Political Gerrymandering and the Courts

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Toward a Coherent Theory of Gerrymandering: *Bandemer* and *Thornburg*

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In *Bandemer v. Davis*, 603 F. Supp. 1479 (1984), a three-judge federal panel held that partisan gerrymandering did present a justiciable claim and that the 1982 House and Senate plans for the Indiana legislature were unconstitutional partisan gerrymanders. In particular, the District Court found that "the district lines were drawn with the discriminatory intent to 'maximize the voting strength' of the majority Republican party and 'to minimize the strength' of the Democratic party" (p. 1492, references omitted). On appeal, the Supreme Court in *Davis v. Bandemer*, 106 S. Ct. 2797, ____ U.S. ____ (1986) agreed (6-3) with the lower court that partisan gerrymandering claims were justiciable, but reversed (7-2) the lower court's findings that Indiana's legislative plans were unlawful. There are four central issues that this paper will discuss.

First, how is it that the Supreme Court could, for the first time, hold partisan political gerrymandering to be unconstitutional,[1] and yet reject the seemingly overwhelming evidence for intentional partisan gerrymandering that the federal district court in *Bandemer* used as the basis for its finding that the Indiana legislative plans constituted impermissible political gerrymandering? In particular, what facts were either missing or inadequately demonstrated in the factual record in *Bandemer v. Davis* for which the Supreme Court will require evidence if a finding of unconstitutional partisan gerrymandering is to be sustained?

Second, does the Supreme Court plurality opinion in *Bandemer* offer

"clear and manageable standards" for determining what constitutes an unconstitutional partisan gerrymander? If it does not, is it in fact possible to draft such standards or, as critics of the opinion have asserted (e.g., Cain, 1985a), is political gerrymandering such a slippery concept that no tractable criteria for judicial decision making can ever be found? Also, are there differences in the appropriate gerrymandering tests for congressional redistricting as compared to state legislative redistricting?

Third, insofar as the Supreme Court did in *Bandemer* set a threshold test for when political gerrymandering rises to the level of a constitutional violation, is that threshold test so high that no partisan gerrymander involving a major political party, no matter how egregious, could ever meet the test, that is, is the *Bandemer* opinion really a dead letter?[2] If the *Bandemer* opinion is not a dead letter, what are its practical implications? In particular, how many existing state legislative and congressional districting plans are likely to be affected by the decision, and what are the long-run implications for changes in the way redistricting will be done in the 1990s and thereafter?

Fourth, what is the relationship between tests for racial vote dilution and those for partisan vote dilution (partisan gerrymandering)? More generally, if we look to the two now leading opinions in each area, both of which were decided on the same day—*Bandemer* and *Thornburg v. Gingles*, a successful Section 2 Voting Rights Act challenge to state legislative districts in a number of North Carolina counties—can we construct from these opinions a coherent theory of what constitutes "fair and effective representation" (*Reynolds v. Sims*, 377 U.S. 533, pp. 565–566 (1964))? I summarize my views on these questions as follows.

First, in a nutshell, the reasons that the Supreme Court failed to strike down the Indiana plans are that (1) for the Indiana Senate there was essentially no evidence of gerrymandering effects, and (2) even for the seemingly egregious House plan, there was no evidence at trial accepted as credible by the district court that the observed skewness in results was anything other than an idiosyncratic result of a single election. Also relevant may have been the fact that in both House and Senate the minority party *gained* seats after the redistricting (six seats in the House, and three in the Senate).

Second, there *is* a clear and manageable standard in *Davis v. Bandemer*—one offered in the plurality opinion. Under it, for partisan gerrymandering to be unlawful, it must be (1) intentional, (2) severe, and (3) predictably nontransient in its effects.

Third, *Bandemer* is far from a dead letter. It was almost entirely the gaps in the evidentiary record that led the Supreme Court plurality to

uphold the Indiana plans. Had the necessary evidence in the record been present, the Supreme Court could have corrected the lower court as to the appropriate constitutional test for political gerrymandering and then reaffirmed its conclusion. The Supreme Court plurality in *Bandemer* was walking a tightrope. It wanted to set standards high enough to strongly discourage frivolous suits but low enough so that the most egregious partisan gerrymanders could be overturned by the courts. In my view the Supreme Court has succeeded admirably in that balancing act.

I believe that the practical implications of *Davis v. Bandemer* have been exaggerated by both proponents and opponents of the decision. By rejecting the over-broad test of the district court majority, and replacing it with the three-pronged test identified above, the Supreme Court has narrowed the scope of plausible gerrymandering challenges to those that are the most egregious. Since most state legislative redistricting and congressional plans are bipartisan "sweetheart deals" which appear exempt from attack under *Bandemer*, few such plans are likely to be rejected (see Mann, 1987), although at-large state or local elections where partisan submergence is at issue may well come under successful challenge.

Fourth, there is a direct connection between the test for racial vote dilution enunciated in *Thornburg v. Gingles* and that for partisan gerrymandering enunciated in *Davis v. Bandemer*. That connection draws on the parallels between the predictability of partisan voting patterns on the one hand, and the predictability of levels of racial bloc voting on the other. However, the particular threshold showing required in political gerrymandering cases is derived from the special characteristics of partisan as opposed to racial gerrymandering. In particular, unlike racial identity, partisan affiliation may be mutable. Also, redistricting is inherently a political process. The effect showing in partisan gerrymandering will not be identical to that in racial vote dilution cases, and in some ways it will be stronger (in particular, dilution must be severe).

THE EVIDENCE FOR GERRYMANDERING IN INDIANA

In *Bandemer v. Davis*, Democratic plaintiffs alleged (p. 1482) that plans adapted for the Indiana House and the Indiana Senate in 1982 were intentional partisan gerrymanders that "discriminated against Indiana Democrats" in violation of the Fourteenth Amendment guarantee of equal protection. In the companion case, *Indiana Branches of the NAACP v. Orr* (603 F. Supp. 1479 (1984)), black plaintiffs alleged (*Bandemer*, p.

1482) that the House redistricting plan intentionally fragments black population concentrations in Lake County (which includes Gary) and Marion County (which includes Indianapolis). Democratic plaintiffs prevailed; black plaintiffs lost.[3]

On the face of it, the evidence in the *Bandemer* trial record for the existence of intentional gerrymandering appears overwhelming. Indeed, the trial court held that evidence easily met the three-pronged test for gerrymandering described by Justice Stevens in his concurring opinion in *Karcher v. Daggett (I)*, 103 S. Ct. 2653, p. 2672; 462 U.S. 725, p. 753 (1983). We now look in detail at the district court findings as to intent, the general shape of the plans, and the impact of the plans on Democrats.

Evidence for Intent

The District Court identified a number of findings directly relevant to gerrymandering intent.

(1) The Indiana plans were drawn out of public sight, and initially passed by so-called "vehicle bills," that is, bills that contained no description of actual districts (*Bandemer*, p. 1483).

(2) The actual plans were available for inspection only a few days before final vote on passage (*Bandemer*, p. 1484).

(3) The vote took place the last day of the legislative session (*Bandemer*. p. 1484).

(4) The districting process was completely under the control of Republicans. The governor was Republican as was a clear majority in both houses of the state legislature. Democrats were excluded completely from the districting process. The actual decisions were made in conference committee in which no Democrats were voting members (*Bandemer*, p. 1483).

(5) The Indiana Republican Party spent a quarter of a million dollars to obtain the assistance of a Michigan computer consulting firm to aid Republicans in drafting plans. It was these plans that the Republican legislators on the conference committee adopted, and that then became the state's legislative plans. No Democratic legislators had access to the information provided by the computer consultant firm (*Bandemer*, pp. 1483–1484).[4]

(6) There were no public hearings on the proposed plans (*Bandemer*, pp. 1483–1484).

(7) The majority party felt able to consider redistricting under procedures that were "unashamedly partisan" (*Bandemer*, p. 1484), and informed Democratic legislators that minority party input in the redistricting would not be given any weight (*Bandemer*, p. 1484).

