking sides in any disagreement as long as they can.

Another frequent attendee of redistricting hearings is the would-be challenger. Sometimes, the challenger is looking to preserve a target district as it exists, and in other instances to secure changes that would make a challenge more successful. Challengers rarely have the entourage of supporters that incumbents do to plead their cases at the meetings, but they find other ways to communicate their wishes. For instance, some of the commissioners can usually be approached through mutual political allies.

Elected officials from other governmental bodies often attend local redistricting hearings, especially at the county level where the district lines affect the representation of subordinate cities, towns, and villages. The officers of these smaller municipalities will appear in order to plead their case in front of the legislature or commission in charge of drawing the new district map. Many times, their testimony is no doubt sincere and based on a genuine appraisal of their constituents' best interest. Occasionally, however, politics plays a role here as well, especially when the redistricting process and the local officials are both partisan. The party in control of redistricting may trot out sympathetic local leaders to expound on its plan's alleged beneficial qualities with respect to the speakers' own jurisdictions even when it is clear that politics, not concern for the interests of the municipalities in question, governed the formulation of the proposed districts. One official may praise the legislature for splitting his town into as few districts as possible since each

district will be dominated by the town's voters, while another officeholder expresses support for dividing her city's residents into more districts than necessary since they will thereby have some influence over a greater number of seats, simply because the partisan goals of the mapmakers dictated such a configuration. Advance knowledge of the plan likely to win final passage before it is unveiled in public allows these officials to anticipate the probable outcome in their remarks and therefore demonstrate their "influence" over the process, while the legislature in turn can trumpet its "responsiveness" to the wishes of the officials giving testimony. The skeptical observer, however, suspects that this version of events does not accurately describe the true methods and motives behind the development of the redistricting plan.

Neighborhood groups are also influential players in local redistricting. The smaller scale of local government explains their relatively important role to some degree. At the level of state and congressional districts, most neighborhoods in a given city need not worry about being divided. And if they are divided, it is because the city or the county itself is divided, and that becomes the central issue, not the split neighborhood. But when the mapmaking occurs within a particular city, county or portion of both, the odds that district lines will cross neighborhood boundaries increase considerably.

Moreover, neighborhoods matter in local government in ways that they generally do not in state and federal arenas. Cities, special districts and counties provide critical services to citizens living in a given geographic area. Lights, sewers, garbage, water, schools, and the like are the public goods that are distributed by the municipality.¹⁴ The level of those services, the equity of service delivery, and the tailoring of services to special needs can be affected by the representation of neighborhoods in the local legislature. Shift the boundaries, and services might change in a good or bad way. Redraw the map, and alliances between different neighborhood groups that have been working to fight off a par-

¹⁴ See Paul E. Peterson, *City Limits* (Chicago: University of Chicago Press, 1981).

ticular development, or get better fire protection, might be severed. Changes to district lines impose organizational costs on local activists and disrupt working relationships that have been built over time. Consequently, neighborhood groups are typically forces for redistricting inertia. The only exceptions to this rule are activists from neighborhoods that were split in the previous map, who unsurprisingly seek recombination in the new district plan.

We observed two distinct patterns of neighborhood activism. The most effective groups attended all the hearings, whether in their area or out, and shamelessly pleaded their case every opportunity they could. They would stay late into the night to monitor proposed changes and rushed to the microphone to voice their objections much as the incumbents were doing. The less effective, and usually poorer, areas tended to mobilize only when the hearings were brought into their neighborhoods. As a result, the commissioners usually did not get to hear their requests as often. When the hearings move out of the neighborhoods and back into City Hall for the final line-drawing stages, some groups do not follow up. This is a critical mistake, since rarely—if ever—are the most important decisions made in the neighborhood hearings. It is simply naive to expect that an argument made only once at the beginning of the redistricting process will prevail in the end.

Other key actors in local redistricting are the organized racial, ethnic, and gender/sexual-orientation groups. Organizations such as MALDEF, PRLDEF, the NAACP, the Asian-Pacific Legal Defense Fund, and gay and transgender advocates participated in full force in cities that mattered to them in the latest round of redistricting. These organizations usually have high levels of technical ability that allow them to submit their own plans as well as to testify and react to other proposals. Since many of their leaders are attorneys by training, they are more familiar than the citizen commissioners and even the local elected officials with the niceties of federal redistricting law.

The involvement of experienced lawyers in the local redistricting process matters because mapmakers, under the watchful eye of the city attorney, try hard to avoid legal challenge and take the threat of a voting rights or *Shaw* suit quite seriously.¹⁵ Political arguments that can

be wrapped in legal justification carry more force in their deliberations. Faced with a statement from a lawyer that a proposal might violate federal law, citizen commissioners and local officials can be intimidated into making concessions in order to safeguard against litigation. The effectiveness of this tactic depends upon the degree to which the city attorney is willing to state on the record whether a proposed change is acceptably risky or not. Since city attorneys are rarely experts in the narrow area of voting rights law, they too tend to be deferential in the face of uncertainty and to err on the side of caution. For a local municipality with a relatively modest annual budget, the potential expense required to defend a district plan against protracted litigation is far from negligible.

