# Political Gerrymandering and the Courts

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AGATHON PRESS
*New York*

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# Unresolved Issues in Partisan Gerrymandering Litigation

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In 1984, in *Bandemer v. Davis*, 603 F. Supp. 1479, a federal district court held (by a 2 to 1 vote) that the 1981 Republican-drawn redistricting plans for both chambers of the Indiana legislature were unconstitutional, because, as intentional partisan gerrymanders, they violated the Fourteenth Amendment rights of the Democratic party (the minority party in the state legislature). In *Davis v. Bandemer*, 106 S. Ct 2797,____U.S.____(1986), the U.S. Supreme Court affirmed (6 to 3) that partisan gerrymandering was justiciable, but confounded most experts by also reversing (by a 7 to 2 vote) the lower court findings that the Indiana plans were unconstitutional gerrymanders.

*Davis v. Bandemer* is potentially the most important redistricting case since *Reynolds v. Sims*, 377 U.S. 533 (1964), because it opens to judicial review the only aspect of redistricting that had been seemingly immune from judicial scrutiny, the intentional partisan gerrymander (cf. Baker, 1986b; Engstrom, 1977). Despite its clear declaration that partisan gerrymandering *is* justiciable, *Davis v. Bandemer* has given rise to considerable scholarly dispute over what the test of unconstitutional political gerrymandering will ultimately prove to be.

Because *Davis v. Bandemer* lacks a majority opinion, and because it rejected the District Court claim that both Indiana legislative plans had been shown to be unconstitutional gerrymanders, interpreting the *Davis* ruling is difficult.[1] Headlines in the press proclaimed variously "Court Disallows Gerrymandering" (*Los Angeles Times*, July 1, 1986) and "Justices Uphold Partisan Lines in Districting" (*New York Times*, July 1, 1986). An Op-Ed column in the *Washington Post* (Edsall, 1986) asserted, "As for which party prevails it depends upon whom

you ask." There are few features of the *Davis* opinion that most scholars agree on, other than that the evidentiary threshold for establishing a constitutionally invalid districting plan will be quite high.

The contributors to this volume were asked to provide their interpretations of the meaning of *Davis v. Bandemer* and to review its implications in terms of a theory of democratic representation, in terms of the constitutional issues it raises; and, in more practical terms, as to its probable consequences for redistricting in the 1990s and for partisan balance of power in Congress, state legislatures, and those units of local and state government that make use of partisan multiseat elections. There are six key issues that are unresolved.

First, is there a coherent theory of constitutional adjudication of partisan gerrymandering claims enunciated in *Davis v. Bandemer*? The most common answer is no. In the words of the *Congressional Quarterly* (July 19, 1986, p. 1641), *Davis v. Bandemer* gave "disgruntled political groups a hunting license for redistricting plans they dislike, but left them in the dark as to how to bag one." Most of those who hold this view believe that we must look to future cases to understand what *Davis* really means. Grofman (chapter 3) and Lowenstein (chapter 4) are among the few authors who argue that there is a clear and consistent interpretation of *Davis v. Bandemer*. However, the interpretations they offer are very different. Lowenstein argues that *Davis v. Bandemer* is meant to preserve the status quo ante by leaving open the possibility of intervention in the most extreme of cases, but ruling out intervention in any litigation brought by a major political party. Grofman argues that *Davis v. Bandemer* sets forth a straightforward three-pronged test for partisan gerrymandering: that it be intentional, severe, and predictably long-lasting in its consequences.

Second, is implementing a proportional representation standard the only viable way to avoid partisan gerrymandering? This claim is made by Levinson (1985) and by Schuck (1987; chapter 11). It is rejected by Lowenstein (chapter 4, note 1), who is otherwise sympathetic to Schuck's position, and by most of the other authors in this volume. In my view, in racial vote dilution cases such as *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), the courts have been able to specify a standard for judging racial vote dilution that is not equivalent to requiring proportional representation, and analogous tests can be devised in the partisan gerrymandering case (see esp. Grofman, chapter 3). However, other authors (e.g., Lowenstein and Steinberg, 1985; Lowenstein, chapter 4; Cain, 1985b) argue that no manageable standards for detecting or remedying partisan gerrymandering exist.

Third, how could the Supreme Court have held partisan gerryman-

dering to be justiciable and yet have failed to strike down Indiana's legislative plans as unconstitutional gerrymanders (especially the seemingly egregious House plan, including multimember districts that extended beyond the Marion County line)? There are three answers offered to this question. The most common answer is "Beats me!" Most who give this answer would regard even the plurality opinion in the Supreme Court decision in *Davis v. Bandemer* as internally contradictory. The second answer is that offered by Lowenstein (chapter 4). According to him the fact that the Indiana Democrats were not completely "shut out" of the overall political process in the state explains the Supreme Court's unwillingness to consider their Fourteenth Amendment rights to have been violated. My answer is a different one. As someone familiar with the case facts in *Bandemer* (where I was an expert witness for the state of Indiana), I focus in chapter 3 on the evidentiary features (noncompetitive elections, seat losses for the minority party, reliable projections of future results, etc.) that are *missing* from the *Bandemer* trial record. As Justice White said in his plurality opinion in *Davis v. Bandemer*, at 2812:

> Relying on a single election to prove unconstitutional discrimination is unsatisfactory. The District Court observed, and the parties do not disagree, that Indiana is a swing State. Voters sometimes prefer Democratic candidates, and sometimes Republican. The District Court did not find that because of the 1981 Act the Democrats could not in one of the next few elections secure a sufficient vote to take control of the assembly. Indeed, the District Court declined to hold that the 1982 election results were the predictable consequences of the 1981 Act and expressly refused to hold that those results were a reliable prediction of future ones. The District Court did not ask by what percentage the statewide Democratic vote would have had to increase to control either the House or the Senate. The appellants argue here, without a persuasive response from appellees, that had the Democratic candidates received an additional few percentage points of the votes cast statewide, they would have obtained a majority of the seats in both houses. Nor was there any finding that the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980s or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census. Without findings of this nature, the District Court erred in concluding that the 1981 Act violated the Equal Protection Clause.

Fourth, how is disproportionality of election results to be measured in the case of political parties? Here there are two standard methods. One is the comparison of election outcomes with the voting patterns in (statewide) baseline elections, as described by Backstrom, Robins, and Eller (1978; chapter 6). The second is the comparison of seat

percentages and vote percentages in the actual election at issue (see, e.g., Tufte, 1973; Niemi, chapter 7). Regardless of which comparison we make, we may choose to focus either on bias, which is a measure of symmetry in the treatment of the voters for each party's candidates (see, e.g., Tufte, 1973; Grofman, 1983b; Niemi and Deegan, 1978); or on the responsiveness of changes in seat percentages to changes in the votes received by a party's candidates (or to changes in baseline party strength). One measure of responsiveness is the swing ratio (Tufte, 1973; Taagepera, 1986; Niemi, chapter 7). In my view (Grofman, chapter 3; see also Grofman, 1985b; Owen and Grofman, 1987), both the seats-votes and the baseline method can provide valuable information about the existence of partisan gerrymandering, but both usually need to be supplemented by analysis of the differential treatment of each party's incumbents through techniques such as incumbent displacement. How severe disproportionality must be before it rises to the level of a constitutional violation remains an open question.

Fifth, is gerrymandering to be judged in terms of its methods (e.g., ill-compact districts, violation of political boundaries, unequally populated districts, fragmentation of communities of interest) or its results (the minimizing or canceling out of the voting strength of a racial or political group)? Wells (1981), Horn et al. (1988), and other reformers argue that we can best cure gerrymandering by imposing strict "neutral" standards. While I certainly have no objections to the use of such standards in redistricting, I do not believe that the imposition of such standards can rule out the possibility of gerrymandering. However, like Baker (chapter 2) and Morrill (chapter 10) I believe that violation of neutral districting criteria can provide (prima facie) evidence of gerrymandering and is directly relevant to intent (cf. Justice Stevens' opinion in *Karcher v. Daggett* I, 103 S. Ct. 2653, and Grofman, 1985a). However, for me, it is evidence of the actual or projected partisan (or racial) consequences that is critical.

Sixth, what will be the long-run implications of *Bandemer* for redistricting in the 1990s and thereafter? Mann (1987) suggests that the practical importance of Bandemer has been much exaggerated both by its supporters and by opponents. Because it seeks to rule out only plans whose effect is to "consistently degrade a voter's or a group of voters' influence on the political process as a whole," and because it does not touch bipartisan gerrymandering, Mann argues that, at least for congressional districting, it is likely to be relevant in only a handful of states, such as California. I share this view.

The essays in this volume reflect a range of views, and taken in toto, cover all of the questions discussed above. In the introductory section

of this volume, in the essay after this one, Gordon Baker argues that *Bandemer* is the logical culmination of a quest for "fair and effective representation" that began with *Baker v. Carr*. As should be apparent from my earlier remarks, this is a view that I strongly share. Baker also notes that while terms like justice and equality are hard to define, it is often easy to recognize blatant examples of injustice or inequality. In like manner, courts reviewing alleged gerrymandering can confine themselves to striking down only the most egregious instances.

The second section of the book offers several conflicting views of "What Does *Bandemer* Mean?" Daniel Lowenstein argues that the confusion over what *Bandemer* means results not from any deficiency in setting forth "standards," but rather from Justice White's failure to make explicit the conceptual basis for the newly recognized partisan gerrymandering constitutional claim. Consideration of Justice White's opinion and its relation to the malapportionment cases, the racial discrimination cases, and the general framework of Equal Protection doctrine leads Lowenstein to conclude: "*Bandemer* does not make partisan gerrymandering as such unconstitutional, but makes it an unconstitutional weapon when used against certain groups," namely, groups that he characterizes (in the addendum to his essay) as "outcast" political groups.