(8) Paralleling the partisan and closed nature of the drafting process, both the House and Senate adopted the legislative plans reported by the conference committee on a vote that went along party lines. Amendments or alternatives endorsed by the Democrats were defeated along party lines (*Bandemer*, pp. 1483–1484).

(9) Democratic legislative leaders admitted that the bill's aim was partisan. House Speaker Dailey, asked in his deposition about the motivations underlying certain districts, responded, "we wanted to save as many incumbent Republicans as possible" (*Bandemer*, p. 1487).

Also, relevant to intent was

(10) "The absence of clear policy statements about the general criteria that shaped the plan from either the debate on the bills or the documents presented to the court" (*Bandemer*, p. 1485).

The Supreme Court accepted the lower court's finding of discriminatory intent (*Davis v. Bandemer*, p. 2808). Indeed, the Supreme Court plurality opinion delivered by Justice White (Part III, joined by Justices Brennan, Marshall, and Blackmun) asserted that "As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended" (*Davis v. Bandemer*, p. 2809). Thus, factors (1) through (10) above are *more than sufficient* to establish partisan gerrymandering intent.

Geographic Features of the Plans

The District Court majority identified the "result" of the General Assembly's work as "evident to the Court through a number of exhibits and maps" (*Bandemer v. Davis*, p. 1484). Among the features of the plans singled out by the district court were:

(11) The absence of "nesting" of House districts within Senate districts. The districts for each house of the general were drawn independently of one another (*Bandemer*, p. 1485).

(12) The absence of any "evident pattern to the redistricting plan" (*Bandemer*, p. 1485).[5]

(13) The lack of "any consistent application of 'community of interest' principles" (*Bandemer*, p. 1486).[6]

(14) Unusually shaped districts, especially in the House plan and especially in Marion County (*Bandemer*, p. 1487). No "apparent concern" for compactness of districts (*Bandemer*, p. 1488).

(15) No consideration given to "existing political subdivisions in the districting" (*Bandemer*, p. 1487).

(16) Use of a mix of single-member districts and multimember districts in the plan for the Indiana House. Multimember districts are

confined to urban areas, but "there is no particular pattern which is applied consistently" (*Bandemer*, p. 1489).

Impact on Democrats

In a section on "The Impact of the Redistricting Plan on Democrats" the District Court majority stated a number of additional findings about the Indiana plans.

(17) "In 1982 Democratic candidates for the Indiana House earned 51.9% of all votes cast across the state. However, only 43 Democrats were elected to seats [in the 100-seat house]" (*Bandemer*, p. 1485).

(18) "In the Indiana Senate, 25 seats were up for election. Democratic candidates received 454,849 votes, or about 53.1 percent of the vote. Republican candidates received 402,492 votes or about 46.9%. Thirteen Democrats [52.0%] and twelve Republicans [48.0%] were elected to senate seats" (*Bandemer*, p. 1486).

(19) "46.6 percent of the populations of the House districts which primarily encompass Marion and Allen counties, among the state's most populous, are Democrat, or at least have Democratic voting tendencies. Yet under the plan adopted in 1981–82, and after the 1982 election, 18 Republicans filled the 21 House seats representing these two counties (and those portions of other counties into which the relevant district lines meander). Thus the Republicans enjoy 86% of the House seats apportioned to the populations of Marion and Allen [and the Democrats 14%] of which 46.6% are identifiable as Democratic voters" (*Bandemer*, p. 1489).

(20) "There is no refuting that the Republican majority focused on protecting its incumbents and creating every possible 'safe' Republican district possible, and that this was achieved by either 'stacking' Democrats in districts where their majority would be overwhelming or by 'splitting' any Democratic party power with district lines, thus giving Republican candidates a built-in edge" (*Bandemer*, p. 1488). In particular, "in Marion County, the 51st House district is heavily Democratic and elected three Democrats to the Indiana House seats in 1982. The remainder of the county, while also populated with areas of less heavy Democratic support, was won by Republican candidates in 1982. Those less heavy Democratic pockets have been split by the mapmaker to reduce the influence those voters wield" (*Bandemer*, p. 1487). In Allen County multimember districts are also used, and districts there bisect "Democratic strength in the urban area" (*Bandemer*, pp. 1486–1487).[7]

(21) The majority party has been able to draw lines that will permit it to win close races in certain districts (*Bandemer*, pp. 1485–1486).

Based on findings such as (17) through (21), the District Court concluded that "the figures before the Court, even when looked upon with restraint, would seem to support an argument that there is a built-in-bias favoring the majority party, the Republicans" (*Bandemer*, p. 1486).

In this section of its opinion the District Court also made three general background findings relevant to its decision on the merits:

(22) Indiana is historically a "swing" state (*Bandemer*, p. 1485). Since 1964, there have been years in which Democratic candidates have captured up to 56% of the state's vote, and years in which Republican candidates have captured up to 58% of the state's votes (*Bandemer*, p. 1485).

(23) In Indiana, "given Indiana's history of party-line voting," a competitive seat can be characterized as "a seat in the 45–55 percentage range" (*Bandemer*, p. 1485).

(24) "There is little doubt that a well-programmed computer, full of the most recent election results in Indiana's 4000-plus precincts can aid in the drawing of lines advantageous to the party in power" (*Bandemer*, p. 1486).

Now we turn to how the District Court made use of these findings in shaping its conclusions of law.

The District Court (at 1490) indicated that it had adopted the line of reasoning in Justice Stevens' concurring opinion in *Karcher v. Daggett (I)* (103 S. Ct., p. 2672 (1983)), taken in conjunction with the standard of proof for intentional discrimination as set forth in *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

The first of the three components of the Stevens test requires that plaintiffs prove "that they belong to a politically salient class, . . . one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries" (*Karcher v. Daggett (I)*, cited in *Bandemer*, p. 1492). The district court concluded that this first component of the Stevens test was easily satisfied because:

(25) "The Bandemer plaintiffs clearly belong to a politically salient class, those who align themselves with the Democratic Party" (*Bandemer*, p. 1492). Also, "particularly with the computer technology now available, and so utilized by the Republicans in formulating the 1981–82 appointment plan, the geographical distribution of the *Bandemer* plaintiffs and the class they represent is ascertainable from the *voting* records, precinct by precinct, throughout the state" (*Bandemer*, p. 1492, emphasis added).

Just as the Supreme Court plurality did not differ with the District

Court in its finding of intent to discriminate, the Supreme Court plurality accepted the lower court findings that Democrats in Indiana were a cognizable class, and refers to that class as that of "Democratic voters over the state as a whole" (*Bandemer*, p. 2807).[8] The second requirement of the Stevens test is to prove that "in the relevant district or districts or in the State as a whole, [plaintiffs] . . . proportionate voting influence has been *adversely affected* by the challenged scheme" (103 S. Ct., p. 2672, cited in *Bandemer*, p. 1492, emphasis added). Again borrowing language from Justice Stevens in *Karcher*, the District Court plurality asserted that:

(26) "Such a 'vote dilution' may be demonstrated if population concentration of group members has been fragmented among districts, or if members of the group have been over-concentrated in a single district greatly in excess of the percentage needed to elect a candidate of their choice" (*Bandemer*, p. 1492, internal cite to *Karcher v. Daggett (I)*, p. 2672 n. 13).

The District Court then asserted that plaintiffs have provided such evidence, particularly for districts in Marion County and Allen County (see *Bandemer*, p. 1493, see also *Bandemer*, pp. 1485–1486, or numbered items (19) and (20) in the text above).

The Supreme Court plurality opinion agreed with the District Court that, in order to succeed, plaintiffs for a political gerrymandering case are "required to prove both *intentional discrimination* against an identifiable political group *and an actual discriminatory effect on that group*" (*Davis v. Bandemer*, p. 2808, emphasis added). It is with respect to the evidence required to prove discriminatory effect that the Supreme Court and the District Court part company.