In our experiences in the eighties and nineties, gay and transgender groups were not as active as the racial and ethnic organizations.¹⁶ That certainly changed in certain urban areas in 2001. For instance, the gay and transgender advocates were easily the best organized and most persistent interest groups during the San Diego redistricting process, and held three of nine appointments on the San Francisco citizen redistricting commission. These activists occupy a somewhat unique position in the spectrum of redistricting interest groups. On the one hand, they claim with justification to represent a vulnerable segment of the population that has suffered historical dis-

¹⁵ The Supreme Court held in *Shaw v. Reno*, 509 U.S. 630 (1993), that the creation of majority-minority districts which violated “traditional districting principles” such as compactness, contiguity, and respect for the boundaries of political subdivisions could violate the Equal Protection Clause. The Court’s position on this issue was further elaborated in several subsequent cases, including *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Bush v. Vera*, 517 U.S. 952 (1996); and *Easley v. Cromartie*, 532 U.S. 234 (2001).

¹⁶ The gay community in New York City successfully mobilized to secure a “gay” City Council seat on the Lower West Side of Manhattan during the last round of redistricting in 1991. See Frank J. Macchiarola and Joseph G. Diaz, “The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?,” *Cardozo Law Review* 14 (April 1993), pp. 1175–1233, at 1211. Gay-lesbian-bisexual-transgender activists in San Francisco and San Diego, however, were much more involved in the post-2000 local redistricting process than they had been in previous decades.

crimination. No one actually suggested that they were technically covered under the Voting Rights Act, but in these cities they were informally treated as a protected class.

At the same time, the gay community is relatively well-educated, predominantly white and middle class (although in San Francisco, it is split to some degree between older homeowners and younger renters). In partisan races, gay-lesbian-bisexual-transgender (GLBT) activists and racial minorities often join forces to support progressive and Democratic candidates in contests against conservatives and Republicans. When the relevant political divisions occur within the progressive Democratic ranks, however, alliances between GLBT groups and more socially moderate racial minorities can become less stable. In San Diego, this fracture led to endless debates over whether to link the gay community with neighboring white or nonwhite areas.

Finally, among the usual suspects in local redistricting, there are the gadflies. In our experience, every city seems to have at least one individual who can—without the distraction of work, family, or friends—devote him- or herself full-time to monitoring, commenting upon, and trying to participate in a local jurisdiction's redistricting process. Often bright and eccentric, gadflies keep the pot boiling with their observations and proposals. In the larger arena of state and national politics, the gadflies are lost in the crowd. But in local communities, their presence is more noticeable and important.

The point of this introduction to the characters that play the local redistricting game is to demonstrate that they are not representative of the public at large. To return to the Lasswellian formulation, the "who" in the local redistricting game are not "the people" in some romantic populist sense. Despite sometimes elaborate and extensive attempts to engage the interests of average constituents and solicit their input, redistricting rarely excites the passions of the regular folk. The public testimony before local elected officials and citizen commissioners on the subject of district lines typically suffers from what social scientists call "selection bias"; that is, the people who participate are not a random, representative draw from the total population. Of course, the elected officials may be responsible for this distortion if they recruit

supporters to plead their cases for them, but it would likely happen anyway. San Francisco, which was acutely aware of this potential problem even before the 2001–2002 citizen commission began its work, even took the unusual step of authorizing a public opinion poll which asked voters to rank redistricting criteria and to describe the portions of their districts that they wanted to keep and lose. In the end, however, the results of the poll did not influence the citizen commission's decisions very much.

The second thing to bear in mind is that this selection bias tends to favor the well-organized groups over the less well-organized ones. Hence the neighborhood associations, individuals closely tied to incumbent political machines, and sexual and racial groups all have an advantage when it comes to petitioning and lobbying the redistricting decision-makers. The "grassroots" represented during local redistricting is not so much the populist ideal as the pluralist reality—groups rather than individuals make their voices heard. The courts assume political motives when partisanship is in the mix.¹⁷ They should probably assume the same

¹⁷ In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Supreme Court held political gerrymanders—districting plans designed via savvy mapmaking to provide one party a number of seats well in excess of its proportion of the total vote received—theoretically justiciable, but set such a high standard for making a constitutional claim that a successful challenge under the precedent is extraordinarily difficult (and in fact has yet to be accomplished sixteen years after the decision). As Justice White wrote, "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole" (White, J., plurality opinion, at 132), an injury which extends beyond the lack of proportional representation in a legislature. Though the Court agreed that the facts of the case, in which Indiana Democrats challenged the constitutionality of a Republican-drawn state legislative district plan, clearly supported the conclusion that political—in this case, partisan—considerations reigned supreme during the redistricting process, it nevertheless upheld the plan as constitutional. Though some justices have occasionally expressed dismay at evidence of political gerrymandering in redistricting cases, the Court continues to allow state and local governments near-total freedom in conducting politically-motivated districting within the bounds of federal equal population and racial fairness requirements. In *Easley v. Cromartie*, supra, the Court even accepted North Carolina's claim that its redrawn Congressional District 12 was a political gerrymander in order to reject the contention that the district was instead a racial gerrymander impermissible under *Shaw*.

when it is not. It is a slightly different kind of politics but no less political.