Grofman, in contrast to most other scholars, argues that there really is a concrete test of partisan gerrymandering outlined in *Bandemer*, and that to understand it one must look in detail at why the Supreme Court majority rejected the lower court finding that Indiana's legislative plans were unconstitutional gerrymanders. In particular, Grofman focuses on the absence of evidence that the Indiana plans were not sufficiently competitive so as to leave open the possibility of a future reversal of partisan control and the absence of any predictions of future election results accepted as reliable by the district court. For Grofman, the key phrase in *Bandemer* is "*consistently* degrade a voter's or a group of voters' influence on the political process as a whole" (p. 2810, emphasis added). Grofman also seeks to demonstrate that it is possible to integrate the Supreme Court and other federal court rulings in racial vote dilution cases with the views of Justice White in *Davis v. Bandemer* so as to develop a coherent theory of both racial and political gerrymandering.

Bruce Cain (Chapter 5) looks at *Bandemer* from the perspectives of the political practitioner, the democratic theorist, and the reformer. A critical point in Cain's chapter is that both *Davis v. Bandemer* and *Thornburg v. Gingles* raise fundamental questions about the role of groups in American democracy.

In the third section, "How to Measure Partisan Gerrymandering," proponents of several different approaches discuss how courts could make practical use of social science tools of analysis to define and measure gerrymandering. Most authors in this section share the belief that this is both a doable task and a desirable one for courts to undertake. Charles Backstrom, Scott Robins, and Steven Eller review and extend the arguments in their influential 1978 *Minnesota Law Review* article to consider how a statewide baseline for partisan voting strength can be established that would provide a standard against which gerrymandering could be judged. Richard Niemi reviews and extends his earlier work on measuring bias in the relationship between a party's share of votes and its share of legislative seats. He also responds to arguments of critics (e.g., Cain, 1985b; Lowenstein and Steinberg, 1985) of this approach.

McDonald and Engstrom draw on their own extensive work on racial gerrymandering to look at related issues in measuring partisan gerrymandering. Gordon Baker, too, draws on the racial vote dilution literature to offer an approach to measuring political gerrymandering analogous to the "totality of circumstances" test that has been used in adjudicating cases brought under Section 2 of the Voting Rights Act (as amended in 1982). Richard Morrill, a leading political geographer, provides another perspective on gerrymandering, as well as a discussion of his recent empirical work on partisan and geographic features of 1980s congressional plans.

Peter Schuck, in contrast, argues that federal courts should have resisted the temptation to meddle with the partisan aspects of redistricting because it is a task for which they are ill-suited and because it forces judges into a "standardless" quagmire, or into reliance on a proportional representation standard foreign to our system of government.

The last two sections of this volume deal with applications to specific state legislative or congressional plans of some of the methodologies discussed in the third section. Richard Niemi and Stephen Wright look at seats-votes relationships under the Indiana legislative plans that were challenged in *Bandemer*. Niemi and John Wilkerson examine the compactness of the challenged single-member and multimember districts in the Indiana House. They look at two distinct aspects of compactness: one perimeter-based and the other based on areal dispersion.

Samuel Kernell and Bernard Grofman look at the consistency of partisan voting patterns in California at the census tract level, over a number of different elections and election types. They argue that, in

California, it is readily possible to identify areas of Republican and Democratic voting strength even in areas as small as the census tract—information that can then be used for purposes of partisan gerrymandering to predict probable long-run consequences of districting plans. Thomas Hofeller and Bernard Grofman consider three different types of compactness measures: perimeter-based, areal-dispersion-based, and population-dispersion-based, and apply them to compactness comparisons of three different California congressional plans, one drawn by a state court and two drawn by a Democratically controlled legislature. They find the court-drawn plan to be the most compact of the three plans under all three compactness measures.

This volume is intended to be a largely self-contained overview of the key issues and the key arguments concerning political gerrymandering. However, the essays in this book are meant to be read in conjunction with those in the October 1985 issue of the *UCLA Law Review*. Articles in that issue, by Richard Niemi, Daniel Lowenstein, and Jonathan Steinberg, and myself, and comments by Bruce Cain and Martin Shapiro, and Sanford Levenson, deal with districting criteria in general and partisan gerrymandering and the District Court opinion in *Bandemer* in particular. Because these essays deal with the state of redistricting case law pre-*Davis v. Bandemer* and pre-*Thornburg v. Gingles*, they provide a useful complement to those in this volume. Other relevant material is contained in the Summer 1985 *PS* "Mini-symposium on Political Gerrymandering." The essays in *PS*, most based on expert witness affidavits in *Badham v. Eu* (D. California, 1983), remain among the most sophisticated political science analyses of the partisan gerrymandering issue written to date.

The essays in this volume were written before the U.S. Supreme Court refused in October 1988 to hear an appeal of the dismissal of the *Badham* complaint. The District Court dismissal of *Badham* does not settle any of the unresolved questions about *Bandemer* discussed elsewhere in this essay.

## NOTE

1. It may be difficult to separate the views of scholars as to the desirability of judicial intervention to remedy even the most egregious cases of political gerrymandering from their views of what *Davis v. Bandemer* means. I see in *Bandemer* an opportunity to steer a careful course between an inaction that will guarantee abuse of constitutionally protected rights and an overreaction that will embroil the federal courts in a host of petty disputes about "politics as usual."