Justice White, speaking for the Supreme Court plurality, explicitly rejected the legal appropriateness of the "adverse effect" standard used by the District Court, and in summarizing previous Supreme Court holdings on minority role dilution, asserted that "the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme unconstitutionally infirm" (*Davis v. Bandemer*, p. 2810). A paragraph later Judge White says, "rather, an 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" (p. 2810, emphasis added).

In a paragraph below, this standard is rephrased by Justice White as the requirement that "a finding of unconstitutionality must be supported by evidence of *continued frustration of the will of a majority of*

the voters or *effective denial to a minority of voters of a fair chance to influence the political process*" (*Davis v. Bandemer*, p. 2811, emphasis added). Justice White goes on to say, a few paragraphs further on, that "a prima facie case of illegal discrimination in reapportionment requires a showing of *more than a* de minimis *effect*" (*Davis v. Bandemer*, p. 2811, emphasis added). It is "appropriate to require allegations and proof that the challenged legislative plan has had or will have effects that are *sufficiently serious to require intervention by the Federal Courts in state reapportionment decisions*" (*Davis v. Bandemer*, p. 2811, emphasis added).

I gather two clear messages from the language of the Supreme Court plurality above: If partisan gerrymandering effects are to be held unconstitutional they must be shown to be (1) serious in nature, and (2) likely to be persistent in duration.[9]

Justice White, speaking for the Supreme Court plurality, concludes that "the District Court's findings do not satisfy this threshold condition to stating and proving a cause of action" (*Davis v. Bandemer*, p. 2811).

We will now focus on the key findings *missing from* the District Court opinion that allowed the Supreme Court to uphold the constitutionality of the Indiana plans.

First, there was no clear evidence that the observed disproportionality between Democratic seat share and Democratic vote share in 1982 could be attributed to the 1981 districting plan.[10] In particular,

(27) "The District Court declined to hold that the 1982 results were the predictable consequences of the 1981 Act" (*Davis v. Bandemer*, p. 2812).

(28) "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 here argue, *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" (*Davis v. Bandemer*, p. 2812, emphasis added).

Second, there was no evidence whatever, accepted as credible by the District Court, that the 1982 Indiana election results could in any way be used to infer predictable consequences for subsequent elections.

The Supreme Court plurality asserted categorically that "*relying on a single election to prove unconstitutional discrimination is unsatisfactory*" (*Davis v. Bandemer*, p. 2812, emphasis added). Several other times in the plurality opinion (e.g., in two separate paragraphs on p. 2814) Justice White repeats the point that data from a single election is insufficient.

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In particular,

(29) "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" (*Davis v. Bandemer*, p. 2812).

Moreover,

(30) "The District Court . . . expressly refused to hold that these [1982] results were a reliable predictor of future ones" (*Davis v. Bandemer*, p. 2812).[11]

Third, the District Court relied unduly on statewide discrepancies between Democratic candidates' vote share and their seat share without a clear showing that these discrepancies were severe or had significant long-run implications.

In particular,

(31) The District Court made no finding that "the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980s" (*Davis v. Bandemer*, p. 2812).

(32) The District Court made no finding that "the Democrats would have no hope of doing better in the reapportionment that would occur after the 1990 census" (*Davis v. Bandemer*, p. 2812).

Fourth, the District Court unnecessarily and without adequate evidence struck down the Senate plan.

(33) "Even if the District Court correctly identified constitutional shortcomings in the House districting, this did not call for invalidating the provisions for the Senate. The only relevant fact about the Senate appearing in the District Court's findings is that in the 1982 elections to fill 25 Senate seats, Democrats won 53.1% for the statewide vote and elected 13 [52%] of their candidates. That on its face is hardly grounds for invalidating the senate districting" (*Davis v. Bandemer*, p. 2813 n. 16).[12,13]

Fifth, the District Court treated features of the (House) plan such as ill-compact districts and failure of the district lines to adhere consistently to political subdivision boundaries—features that can best be regarded as prima facie indicators of gerrymandering intent—as if they were themselves sufficient evidence for gerrymandering effects.

The third element of the Stevens test is that the plaintiffs must make a prima facie showing that "raises a rebuttable presumption of discrimination" (*Karcher (I)*). Again citing the views of Justice Stevens, the district court held that *Bandemer* plaintiffs met this element of the Stevens test with evidence from "*the shape of the district configurations themselves*" (*Bandemer*, p. 1493, quoting *Karcher (I)*, emphasis added).[14]

In contrast, Justice White takes "the shape of the House and Senate districts and the alleged disregard for political boundaries" as evi-

dence of intent, not effect (*Davis v. Bandemer*, p. 2808), although the plurality opinion also holds that "evidence of valid and invalid configurations would be relevant to whether a districting plan met legitimate state interests" (*Davis v. Bandemer*, p. 2815).

While the evidence in *Bandemer* appeared strong on its face, and it was found more than adequate to prove *intentional* partisan gerrymandering, the Supreme Court plurality held that the District Court had set too low a threshold test for gerrymandering effects and had not found the severe and expected-to-be long-lasting effects needed for partisan gerrymandering to be declared unconstitutional.

It is worth a moment's digression to reflect on the striking peculiarity that, in the Indiana case, it would appear that a gerrymandering claim was made without plaintiffs offering evidence at trial that the plan could be expected to do them long-run damage. In actuality, plaintiffs did offer trial testimony on the anticipated long-run consequences of the 1981 plan, but plaintiffs did not offer *expert witness* testimony on the seats-votes aspects of the case.[15] Plaintiffs' testimony on seats and votes, based in large part on projections from over a decade of statewide election results, was presented by a witness, Mr. Dreyer (with an M.A. in political science), who neither sought (nor received) credentials as an expert witness. Moreover, that witness explicitly refused to claim that his projections had *any* predictive statistical validity.[16] The expert witness for the state of Indiana (myself), in rebuttal, pointed out a variety of flaws in Dreyer's analysis. In reviewing Dreyer's projections the District Court said, "this Court does not wish to choose which statistician is more credible or less credible" (*Bandemer*, p. 1485). Instead the district court chose to rely on simple calculations of votes (and seats) in the 1982 election and *to offer no projections of its own*.

Another interesting fact about the Indiana redistricting was that after the redistricting, the minority party, the Democrats, gained seats in both chambers (6 in the House, and 3 in the Senate). Indeed, across both chambers, a total of 7 Republican incumbents were defeated in the general election. The fact was noted in Appellant's Supreme Court briefs, but was not central in the trial record.

In my view, the reason that the Supreme Court plurality decided to reject the claim that the Indiana legislative plans were an unconstitutional gerrymander is not that they had decided that the plans were not gerrymandered, but rather, quite simply, that the evidence presented at trial and *accepted as credible by the District Court* failed to compel such a conclusion.[17] To appreciate this point required a detailed discussion of the evidentiary bases for the District Court findings and the ways in which the Supreme Court held the District Court findings to be both factually and legally inadequate.

I now turn to the question of whether Justice White's plurality opinion in *Davis v. Bandemer* does indeed offer a clear and manageable standard for gerrymandering.

MANAGEABLE STANDARDS

We learn from *Davis v. Bandemer* that indicia of gerrymandering *intent* are not in dispute, nor is the meaning of the term *gerrymandering* itself. Both the district court majority (*Bandemer*, p. 1488) and the Supreme Court plurality (*Davis v. Bandemer*, p. 2802 n. 6) took the straightforward view that gerrymandering has to do with the way district lines are drawn for partisan advantage, for example, by *stacking* (wasting) votes of one party in districts that they win by large majorities, and/or by *cracking* (dispersing) them in such a way as to be ineffectual. Like most commentators (from Sickels, 1966, to Owen and Grofman, 1987), the Supreme Court plurality took the view that it is partisan consequences that define a political gerrymander, not irregularly shaped districts per se. As Sickels (1966, p. 1300) aptly states,

> Dragons, bacon strips, dumbbells and other strained shapes are not always reliable signs that partisan (or racial or ethnic or factional) interests are being served, while the most regularly drawn district may turn out to have been skillfully constructed with an intent to aid one party.