Lasswell's "what" concerns that which is at stake in politics and the motivations that drive the various actors to get involved. The most abstract answer is that local governments make decisions about the allocation of local public goods and services. They also make decisions that affect the allocation of private goods, ranging from taxes and fees to contracts, appointments and employment. While political and civil service reform has done much to lessen the private consequences of political change, there is still much to be divided up. Private developers, for instance, have self-interested reasons for caring about which local representatives are in office, and therefore for also caring about boundary decisions that affect the electoral prospects of an ally or foe. This concern is reinforced by the norm in many local governments that representatives maintain informal exclusive jurisdiction over projects within their districts in return for allowing their colleagues to enjoy the same privilege. This culture of reciprocity strengthens the ties between local government representatives and specific neighborhoods, accounting for the strong inertial forces in local redistricting.

Since the Court has repeatedly acknowledged the political nature of map-drawing, this is not a revolutionary assertion. Is it possible for the politics to go so far awry that court intervention might be necessary? The possibility of racial and ethnic prejudice is real. The absence of partisanship can reveal racial and ethnic cleavages more clearly. The experts in voting rights cases, for instance, use nonpartisan races where they exist as the cleanest test of racial polarization and cohesiveness under the *Gingles* doctrine.¹⁸ In a post-*Shaw* world where race cannot be the primary criterion for drawing district boundaries, nonpartisanship removes the defense that what appears to be line-drawing by race is really mapping along party lines. In addition, the relative non-sophistication of many citizen commissioners and local elected officials raises the odds that someone will say something during the deliberations that could become the basis of an intentional discrimination claim.

But apart from race and ethnicity, can there

be a political lockup in the manner envisioned by the Court in *Davis v. Bandemer*? It would be theoretically possible, if wealthier economic interests, for instance, were able to dominate a city's politics over time. Or to put it in political science terms, if the pluralist condition that groups or coalitions can dominate some policy domains some of the time, but not all of them all of the time, is violated.¹⁹ Presumably, if this happened over several decades, and the subordinate faction had no other form of redress, the potential might exist for a *Bandemer* claim. But the very absence of partisan lines tends to make factionalism more fluid at the local level, particularly in a nonpartisan setting. So it seems unlikely that a political discrimination claim under the Court's opinion in *Bandemer*, which has yet to be sustained in a partisan setting, could realistically succeed when parties are absent.²⁰

PROCESS AT THE LOCAL LEVEL

"How" local interests affect the mapmaking process is mediated by the procedures and rules specified by local government charters. The widely repeated truism about U.S. federalism is that decentralization leads to incredible variety in local laws, policies and procedures.²¹ Although more heavily constrained by

¹⁸ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

¹⁹ For further elaboration of the pluralist viewpoint, see Nelson W. Polsby, *Community Power and Political Theory*, 2nd ed. (New Haven, CT: Yale University Press, 1980) and Robert A. Dahl, *Who Governs?: Democracy and Power in an American City* (New Haven, CT: Yale University Press, 1961).

²⁰ While we note the ability of local nonpartisan or intrapartisan factions to act like parties during redistricting, these group divisions tend to be relatively temporary over the long term, as the public salience of specific issues rises and falls, individual figures who attract personal support (or opposition) pass from the political scene, and new coalitions replace the old ones. Clearly, any constitutional claim satisfying the *Bandemer* standard would require demonstration that a political group of significant size was systematically deprived of power over a period of many years—an exceedingly unlikely achievement, to say the least.

²¹ See, for example, Daniel J. Elazar, *American Federalism: A View from the States*, 2nd ed. (New York: Harper and Row, 1972).

constitutional doctrine, this generalization also applies to various residual aspects of redistricting beyond equal population and compliance with the 14th amendment and Voting Rights Act. Local governments have some choices, and they have exercised them. Absent a comprehensive census of all the different local government redistricting procedures, we modestly offer an illustrative sample of the ten largest cities in California and New York.

With respect to process, our sample cities divide into four main categories. First, there are the cities that choose their entire city council in at-large elections and therefore do not need to draw new district boundaries after every census. The city of Anaheim is the only at-large case in the California sample, and it is located in a county with a more conservative culture and lower level of diversity than the state as a whole. Two of the ten largest cities in New York maintain pure at-large systems: Schenectady, a largely white city west of Albany, and Mount Vernon, which is located just north of the Bronx in Westchester County and which is about 60% African-American.

The second category is the council-run redistricting, which is comparable to the most common form of legislative redistricting at the state level: incumbent officeholders retain responsibility for developing and approving new district boundaries. Five of the ten largest cities in California (Long Beach, Fresno, Sacramento, Oakland, and Santa Ana) and five in New York (Rochester, Yonkers, Syracuse, New Rochelle, and Utica) vest all redistricting powers in their city councils. Of course, some observers consider this arrangement problematic because of the possibility that self-interested legislators will enact an incumbent protection plan.²²

The same can also be said of the advisory redistricting commissions. Two cities in each of our state samples—Los Angeles and San Jose in California, and Buffalo and Albany in New York—formally provide for appointive panels which are authorized to prepare redistricting plans, though the city council in each case retains the right to approve or amend the commission's work. Nothing has been written about this process to date, but two possibilities come to mind. The first is that advisory commissions are merely surrogates for the city

council and make essentially the same decisions that the councilmembers would (in each city, a majority of the advisory commission is appointed directly by the council). This seems like a plausible assumption since the advisory commission members know that their proposed lines must conform to the council's wishes or they will likely not be approved. But another equally plausible theory is that when citizens make redistricting decisions in an open, visible forum, the council cannot then override their choices without some cost in terms of legitimacy and public respect.

The last and most interesting category is the citizen commission with autonomous powers over map-drawing decisions. This is still a relatively rare institution; of our sampled cities, only San Diego, San Francisco, and New York City deny their councils the authority to approve district boundaries. Notably, all of these are large, racially and ethnically diverse cities (in fact, we suspect that autonomous commissions are even less common in smaller and more homogeneous communities). All three cities have complex, contentious politics and relatively professional city councils (or, in the case of San Francisco, a Board of Supervisors). Placing the power to enact district plans in the hands of a commission is intended to reduce or, if possible, eliminate the influence of incumbent councilmembers on the redistricting process.

A key feature of citizen commissions, whether advisory or not, is how the members are appointed. San Diego's commission is ostensibly the most independent since all seven members are appointed by the Presiding Judge of the San Diego Municipal Court. In the 2001 redistricting process, the first under the citizen commission arrangement, the court appointees were highly diverse (two Asians, three Latinos, one African-American, and one white woman). One had held a high cabinet level office in a Republican gubernatorial administration in the eighties, and several others were active in mu-

²² Kubin, *supra* note 9; Robinson O. Everett, "Redistricting in North Carolina—A Personal Perspective," *North Carolina Law Review* 79 (June 2001), pp. 1301–1331, at 1328–1331.

nicipal commissions or neighborhood politics. But none of the commission members maintained overt ties to individual councilmembers.

Other commissions are more clearly council-dominated. In San Jose, for instance, each councilmember appoints a member to the panel, which essentially guarantees that every incumbent has a surrogate advisory vote and a real vote on the final plan. Albany has a similar system.

The third variation is a commission with appointees from several sources. In San Francisco, the Mayor names three members, the Board of Supervisors selects three, and the city's Election Commission (which is controlled by the Board) chooses the last three. In the highly polarized world of contemporary San Francisco politics, this division of appointment authority gives the Board of Supervisors a built-in numerical advantage over the Mayor on the ostensibly independent commission. This edge proved to be critical during the 2001–2002 redistricting process since all subsequent votes split almost perfectly (5–4) along the lines of appointment, as the competing factions fought over proposals that they thought would work to the electoral advantage of one or the other.

The attempt to balance mayoral and council influence through appointments is also evident in New York City's and Buffalo's arrangements. In the former, the Mayor appoints seven commission members, the Council Speaker selects five, and the Council Minority Leader three. New York City requires that no more than seven members of its autonomous commission be enrolled in any one political party and that a plan must receive nine of fifteen votes to be enacted, preventing any single slate of appointees from dominating the process. Buffalo's advisory commission has nine members, with five appointed by the City Council and four by the Mayor.

This explicit division between mayoral and council appointments recognizes the political reality of current urban politics; namely, that mayors and councils often do not see eye-to-eye on many issues. This can be caused by personality and ideological differences, to be sure, but often it stems from the demands of their distinct electoral constituencies. While some cities have retained at-large councils, many

large cities with diverse populations have moved to district systems in order to better represent the heterogeneity of their electorates in municipal government. Since mayors are elected citywide, their perspectives often clash with the more parochial interests of the city council.²³ This Madisonian tension, which has always existed at the federal level between the President and Congress, has become more common in local government as the combination of a mayor elected citywide and a council elected by district has become more prevalent. Several recent city charter reforms, for instance, have attempted to alter the formal balance of power between mayors and city councils.

Charter requirements specifying the date by which a new district plan must be enacted also differ from city to city. This contrasts with the more tightly constrained timetable for congressional redistricting, which must be completed before the first round of elections in the new decade begins. In California, for instance, the deadline ranges from 120 days after receipt of the final census numbers (Fresno) to the end of 2003 before the 2004 elections in the case of Oakland. In our experience, the longer redistricting looms as a prospect, the more potential it has to poison the waters for other issues. There is much to be said for getting it over and moving on.

THE EFFECT OF SUNSHINE LAWS

As critical as the particular institutional arrangements that structure local redistricting decisions are the transparency norms that govern the bargaining over local lines. The best example of this is in California. The Brown Act, the state's main sunshine law, covers local jurisdictions but not the state legislature.²⁴ Enacted originally in 1953 and amended frequently since, the law is intended to ensure that the actions of local governments "be taken

²³ Bruce E. Cain, Megan Mullin, and Gillian Peele, "City Caesars?: An Examination of Mayoral Power in California," presented at the Annual Meetings of the American Political Science Association, San Francisco, August 30 to September 2, 2001.