However, violations of natural communities of interest, ill-compact shapes, or excessive crossings of local jurisdictional boundaries can be seen as prima facie indicators of gerrymandering. For example, Grofman (1985a), like many commentators, identifies them as three of twelve such potential indicators and, as such, they may substitute for direct ("smoking-gun") evidence of gerrymandering intent (See also Morrill, chapter 10; Baker, 1986a, and chapter 2; Niemi and Wilkerson, chapter 12; and Hofeller and Grofman, chapter 14).[18]

There was dispute among the Supreme Court justices as to the threshold level of discriminatory effects that would render a plan unconstitutional. The plurality opted for an effects standard of serious and consistent degradation of influence on the political process as a whole (combining phrases from *Davis v. Bandemer*, pp. 2810–2811).[19] Justice Powell (joined by Justice Stevens), unlike the plurality, would have found the Indiana plans unconstitutional. His opinion in *Bandemer* (like that of Justice Stevens in *Karcher*) took a broad view of how evidence on district configurations could be used. In particular, Justice Powell reiterated that "the merits of a gerrymandering claim must be determined by reference to the configuration of

the districts, the observance of political subdivision lines, and other criteria that have *independent relevance* to the fairness of redistricting" (*Davis v. Bandemer*, p. 2827, emphasis added). Also, Justice Powell, unlike Justice White, did not insist on the need for a finding of an anticipated *continuing* disproportionality in election results (see discussion in *Davis v. Bandemer*, p. 2814).

I believe that the gap between Justice Powell and Justice Stevens and Justice White's plurality opinion can easily be exaggerated. As Justice White points out: "The election results obviously are relevant to a showing of the effects required to a political gerrymandering claim under our view. And the district configurations may be combined with vote projections to predict future election results that are also relevant to the effects showing" (*Davis v. Bandemer*, p. 2815). Moreover, with the *Bandemer* precedent of justiciability firmly in place with a 6-3 decision, it is likely that, in the next gerrymandering case, with a different set of case facts, the views expressed by Justice White and those expressed by Justice Powell will begin to meld.[20]

I believe that there are four features of the Supreme Court plurality opinion that are critical in understanding Justice White's approach to specifying manageable standards for gerrymandering effects:

(1) Justice White's insistence that *Bandemer* was a claim that "the 1981 apportionment discriminates against Democrats *on a statewide basis*" (*Davis v. Bandemer*, p. 2807, emphasis added);

(2) Justice White's repeated insistence on evidence that the demonstrated effects must be ones that are not likely to be transient with a single election;

(3) Justice White's reiteration of the Supreme Court's already oft-repeated rejection of "any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be" (*Davis v. Bandemer*, p. 2809, internal citations omitted); and

(4) Justice White's assertion that a finding of unconstitutionality could be supported by a "continued frustation of the will of a *majority of the voters*" or by "effective denial to a *minority of voters* of a *fair chance* to influence the political process" (*Davis v. Bandemer*, p. 2811, emphasis added).

Statewide vs. District-Specific Gerrymandering Claims

That the *Bandemer* plurality opinion is couched consistently in terms of standards for *statewide* vote dilution is an important but neglected point. It suggests that a political gerrymandering case might be

brought seeking a remedy for concentration and dispersal gerrymandering that had affected only a subset of legislative districts, not an entire state. If I am correct about the feasibility of distinguishing statewide and district-specific challenges, a district-specific gerrymandering test would be unlikely to turn upon an analysis of probable *statewide* outcomes, although a severe discriminatory effect would still have to be shown. Also, because *Bandemer* was a statewide challenge to *legislative* plans, it seemed reasonable for Justice White to focus on consequences for control of the state legislature. In a challenge to congressional rather than legislative districting such a focus would be irrelevant.[21]

The distinction between claims of statewide discrimination and district-specific challenges was in fact made in *Davis v. Bandemer*, and the plurality opinion provides support for my view that the appropriate tests for gerrymandering effects would be different for the two types of claims. In Justice White's words, "Although the statewide discrimination asserted here was allegedly accomplished through the manipulation of individual district lines, *the focus of the equal protection inquiry is necessarily somewhat different from that involved in the review of individual districts*" (*Davis v. Bandemer*, p. 2808, emphasis added).

Further support for the legal significance of this distinction derives from analysis of recent vote dilution cases. Vote dilution challenges to single-member districts in a given city or state or to congressional districting plans often focus on a subset of districts in which manipulation of district lines for gerrymandering purposes is alleged to have taken place. For example, in *Ketchum v. Byrne* (740 F. 2d 1398 (7th cir., 1984), *cert. denied* 105 S. Ct. 2673 (1985)), particular Chicago city council districts were attacked as retrogressive and the fragmentation of Hispanic and black population concentrations in certain areas of the city was singled out for review.

In *Major v. Treen* (574 F. Supp. 325 (1983)), although the suit sought to overturn Louisana's congressional districting plan, the district court acknowledged that:

> the *gravamen* of plaintiffs' claims is that Act 20 was designed and has the effect of cancelling, minimizing or diluting minority voting strength by *dispersing a black population majority in Orleans Parish into two congressional districts*. The question posited is whether legislation dividing a highly concentrated black population existing in one geographic and political unit, a parish, into two districts, rather than placing them in a single district in which blacks would constitute a majority deprives Louisana black voters of the right to effective participation in the electoral process. (*Major v. Treen*, p. 327, emphasis added)

Plaintiffs prevailed on this district-specific claim. Similarly, in *Thornburg v. Gingles* (590 F. Supp. 345 (1984)), although the challenge was to a statewide plan, the "*gravamen* of plaintiffs' claim" had to do with "minority submergence" in six multimember districts and "fracturing between more than one Senate district in the northeastern section of the state of a concentration of black voters sufficient in numbers and contiguity to constitute a voting majority in at least one single-member district" (*Thornburg*, 1984, pp. 349–350, emphasis added).

In *Davis v. Bandemer* the Supreme Court did not make use of any evidence of fragmentation or packing of partisan voting strength. But that was because *Bandemer* was treated as a statewide case, requiring a *statewide* proof of nontransient discriminatory effects. In Justice White's own words (*Davis v. Bandemer*, p. 2815 n. 20): "Given our conclusion that no unconstitutional discriminatory effects were shown as a matter of law, we did not need to consider the District Court's factual findings on the other factors [such as contours of particular districts] addressed by Justice Powell." Cases such as *Major v. Treen* and *Ketchum v. Byrne* show that, in a district-specific political gerrymandering challenge, evidence of fragmentation or packing of partisan voting strength will always be relevant, even though it will not always be determinative. Indeed, in *Ketchum*, the 7th circuit asserted "the ways in which . . . lines are drawn may become independent indicia of discriminatory intent *or result*" (*Ketchum*, p. 1405, emphasis added).[22]

Even in a statewide discriminatory suit,

> If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings. Thus, evidence of exclusive legislative process and *deliberate drawing of districts in accord with accepted gerrymandering principles* would be relevant to intent, and *evidence of valid and invalid configuration* would be relevant to whether the districting plan met legitimate state interests. (*Davis v. Bandemer*, p. 2815, emphasis added)

Nontransient Effects

Although Justice White asserts that "a mere lack of proportionate results in *one election*" (*Davis v. Bandemer*, p. 2814, emphasis added) is insufficient to sustain a claim of unconstitutional gerrymandering, Justice White strongly rejects Justice Powell's reading of the plurality opinion (p. 2831, n. 10) as requiring that "more than one election must pass before a successful racial or political gerrymandering claim

must be brought" (*Davis v. Bandemer*, p. 2814, n. 17). To the contrary, Justice White asserts that "projected election results based on district boundaries and past voting patterns may certainly support this type of claim, even where *no* election has yet been held under the challenge districting" (*Davis v. Bandemer*, p. 2814, n. 17).[23] This language directly raises one of the central issues for post-*Bandemer* gerrymandering litigation: "Is it possible to project election results with reasonable reliability and, if so, how is this to be done?"