²⁴ California Government Code § 54952(a).

openly and that their deliberations be conducted openly."²⁵ Transparency theoretically increases accountability and legitimacy by giving citizens a better basis for knowing what their representatives are up to. At a minimum, well-functioning democracy requires that voters are informed enough about government actions and decisions to choose between opposing slates of candidates. Sunshine laws take openness one step further, on the assumption that observing officials as they make choices gives citizens a better opportunity to express their opinions through public testimony and to divine the real motives behind government decisions.²⁶ However, sunshine laws have also been criticized for destroying collegiality, promoting grandstanding and undermining deliberation.²⁷ Here we consider only their specific effects on redistricting decisions.

Three aspects of sunshine laws are particularly relevant. The first is the definition of a meeting per se. Needless to say, redistricting decisions usually require extensive negotiations and deliberations. A critical question is whether these discussions can be held in a secret or closed session, or whether all deliberations must be conducted in front of the public. The specific wording of the Brown Act defines a meeting as "any aggregation of a majority of members of a legislative body at the same time and place to hear, discuss or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local body to which it pertains."²⁸ Moreover, the law prohibits serial meetings by a majority of the members themselves or through intermediaries.²⁹ These provisions essentially prevent local mapmakers in California from meeting informally in order to fashion a compromise; all negotiations must be conducted in public. In fact, in both San Francisco and San Diego, portions of the recently enacted district plans were developed live on the city's cable television station.

This requirement makes the job of developing a consensus, even by a redistricting consultant, more difficult. In principle, the consultant cannot even sequentially visit the members in order to ascertain privately what they want from an ideal plan. As one might expect, making decisions in public strongly undermines

any incentive to speak frankly about various alternative proposals in any collective setting. This is of course true about public statements in any redistricting process, but where the sunshine laws are weaker, members can try to work out their differences in caucus meetings and private serial discussions.

Hence, the second critical aspect of sunshine rules is whether and under what conditions the commission or redistricting body can enter secret session.³⁰ The Brown Act severely restricts the circumstances under which a local legislature or agency can exclude the public and the press from a meeting. The exemption to the openness requirement that is most relevant for redistricting is the existing or anticipated threat of litigation.³¹ Since the probability that a district plan will face legal challenge is often if not always greater than zero, there is some room to take sensitive discussions out of public view. Facing a Justice Department suit for alleged violations of Section 2 of the Voting Rights Act, the Los Angeles City Council met frequently in closed session when redrawing its boundaries in 1986. The consultant also met sequentially with councilmembers many times without objection from the city attorney. But neither the San Diego nor the San Francisco citizen commissions ever met in closed session during the post-2000 redistricting process, despite threats of lawsuits from some quarters.

The New York Open Meetings Law, the state's counterpart to California's Brown Act, applies to the New York State Legislature as well as to local governments.³² It likewise pro-

²⁵ California Government Code § 54950.

²⁶ R. James Assaf, "Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings," *Case Western Reserve Law Review* 40 (1990), pp. 227-269.

²⁷ James H. Cawley, "Sunshine Law Overexposure and the Demise of Independent Agency Collegiality," *Widener Journal of Public Law* 1 (1992), pp. 43-124; John O'Looney, "Fractured Decision Making: Sunshine Laws and the Colliding Roles of Media and Government," *National Civic Review*, Winter-Spring 1992, pp. 43-56.

²⁸ California Government Code § 54952.2.

²⁹ *Ibid.*

³⁰ Pupillo, *supra* note 8, at 1172-1173.

³¹ California Government Code § 54956.9.

³² New York Public Officers Law, Article 7, § 102(2).

REDISTRICTING CRITERIA AND CHARTERS

vides for three days' advance public notice for the official meetings of governmental bodies such as legislatures and commissions; unlike California, however, New York does not require the prior publication of agendas which constrain the business to be conducted at a particular meeting.³³ While the New York State Court of Appeals has broadly construed the Open Meetings Law to apply to any gathering of a quorum of members of a governmental body at which its business is discussed, including "informal" sessions at which no votes are taken,³⁴ the law also specifically exempts party caucuses and committees from its provisions.³⁵ Citizen commissions are therefore required to conduct their deliberations in public (though New York does not explicitly ban serial meetings), while partisan officials—paradoxically—may safely craft their redistricting plans behind closed doors without penalty.

The public notice provisions of sunshine laws make it very hard to meet for emergencies or to expedite the process. In California, agendas must be posted 72 hours in advance, and the redistricting body cannot decide or discuss any additional matters.³⁶ So unanticipated issues must be put off until they have been properly noticed. Since it is the nature of the redistricting beast for new ideas and proposals to come in continuously, this requirement makes it hard to plan meeting schedules in advance to cover all the matters that will need to be discussed. This is particularly a problem as the deadline for completing line-drawing work approaches.