This last question is directly linked to the cognizability of Democrats or Republican voters as a class. While the "ability to determine the distribution of Democratic voters" was not disputed by the defendants [the State of Indiana] in *Bandemer* (p. 1492), in other gerrymandering cases this point is very likely to be a matter of dispute. For example, Schuck (chapter 11) argues that party identification is too evanescent a concept to be used in identifying the members of an aggrieved class and reminds us that individuals sometimes vote for candidates of one party and sometimes for candidates of another depending on the type of election, the characteristics of the candidates, and other exogenous circumstances. However, in my view, this argument as to why partisan gerrymandering cannot be dealt with by judicial inquiry has already been rejected by the Supreme Court. "That the characteristics of the complaining group *are not immutable* . . . may be relevant to the manner in which the case is adjudicated, but . . . do not justify a refusal to entertain such a case" (*Davis v. Bandemer*, p. 2806, emphasis added).

There are two well-established techniques for projecting election results and/or comparing the impact (and fairness) of alternative plans. Method one requires us to establish a baseline measure of (two-party) vote in the districts at issue using votes in some set of election contests that appropriately reflect underlying partisan support propensities (usually statewide ones). This approach has been ably expounded by Backstrom, Robins, and Eller (1978; chapter 6). The second approach involves looking at a party aggregate share of the statewide (two-party) vote in the actual (type of) election contests that are under challenge. In one variant of this approach, ably expounded by Richard Niemi (Niemi and Deegan, 1978; Niemi and Fett, 1986; Niemi, chapter 7; Niemi and Wright, chapter 13) the focus is on estimating expected responsiveness to vote shifts and expected partisan bias. Some variant of method (2) has also been used by a number of other scholars (see, e.g., Tufte, 1973; Scarrow, 1982; Grofman, 1983a,b; Taagepera, 1986; Glazer, Grofman, and Robbins, 1987; King and Browning, 1987; Browning and King, 1987).

The Supreme Court in *Bandemer* was confronted with a divided lower court opinion in that case in which the two judges in the majority calculated baseline Democratic strength by method (1), while the dissenting judge, Judge Pell, obtained a different (and lower) number by amalgamating data from a set of statewide races via method (2). Judge Pell claimed support for his method because Backstrom, Robins, and Eller (1978) had been favorably cited by Justice Stevens in his concurring opinion in *Karcher v. Daggett (I)*. Because the Supreme Court in *Bandemer* did not find evidence from a single election sufficient to meet its "consistent degradation" test, it explicitly refused to decide the question of which of these two methods was the more appropriate (*Davis v. Bandemer*, pp. 2811–2812 n. 15). (Also see Footnote 10 above.)

We believe that both methods (1) and (2) can contribute to determining the existence and effects of gerrymandering. Methods (1) and (2) are useful complements to one another. Method (1) uses the actual sum of the votes received by all candidates of the given party in a set of districts to develop a total vote strength figure for that party. The advantage is that such a sum is a simple and direct measure of aggregate vote strength; the disadvantage is that it is confounded by idiosyncratic district-specific factors such as incumbency. On the other hand, method (2) seems to require careful judgment about appropriate selection of baseline races and thus may be subject to greater controversy. However, we expect that, in practice, if gerrymandering is severe enough, most reasonable selections of statewide races will reveal the extent to which one party's votes have been more packed and more dispersed across the districts than those of the party doing the gerrymandering.[24]

Lowenstein (chapter 4, pp. 75–76) asserts that the question of exactly how a political group's membership is to be identified remains open (see *Davis v. Bandemer* p. 2812, n. 15), and then rhetorically asks whether membership would be identified "By the way they vote? By other political activities? By their political interests?" As I read it, the plurality opinion in *Davis v. Bandemer* (p. 2812, n. 15) recognizes methods 1 and 2 above as the two basic ways to identify partisan voting strength. While the exact nature of the requisite applications of these two methodologies remains to be litigated, like Justice White I do not think it yet necessary to decide between these two methods. Indeed it may never be necessary to pick one or the other, since both have advantages.

Just as the choice among "average deviation," "total deviation," or "electoral percentage" as the best *single* indicator of deviation from

"one person, one vote" equality, was not settled (in favor of the "total deviation" as the basic measure) for a number of years after *Reynolds* (Grofman, 1985a; Wollock, 1980), so, too, the choice between a "baseline" and a "votes cast" measure of partisan voting strength need not be resolved yet. Also, even though total deviation is the measure of "one person, one vote" compliance on which courts primarily rely, other measures such as average deviation continue to be used to provide useful supplemental information (see especially *Connor v. Finch*, 431 U.S. 407 (1977), p. 82) and *Holmes v. Burns*, no. 82-1727 (R.I. Super. Ct. 1982), aff'd sub nom *Holmes v. Farmer*, 475 A 2d 976 (R.I. 1984)). Thus, there seems no need, certainly at present, to insist on specifying *the* single measure of partisan voting strength.[25]

Moreover, both methods will need to be supplemented by other indicia of gerrymandering effects. Neither method (1) nor method (2) is perfect at detecting the effects of gerrymanders. In particular, both methods will almost certainly completely miss the use of incumbent-displacement gerrymandering techniques. Method (1) is especially flawed in this regard. Indeed, when there has been incumbent displacement gerrymandering, unless the incumbency advantage is explicitly built in to the equations (as in Cain, 1985a), method (1) will often understate the effects of gerrymandering on the seats-votes discrepancy. The fact that the party that has been gerrymandered against now has fewer incumbents means that it also now has fewer votes, while the party that did the gerrymandering will have more of an incumbency advantage, giving it an expected increase in its vote share. Thus, incumbency displacement will reduce the observed discrepancy between votes and seats by reducing the votes of the party that has its incumbents eliminated by gerrymandering, and thus reduce the appearance of gerrymandering.

Like Schuck (1987; chapter 11) the defendants in *Badham v. Eu* ("Memorandum in Support of the Motion to Dismiss the Third Amended Complaint in *Badham v. Eu*," pp. 36–37), claim that partisan voting strength is inherently unmeasurable, but then go on to suggest that, if there is to be a measure of party strength, it ought to be party registration and not votes cast for the party's candidates. The phrase used by Justice White to identify the plaintiff class, "Democratic *voters over the state as a whole*" (*Davis v. Bandemer*, p. 2800, emphasis added) would seem to largely dispose of this issue. Moreover, there are a number of difficulties in using registration data. Party registration data is not available for all states and its meaningfulness varies from state to state depending on state election procedures (e.g., open versus closed primaries; see Finkel and Scarrow, 1985). Most important,

in most states, party registration is a poor proxy for partisan voting strength. In California, for example, vote share for Republican candidates considerably exceeds Republican share of party registration (see Grofman, 1985a; Kernell and Grofman, chapter 15). Thus, if party registration is to be used as an indicator or predictor of party voting strength it must be used with great care, perhaps as one element of a multivariate prediction equation (see Cain, 1985a; cf. Kernell and Grofman, chapter 15).

Even if we agree on a measure of statewide partisan voting strength (and we can, of course, compare the predictive fit of alternative measures in specific cases), we must still determine what to look for to prove gerrymandering. We believe that electoral *bias* (Tufte, 1973; Niemi and Deegan, 1978; Grofman, 1984), that is, asymmetry in the way each party is able to translate its vote strength into seats, is more important than the simple discrepancy between vote share and seat share. Clearly, a 10% discrepancy between votes and seats may be quite reasonable if a party with 65% of the votes gets 75% of the seats. On the other hand, if a party with 45% of the votes got 55% of the seats, there would be considerable grounds for suspicion (cf. Grofman, 1982). In the latter case the *majoritarian criterion* (Grofman, 1985a), that the party with a majority of the votes receive a majority of the seats, has been violated.