Another drawback of extreme openness is that it allows groups and individuals who have a serious stake in the redistricting outcomes to monitor the procedures and more prominent proposals quite carefully. Strict sunshine laws give these observers time to mobilize their followers in order to protest decisions they do not like. This capacity for influence stands in stark contrast to the Burton style of partisan congressional redistricting, under which only a few were allowed to know the whole picture precisely in order to prevent opposition from forming easily.³⁷

Citizen commissioners and novice legislators habitually find it difficult to comprehend the way that redistricting criteria are applied to the map-drawing decisions. Usually, the city attorney's office (or equivalent thereof) is asked to write a memo to guide the deliberations. In our experience, the in-house counsel usually reviews the case law and then drafts a memorandum discussing the major cases. Predictably, this memo usually overwhelms the citizens who serve on these bodies, and moreover does not tell them what they really want to know: how to value and rank the numerous redistricting criteria. In almost every instance we have seen, the longer case review had to be reduced to a one- or two-page summary sheet that divided the criteria by priority.

First precedence must always be given to constitutionally derived considerations such as equal population and a post-*Shaw* definition of fairness to protected classes. In the second tier are the traditional redistricting criteria that the Supreme Court has recognized as legitimate considerations, such as contiguity, compactness, community of interest boundaries, and the like. Finally, there are additional criteria specified by the city charter, if any, and whatever other goals that the council or commission might establish.

As all who worked on this latest round of redistricting discovered, the Court's interpretation of the Constitution and the Voting Rights Act after the *Shaw* line of cases is difficult for citizens to grasp. Even when the line-drawers master the basic points of the doctrine, there is usually ample confusion among those who tes-

³³ New York Public Officers Law, Article 7, § 104(1).

³⁴ *Orange County Publications v. Council of the City of Newburgh*, 60 A.D. 2d 409, aff'd 45 N.Y. 2d 947 (1978).

³⁵ New York Public Officers Law, Article 7, § 108(2).

³⁶ California Government Code § 54954.2.

³⁷ See Jacobs, *supra* note 13. It is not necessary to endorse Burton's extreme secrecy to recognize some value in the ability to make at least minor decisions without wading through the objections of mobilized groups, who often feel the need to chime in even when their interests are not directly or significantly affected by a proposed change.

tify at the hearings. However, in the glare of highly transparent proceedings, citizen commissioners will usually respect some degree of compactness and regard for communities of interest. In other words, by their nature, local commission-drawn plans are more likely to embed provisions for racial and ethnic representation in a neighborhood or community of interest framework than a plan drawn by a state legislature would.

It is also common for citizens to try to construe as many arguments as possible as having the force of law. The best way to block an unpopular proposal is to get the city attorney to say that it might not hold up in court. And the strongest argument one can make for an alternative is to characterize it as court-preferred. This tactic leads to some unusual and imaginative legal interpretations. For instance, UC Berkeley undergraduates attempting to convince the Berkeley City Council to draw a student-majority district initially claimed that students comprised a VRA-protected class. Later, they amended this argument, maintaining instead that, since many students are members of racial or ethnic groups protected under the Voting Rights Act, a district that featured a strong student majority would also constitute a VRA majority-minority seat.³⁸

The complexity of the line-drawing task is such that citizens rarely have more than two or three considerations in their minds when they evaluate and vote on mapping alternatives. A recent attempt in San Francisco to create a comprehensive matrix ranking the different criteria for each plan and then picking the proposal that scored best on the matrix went nowhere. Essentially, citizens tend to have only one or two objectives that they really care about, and make their decisions accordingly.

The charters of nearly all the cities in our sample from California and New York specify various redistricting criteria, of which there are three main types. First (and most common), charter redistricting provisions may simply restate federal constitutional requirements. In Los Angeles, for instance, the charter instructs the advisory commission to draw districts "in conformity with requirements of state and federal law."³⁹ In other cities, such as San Diego

and Buffalo, the charter requires that the districts be of equal population. New York City and Buffalo mention the need to respect racial and ethnic communities, but none of the California cities does with one slight exception. San Francisco's charter stipulates that districts "should be limited to 1 percent from the statistical mean unless additional variations, limited to 5% of the statistical mean, are necessary to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact."⁴⁰

During the 2001–2002 redistricting process, the San Francisco citizen commission applied this provision to reduce the changes made to two majority-minority supervisorial districts in the southern part of the city, following the advice of lawyers representing a coalition of racial and ethnic groups. Both of these districts were overpopulated, and the neighborhoods on the periphery were not happy about the prospect of being traded to another district. By making the deviation plus or minus five percent, fewer areas would have to be changed and the minority percentages could be preserved. The political difference between the opposition to a one-percent as opposed to a five-percent plan was significant, and the commission did not hesitate to take advantage of the higher deviation option.

The second type of criterion common to municipal charters is the non-required but traditional objective such as compactness, preservation of neighborhoods and/or communities of interest, and use of natural or geographic boundaries. Natural boundaries seem to matter more in California than in New York. Communities of interest tend to be identified with neighborhoods in local government more than at the state or federal level. Statewide, communities of interest are likely to be defined as agricultural regions, coastal areas, and the like.

³⁸ Charles Burrell, "Redistrict Proposal Called Illegal," *San Francisco Chronicle*, August 18, 2001, p. A-15. Though Berkeley is not within our sample of the ten most populous California cities, the student district controversy of 2001–2002 is an unusually illustrative example of the correlation between charter interpretation and political interest.

³⁹ Los Angeles City Charter, Article II, § 204(d).