Unfortunately, even measures of electoral bias will also miss (or mistake) the effects of incumbency displacement gerrymandering. Thus, I believe that the detection of gerrymandering requires a *combination* of techniques. As I wrote earlier,

> In determining whether partisan gerrymandering has taken place, I would place particular reliance on (1) showing an incumbent-centered partisan bias (i.e., a differential treatment of the incumbents of the two major parties); (2) demonstrating that concentration and dispersion gerrymandering techniques have been used; (3) showing that deviations from compactness and failure to follow political subunit boundaries were systematically linked to probable partisan impacts; and (4) demonstrating that the plan so constrains the probable range of politically competitive seats (in such a fashion) as to create a near certainty of continued partisan unfairness for the foreseeable future. (Grofman, 1985b, p. 155, footnote citation omitted)

IS *BANDEMER* A DEAD LETTER?

In the previous sections I rebutted the frequently asserted claim (see, e.g., Note, 1986, p. 154; Schuck, chapter 11) that *Davis v. Bandemer* fails to identify judicially manageable standards for adjudicating po-

litical gerrymandering. In this section I consider the claim that the threshold test set by the plurality opinion in that case is so high that no major political party can ever be found to have had itself unconstitutionally gerrymandered against.

Lowenstein (chapter 4, p. 89) asserts that the only gerrymandering claims the plurality in *Davis v. Bandemer* is prepared to recognize "are claims brought by political groups that have suffered from discrimination to the degree that their status under the equal protection clause is analogous to the status of racial minorities." It seems quite clear to me that this assertion about what *Bandemer* means is wrong, and has explicitly been rejected by the Supreme Court when Justice White said (*Davis v. Bandemer*, p. 2806, emphasis added), "That the group has not been subject to the same historical stigma [as racial groups] may be relevant to the manner in which the case is adjudicated, but [does] *not justify a refusal to entertain such a case.*"

Moreover, if Lowenstein's is a correct reading of *Bandemer*, then the plurality wasted a lot of wood pulp on irrelevant remarks. On Lowenstein's view, all that the *Bandemer* plurality needed to have said is:

> This case is about Democrats; Democrats are a major party in a two-party state; major parties are never discriminated against in the same way that racial minorities are; therefore, even though gerrymandering is justiciable, the Democratic claim must be rejected. Q.E.D.

Another flaw in Lowenstein's interpretation of the *Bandemer* plurality opinion is that it is not easily reconciled with other language (referred to in detail in my discussion above), which shows that it was the lack of a solid evidentiary record (especially as to predictable future consequences) that impelled the plurality to reject the District Court's finding of unconstitutionality, not the mere fact that the case involved a major political party.[26]

There is, however, one passage in Justice White's opinion that, at first glance, would seem to support Lowenstein's interpretation of *Davis v. Bandemer*. That passage is seen by Lowenstein as critical.

> The power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, *without actual proof to the contrary*, that the candidate elected will entirely ignore the interests of those voters. (*Davis v. Bandemer*, p. 2810, emphasis added)

Alfange (1986, pp. 245–246) finds this paragraph largely inexplicable and jarringly out of place with the rest of the opinion. On the other hand, Lowenstein (chapter 4) sees it as the heart of the opinion. In contrast to both, I believe this paragraph must be interpreted in the context of the plurality opinion as a whole. In that context, I would emphasize the phrase "without actual proof to the contrary." I see the role of this paragraph as informing us of yet another evidentiary lacuna in the *Bandemer* trial record, the absence of evidence that Democrats and Republicans behave differently in office, so that it ought to matter from the standpoint of fair and effective representation whether candidates of a particular political party are severely and long-lastingly discriminated against.

Consider two groups of candidates, the "Alphas" (candidates whose last names begin with the letters A through M) and the "Zeds" (candidates whose last names begin with the letters N through Z). Imagine that we find that the votes for "Alphas" do not translate as effectively into seats as the votes for "Zeds." Is this evidence of any sort for partisan gerrymandering? Certainly not, unless the "Alphas" and "Zeds" are more than accidental collections of candidates. There must be at least some evidence that distinct political points of view or groups of voters are being discriminated against. No such evidence was offered at trial in *Bandemer* by the Democrats.

In the case of Democrats versus Republicans, generating such evidence is straightforward, for example, showing partisan alignments on legislative roll calls, or demographic or attitudinal differences in party support in the electorate. Clearly, in the contemporary United States, there are considerable differences in the public policies (and the constituency groups those policies favor) between a Republican party whose presidential nominee is Ronald Reagan and a Democratic party whose presidential nominee is Walter Mondale. Analogous differences exist at the state level, and quite probably may also be shown to exist in particular local jurisdictions. The major political parties are the mediating mechanisms by which voter preferences are translated into public policy. To discriminate against a political party is to discriminate against the policy positions associated with those voters represented by that party and thus against the voters themselves (for more on this point see Hess, 1987).

It is not consistent with the rest of the *Bandemer* opinion, or with the case law on determining the effects of racial vote dilution (see below), to treat *Bandemer* as holding that, unless elected officials totally disregard the voters in their district, no discriminatory effect of a redistricting plan can be claimed. Lack of responsiveness to minority con-

cerns has been an element of proof in some racial vote dilution cases, but it is completely absent from many of the recent leading vote dilution cases (e.g., *Ketchum v. Byrne, Thornburg v. Gingles, Major v. Treen*). Moreover, responsiveness, although mentioned, is not one of the seven major factors singled out as relevant to proof of discriminatory effect in the "totality of the circumstances" test described in the *Report of the Senate Committee on the Judiciary on the 1982 Extension of the Voting Rights Act* (U.S. Senate, 1982; see discussion in Grofman, Migalski and Noviello, 1985, pp. 199–201 and ff. esp. 218, n. 10). Indeed, the Senate report explicitly states that "unresponsiveness is not an essential part of plaintiffs' case" (U.S. Senate, 1982, p. 29).

Furthermore, in Justice Powell's apt phrasing (*Davis v. Bandemer*, p. 2830):

> But (i)t defies political reality to suppose that members of a losing party have as much political influence over state government as do members of the victorious party. Even the most conscientious state legislators do not disregard opportunities to reward persons or groups who were active supporters in their election campaign. Similarly, no one doubts that partisan considerations play a major role in the passage of legislation and the appointment of state officers.

In a 1986 "Memorandum in Support of the Motion to Dismiss the Third Amended Complaint in *Badham v. Eu*," the California Congressional Delegation offers an even stronger version of Lowenstein's stringent reading of *Bandemer*, one in which the requisite test is for a group to be "shut out of the political process" (p. 3). They claim (id., p. 5) that Republicans are barred from an equal protection claim because "Unlike the black plaintiffs in *Rogers v. Lodge* or *White v. Regester*, who had no representatives in the political process, California Republicans have a responsive President, a United States Senator, scores of state legislative representatives, and control of 40% of the state's congressional delegation. The views of Republicans are heard loudly and clearly in Washington, in Sacramento and in local municipalities. The political process works for Republicans." Also, "The Republicans have access to a proven and potent part of the California political process—the referendum" (id., p. 5).

If this view of what *Davis v. Bandemer* meant were correct, *Bandemer* would indeed be a dead letter. The notion that success in, say, state legislative races, exempts a group from successfully proving discrimination at other levels of government is peculiar, to say the least. It is a complete misreading of Justice White's opinion. It is also as a vio-

lation of common sense. Remarkably, however, it has been accepted by a federal district in *Badham v. Eu* (1988).

Ketchum v. Byrne, like almost all voting rights cases, relies only on evidence of electoral success *in the jurisdiction at issue* (here the Chicago City Council). Moreover, like many recent racial vote dilution cases, *Ketchum* cannot in any way be characterized as involving a totally excluded minority. The central issue in *Ketchum* was whether an additional two or more black and two or more Hispanic majority city council seats should be created in a plan in which there already were 19 black majority seats and 2 Hispanic majority seats. Furthermore, in congressional cases, even though only the outcome in a *single* seat will be affected, a racial vote dilution claim may nonetheless be sustained (see especially *Major v. Treen*).

Early racial vote dilution cases such as *White v. Regester* (412 U.S. 755 (1973)) were "horribles," that is, cases of nonexistent or virtually nonexistent minority representation; but the first civil rights cases of any type brought to the Supreme Court for remedy usually are "horribles." Minority vote dilution cases subsequent to *White* (e.g., *Thornburg v. Gingles*) did not present such stark patterns of total exclusion, but the Court, nonetheless, held that minorities had been deprived of "an equal opportunity to participate in the electoral process and to elect candidates of choice." The first case in which the Court accepted justiciability, *Baker v. Carr*, was a clear "horrible." Tennessee had not reapportioned for more than forty years, and the discrepancy between the largest seat in the Tennessee House and the smallest seat was on the order of 44 to 1. But reapportionment cases subsequent to *Baker* dealt with deviations from population equality *far* smaller in magnitude—and held those deviations to be unconstitutional. In like manner, the first findings of unconstitutional political gerrymandering to be upheld by the Supreme Court will almost certainly be an acknowledged "horrible"—such as the California congressional plan(s) designed by the late Congressman Philip Burton.

I do not mean to suggest that the *Davis v. Bandemer* threshold is not a high one, but I reject Lowenstein's argument (chapter 4, page 111) that it merely perpetuates a situation in which the Supreme Court plurality sought to "retain the option to intervene" but have "no apparent intention of exercising that option." My earlier work (Grofman, 1985a, pp. 119–123) anticipated Justice White's view that the District Court's majority opinion in *Bandemer* had set such a low threshold for what would constitute an unconstitutional political gerrymander as "to invite attack on all or almost all reapportionment

states" (*Davis v. Bandemer*, p. 2811). Justice White goes on to obser that "District-based elections hardly ever produce a perfect fit b tween votes and representation" (a point I made in my trial testimo in *Bandemer*, see also, e.g., Grofman, 1982). I share fully Justi White's view that "inviting attack on minor departures from sor supposed norm would too much enroll the judiciary in secon guessing what has consistently been referred to as a political task f the legislature" (p. 2811).

What is required by *Davis v. Bandemer* are "allegations and pro that the challenged legislative plan has had or will have effects th are sufficently serious to require intervention by the federal courts state reapportionment decisions" (p. 2811). Justice White chose require a "showing of more than a *de minimis* effect" (id.). This de sion is similar to that made by the Court in *Connor v. Finch*, p 430–433, where the Court asserted that a population deviation of le than 10% was "prima facie constitutional." As I have argued els where (Owen and Grofman, 1987), the necessary standard of pro can be met if the gerrymandering is sufficiently egregious and suf ciently sophisticated so as to be durable in its consequences (as true, e.g., for California's 1982 and 1984 congressional plans: Ow and Grofman, 1987; Grofman, 1985b). Indeed, I regard Justice Whit opinion as a remarkable example of views that are both principl and practical—steering a reasonably steady course between the Scy of encouraging trivial lawsuits and the Charybdis of barring serio ones.

One last point: Is politically gerrymandering "an inherently se limiting enterprise," as Justice O'Connor (citing Cain, 1985a) asse (*Davis v. Bandemer*, p. 2804)? The simple answer is that often it is, b sometimes it isn't, depending on the sophistication of those doing t gerrymandering. Some of the time those doing the gerrymanderi get too greedy; that is, they draw too many marginal districts which the majority party's margin of victory may be eroded by el toral tides that change the balance of partisan control in the legislatu (Scarrow, 1982). Excess party greed, however, is not inevitable.

"Sophisticated gerrymandering" (Owen and Grofman, 1987) c (a) reduce the number of truly competitive seats low enough th unless all or virtually all of the marginal seats changed hands, par san control would be unaffected; (b) lock in a partisan majority in t remaining seats by creating seats lopsidedly safe for the party doi the districting, along with a smaller number of even more lopsided safe seats for the minority party; and (c) make use of incumben

displacement techniques to significantly bolster the majority party's long-run advantage (see Cain, 1985a; Grofman, 1985b). Moreover, at least one of the major studies of 1980s redistricting (Born, 1985, p. 309) concludes, "The results suggested no systematic tendency for party fortunes to wane or wax across the course of a districting. Election returns from the initial year a plan is used, therefore, seem representative of the overall partisan impact across the entire period it remains in effect."

LESSONS FROM *THORNBURG V. GINGLES*

Thornburg's Three-Pronged Test

Thornburg provides a test for vote dilution in at-large elections that has three components: (1) minority population sufficiently large and sufficiently geographically concentrated so that there is a single-member district remedy with at least one district in which minority members are the majority; (2) a "politically cohesive minority community as signalled by a general pattern of racial bloc voting among its members"; and (3) "a white bloc vote that normally will defeat the combined strength of minority support plus white crossover votes."

Looking at the *Thornburg* three-pronged test for racial vote dilution suggests the possibility of establishing direct analogues to its components for the case of partisan gerrymandering. As Cain (chapter 5) as well as Lowenstein (chapter 4) emphasize, the partisan gerrymandering cases, like the racial vote dilution cases, turn on the question of group rights.[27] As the late Robert G. Dixon, Jr. pointed out: "In a functional sense, the gerrymandering issue is the same whether the districts are single-member or multi-member—and whether or not a racial factor is present, because racial gerrymandering is simply a particular kind of political gerrymandering." (Dixon, 1971, p. 32; quoted in Baker, 1986a, p. 17)

The direct analogue to racially polarized voting is straight-ticket voting; the direct analogue to crossover voting is split-ticket voting. Thus, in an at-large plan, if Democrats are the minority group, to see if the third prong of the *Thornburg*-derived test were satisfied, we would seek to determine whether there is a Republican bloc vote that normally will defeat the combined strength of Democratic support plus Republican split-ticket voting. This requires looking at expected levels of partisan voting support to see if there is a pattern of partisan

political cohesion sufficient to lead with certainty or near certainty to the defeat of candidates of the minority party.[28]

The *Thornburg* test may be adapted to the single-member district context. The only change is in the first element of the test. For challenges to single-member district, I would restate the first prong of the *Thornburg* test as: (1) Is there minority population that has been fragmented to a greater extent than is true for white population concentrations, and that is sufficiently large and sufficiently geographically concentrated to form an effective majority in at least one single-member district?[29] In a single-member district plan, we would need to look at the distribution of partisan support across districts, to see if fragmentation and other gerrymandering techniques had been used to dilute minority voting strength.[30]

However, in addition to the usual analyses of packing and cracking, and so forth, I would also look carefully at the overall treatment of incumbents. Incumbent displacement from the core of his/her old district or the locating of two or more incumbent homes in a single district, if applied in a discriminatory fashion, primarily or exclusively to the incumbents of one party only, is potentially a more powerful tool for obtaining long-run partisan advantage than simple concentration or dispersal gerrymandering. The reason is that, in the United States, incumbents have a considerable reelection advantage. Thus, as noted earlier, eliminating incumbents of the other party (while maintaining or strengthening the seats of one's own incumbents) can considerably increase the ability of a party to translate its votes into seats. Discriminatorily disadvantageous treatment of the incumbents of party out of power is important direct evidence of gerrymandering *effects* (and not merely evidence of intent, although it is that as well).[31]

Projecting Electoral Outcomes

Given the importance attached to projections of (future) election outcomes by the plurality opinion in *Davis v. Bandemer*, how are such projections to be based? A great deal can be learned about how the Supreme Court is likely to answer this question in future cases by examining opinions dealing with racially polarized voting, where analogous issues have arisen.