⁴⁰ San Francisco City Charter, Article XIII, §13.110(d).

Insofar as those who testify at local redistricting hearings distinguish between communities of interest and neighborhoods, communities of interest are typically characterized by socioeconomic homogeneity or good working relationships among civic and political organizations around common problems. Thus, a community of interest may exist around a proposed light rail system that passes through several neighborhoods, or among residents who share environmental concerns due to their mutual proximity to large power plants.

Neighborhood-based districting seems like a straightforward concept at first blush until one tries to specify the exact boundaries of a neighborhood. One definition that has not worked so far in any local redistricting we have witnessed is the city or county's officially designated boundaries. Inevitably, these lines do not reflect sociological realities, even when they have been prepared in collaboration with neighborhood groups. In San Diego, an attempt to convince the citizen commission to consider using police beats as the building blocks for council districts met with stiff resistance from neighborhood activists who claimed that those boundaries were never intended to affect political representation. As a consequence, it is common for a commission to be faced with several different definitions of a given neighborhood. If the area is on the periphery of a district, this can be a negotiating problem.

Finally, there are the charter provisions that seem to be uniquely and idiosyncratically local. For example, the New York City charter prevents any two boroughs from sharing more than one city council district.⁴¹ New York also contains the only local charter provision of which we are aware that attempts to prohibit partisan gerrymandering.⁴²

Equally unusual is a provision in the Berkeley charter requiring any new district plan to "preserve, to the extent possible, the council districts originally established" in 1986 as long as the districts conform to the Voting Rights Act and the Equal Protection Clause.⁴³ In a memo to the Berkeley City Council during the 2001–2002 redistricting process, the City Attorney interpreted the phrase "to the extent possible" to mean that adherence to the status quo trumped traditional redistricting criteria such

as compactness or respect for communities of interest.⁴⁴ UC Berkeley's student government wanted the council to create a student-majority district. By analyzing various alternatives, the students determined that the absolute minimum-change plan would move only 4,064 people between districts out of a total city population of 102,743 but could be accomplished only by drawing a noncompact, finger-like district. The students proposed an alternative plan which rotated two districts in order to create one in which residents under the age of 24 constituted 71% of the population. They claimed that students comprised a legitimate community of interest concerned about such issues as rent control, public safety and transportation.⁴⁵

The Berkeley City Attorney advised the city council that the students' plan violated the charter provision mandating the preservation of existing districts, but never specifically defined the numerical parameters of an acceptable minimum change.⁴⁶ Since the council itself did not ultimately adopt the least-change plan, what was the allowable deviation? Left with legal advice that implied that the city would know an unacceptable departure from the status quo when it saw one, the council chose a district map that divided the student population, minimizing the electoral threat that a student candidate would pose to an incumbent councilmember. The enacted plan received the support of the "progressive" majority on the council that wanted to spread the student vote over two districts. Members of the "moderate" faction (who are very liberal by normal political standards but comprise the right wing in

⁴¹ New York City Charter, Chapter 2, § 52(3).

⁴² "Districts shall not be drawn for the purpose of separating geographic concentrations of voters enrolled in the same political party into two or more districts in order to diminish the effective representation of such voters." New York City Charter, Chapter 2, § 52(1)(f).

⁴³ Berkeley City Charter, Article V, § 9.

⁴⁴ Manuela Albuquerque, City Attorney of Berkeley, California, "City Council Redistricting Process," Memorandum to the Mayor and City Council of Berkeley, August 16, 2001, p. 5.

⁴⁵ Tyche Hendricks, "UC Students Push Political Boundaries," *San Francisco Chronicle*, August 15, 2001, p. A-11.

⁴⁶ Albuquerque, "Application of Legal Standards to ASUC Redistricting Proposal," Memorandum to the Mayor and City Council of Berkeley, August 16, 2001, p. 1.

Berkeley politics) supported the student plan because it concentrated progressive voters in a smaller number of districts, increasing the likelihood that the ruling bloc would lose a seat—and therefore control of the council—at the next election. In this case, a strict reading of the charter language favored the progressives and a less strict one the moderates.

The obvious conclusion here is that the charter language served to mask the true motives of the line-drawers. This is not a shocking development in redistricting politics, but it does serve as a warning about charter provisions and language. Redistricting criteria specified by charters can be open to a great deal of interpretation. Even the relatively straightforward objective of “compactness” may be measured in a number of different ways; such indistinct concepts as “neighborhood boundaries” and “communities of interest” practically require subjective judgment. Disagreements that are presented for public consumption as disputes over the definition or relative weighting of redistricting criteria may in actuality be struggles for electoral advantage among political factions who invoke particular provisions of the city charter in order to justify their self-interested goals.

Incumbent forces are very strong at the local government level. They may be particularly strong when the ballot is nonpartisan because voters have no party cues to guide them. There is certainly nothing inherently wrong with one faction trying to get the upper hand over another; that is politics. But a political position should not enjoy preferential status just because it presumes to have legal authority beyond the constitutional criteria of equal population and racial fairness. It would be better for all concerned if political arguments were seen for what they are: political arguments.

This leads to a deeper question. What importance should the courts assign to charter language? To date, it would seem the courts have wisely stayed away from interpreting and enforcing charter provisions. *Griswold v. County of San Diego*⁴⁷ concerned San Diego County charter requirements that at least two of five districts for the Board of Supervisors “shall comprise areas outside of the City of San Diego except for such small portions of that city as

may be included in giving consideration to the factors authorized by general law” (e.g., compactness, communities of interest).⁴⁸ The adopted plan placed portions of all five districts in San Diego city. The Appellate Court upheld the plan, stating: “A court may not substitute its judgment for that of the legislative body merely because it doubts the wisdom of the action taken . . . consideration of such factors as topography, geography, contiguity and the existence of communities of interest, and the weight to be given them are matters directed primarily to the legislative branch for determination. When such determinations have been made by the legislative body, courts should not interfere except upon a showing of manifest abuse.”⁴⁹

The courts’ unwillingness to weigh in on charter criteria is reinforced when the charter language includes phrases such as “to the extent possible.” In at least two decisions, courts denied charter-based challenges when the provisions at issue appeared to give redistricting authorities flexibility to balance competing considerations. In *Brooklyn Heights Association v. Macchiarola*,⁵⁰ an attempt to create a majority-Latino council district in New York City by connecting two nonadjacent Latino areas via a commercial waterfront census block was challenged by a neighborhood group arguing that the commercial area belonged by reason of community of interest in an adjacent nonminority district.⁵¹ The city charter specified seven redistricting criteria to be applied “to the extent possible” in numbered order, with the “fair and effective representation of . . . racial and language minority groups” ranked second⁵² and the preservation of “neighborhoods and communities . . . of common interest” ranked third.⁵³ The New York State Court of Appeals held that “it is not our role to second-guess the Commission’s reasonable policy

⁴⁷ 32 Cal.App.3d 56 (1973).

⁴⁸ *Griswold v. County of San Diego*, 32 Cal.App. 3d at 65.

⁴⁹ *Ibid.* at 66–67.

⁵⁰ 82 N.Y. 2d 101 (1993).

⁵¹ *Brooklyn Heights Association v. Macchiarola*, 82 N.Y. 2d 101 (1993).

⁵² New York City Charter, Chapter 2, § 52(1)(b).

⁵³ New York City Charter, Chapter 2, § 52(1)(c).

choice relating to implementing the technical requirements of districting."⁵⁴ Observing that the charter did not require strict adherence to the seven ranked additional criteria but only that they be applied to the maximum extent practicable, the court declined to overturn the plan, noting that the process "necessarily involved many compromises and choices" and that the decisions of the commissioners were not "arbitrary and capricious."⁵⁵

More recently, the Appellate Division of the New York State Supreme Court ruled in *Valentino v. County of Tompkins*⁵⁶ against a challenge to a district plan for the Tompkins County Legislature by members of the Ithaca Town Board, who claimed that it divided the town in violation of a county charter provision that required municipal boundaries to be followed "to the extent possible." Again, the plaintiffs had failed to show that the action was taken in bad faith, and the court declined to decide whether one plan was merely superior to another.

Based on our experiences, the message that the law or the charter (beyond the federal constitutional criteria) should not be used to gain an upper hand in political arguments cannot be repeated enough or too clearly. To return to the Berkeley case again, one city council faction clearly wanted to interpret the phrase "to the extent possible" to preclude consideration of plans that gave more weight to any traditional redistricting criteria than to the preservation of existing district lines; not coincidentally, such a reading happened to favor its proponents' electoral prospects. A city administration may choose to take such a position for political reasons, but it should not be allowed to hide behind legal justifications to promote its stance. Since city attorneys are often appointed by city councils or mayors, their advice will often reflect what the city council or mayor wants. To the extent that citizens understand this reality, they can correctly assign responsibility for redistricting outcomes to the municipal officials who supervised the process, and adjust their political choices accordingly.

CONCLUSION

There are a few points that emerge from our analysis that the courts may want to bear in mind when considering local redistricting cases. First, politics is alive and well in map-making at the grassroots. Many of the same conflicts among competing criteria that the courts have seen in state and congressional cases arise at the local level as well, even when the ballots are nonpartisan. Second, citizen commissions may or may not be the wave of the future, but they do not insulate the process from political pressures, no matter how the commissioners are appointed. Neighborhood associations, interest groups, and incumbent officeholders have found effective ways to make their preferences known and to exert influence on the outcome. Sunshine laws hold those who draw local lines accountable, but by so doing they strengthen the very interests who lobby the commissions and local redistricting authorities. Thirdly, additional criteria can provide some useful guidelines for local redistricting, but those who draw the lines should understand very clearly that once the constitutional requirements are satisfied, there is plenty of discretion among the other criteria. Because the courts have often intervened in the redistricting process in order to protect basic constitutional freedoms, some citizens will look to the legal system to resolve their community disputes for them as well. The courts should continue to stay above that fray.

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⁵⁴ *Brooklyn Heights* at 106.

⁵⁵ *Ibid.*

⁵⁶ *Valentino v. County of Tompkins*, 732 N.Y.S. 2d 468 (2001).

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