In the racial vote dilution cases, recent evidence of factors such as racially polarized voting and lack of minority electoral success is taken by courts to be a reliable indicator of the future, absent very strong evidence to the contrary. It is worth quoting Justice Brennan's position, speaking for the Court in *Thornburg v. Gingles* (p. 2770, internal cites omitted), in full on this point:

> Because the loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election . . . Also, for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of incumbency, or the utilization of bullet voting, may explain minority success in a polarized contest.[32]

In like manner, I believe, it is *evidence of predictable regularities in partisan voting patterns that are not candidate-specific* that the Supreme Court will demand in future partisan gerrymandering cases. In the racial context, Justice Brennan quotes favorably the views of two leading civil rights attorneys, James Blacksher and Lawrence Menefee: "Racial polarization should be seen as an attribute not of a single election, but rather of a polity viewed over time. The concern is necessarily temporal and the analysis historical because the evil to be avoided is the subordination of minority groups in American politics, not the defeat of individuals in particular electoral contests" (*Thornburg*, p. 2770, internal citation omitted). I believe this analysis applies with equal force to the political gerrymandering context.

Of course there are differences between the political context and the racial one; and, in certain key ways, Justice White's opinion sets a higher threshold for partisan gerrymandering than for racial vote dilution. In particular, in racial cases under section 2 of the Voting Rights Act, either intent *or* effect is sufficient to demonstrate a statutory violation. In contrast, for partisan gerrymandering, intent *and* effect are necessary.[33] Also, certain factors such as history of exclusion from the political process will almost always be absent from litigation brought by a major political party, and proof of other factors will have to compensate. Most important, perhaps, for a statewide case (as distinct from a district case) a political party will have to show *statewide* effects of discrimination. As I read the racial vote dilution cases, no such showing is necessary.

However, future gerrymandering cases, like *Badham* (see note 21) and unlike *Bandemer*, may be brought alleging both a district-specific and a statewide discriminatory effect, or may be brought against congressional plans where district-specific considerations would seem to be of greater relevance. Indeed, I believe that, for challenges to con-

gressional plans, if the effect is to unconstitutionally minimize or cancel out the possibility of control of even a single congressional district, that will prove to be sufficiently "severe" to be justiciable. Certainly, by analogy, cases like *Major v. Treen* support such a single-seat threshold for vote dilution litigation involving *congressional* seats.

Remedy

Levinson (1985) and Schuck (chapter 11), among others, have argued that any test for partisan gerrymandering is simply a requirement for proportional representation in disguise, the Supreme Court disclaimers to the contrary notwithstanding (cf. Thernstrom, 1985, 1987; Niemi, Hill, and Grofman, 1985). If an unconstitutional gerrymander is found, does the plurality opinion in *Davis v. Bandemer* require proportional representation as its remedy? In a word, no.

Justice White (p. 2806) characterizes the claim in *Bandemer* as one that "each group in a state should have the same chance to elect representatives of its choice as any other political group." This is language almost identical to the new (1982) language added to the Voting Rights Act of 1965: Each (protected) group should have "an equal opportunity to participate in the political process and to elect candidates of choice." Thernstrom (1987) and other critics of the Voting Rights Act have charged that this language is tantamount to a requirement of proportional representation. The evidence from the vote dilution cases (especially the Supplemental Opinion in *Gingles v. Edmisten*) demonstrates the error of this view.

The simple fact that must be understood about redistricting done on the basis of single-member districts is that such districting will usually not achieve proportional representation at the group level. The smaller the minority population (and, ceteris paribus, the more scattered it is), the further away we are likely to get from proportionality (see Grofman, 1982, and references therein). In the case of single-member districts, fairness is not the same as proportionality (see, e.g., Backstrom, Robins, and Eller, 1978; Grofman, 1983a; Niemi, 1982; Niemi, chapter 7).

If unconstitutional political gerrymandering is found, just as in the racial vote dilution or equal population cases, the first opportunity for remedy should rest with the jurisdiction, unless the jurisdiction has by its previous history of action forfeited such a right (see, e.g., *White v. Weiser*, 421 U.S. 783, p. 795; *Kirksey v. Board of Supervisors*, 554 F. 2d 139 (5th Cir.) *cert. denied* 434 U.S. 968 (1977)). In most cases, I would anticipate that a plan drawn under neutral principles without intent

to discriminate will pass subsequent court muster. If the jurisdiction fails to propose a remedy in a timely fashion, then the Court itself can (either directly or through the appointment of a Special Master) prepare a new plan. Like Lowenstein (chapter 4, page 108, n. 21), I agree that the Court "often does and should strike down practices that can be understood to be wrong when the Court would be unable to specify a practice that is uniquely right." Unlike Lowenstein, where gerrymandering is egregious enough, I believe that the remedy of a redrawn plan, though it may not be guaranteedly better than what it replaces, is nonetheless so likely to be an improvement in eliminating the worst aspects of the unconstitutional discrimination of the previous plan, as to justify judicial intervention in the redistricting process.

CONCLUSIONS

More than two decades ago the U.S. Supreme Court struck down grossly malapportioned districts, many of which had not been redrawn in decades, as a violation of the equal protection clause of our Constitution. The "one person, one vote" doctrine it subsequently enunciated was regarded by many at the time as a revolutionary intervention of the courts in the political process. It has now been sanctified by history, and is generally regarded as a resounding success. In *Bandemer*, Justice White rebutted the argument that, because no simple arithmetic test of political gerrymandering was available, political gerrymandering claims could not appropriately be dealt with by the courts in the way that "one person, one vote" claims had been resolved. As Justice White points out,

> The one person, one vote principle had not yet been developed when *Baker* was decided. At that time, the Court did not rely on the potential for such a rule in finding justiciability. Instead, . . . the Court contemplated simply that legislative line-drawing would be susceptible of adjudication under the applicable constitutional criteria. (*Davis v. Bandemer*, p. 2805)

Justice White asserts "in the light of our cases since *Baker* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymandering cases are to be decided" (*Davis v. Bandemer*, p. 2805). As by now should be clear, I fully agree with him.

The basis for manageable standards is laid out in the *Davis v. Bandemer* plurality's enunciation of the "intentional," "severe," and "consistent degradation" tests, and in the Supreme Court's resolution of analogous issues of racial vote dilution in *Thornburg*.[34] Like Alfange (1986, p. 179) I believe the ultimate test of *Davis v. Bandemer*

will be determined by its ability to provide relief from egregious political gerrymandering without exposing virtually every districting plan to tedious and unnecessary judicial scrutiny. I believe that it will pass that test.

NOTES

1. The Supreme Court dismissed rather cavalierly the claim that it had previously ruled partisan gerrymandering nonjusticiable. Many scholars (myself included) thought that summary affirmances in cases such as *WMCA Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (S.D.N.Y) aff'd per curiam 382 U.S. 4 (1965) vacated 384 U.S. 887 (1966), where the lower court had held partisan gerrymandering nonjusticiable, implied an unwillingness on the part of the Supreme Court to enter what was potentially the deepest part of the "reapportionment thicket." In preparing for trial, the State of Indiana paid more attention to the Indiana NAACP challenge to its legislative plans (in the consolidated case, *Indiana Branches of the NAACP v. Orr* (1984)) than it did to the Democratic party challenge, in part because of a belief that, absent a clear sign from the Supreme Court, the district court would be reluctant to make new case law in the area of partisan gerrymandering. To do so might be seen to fly directly in the face of the Supreme Court's findings in *Whitcomb v Chavis*, 403 U.S. 124 (1971), that Indiana's multimember districts were constitutional and that, even when the minority in question was racial, evidence of electoral disproportionality alone was not sufficient to prove unconstitutionality. As the Supreme Court said in *Whitcomb*, in reversing the lower court findings of racial gerrymandering, "The failure of the minority to have legislative seats in proportion to its population emerges more as a function of losing elections than one of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'canceled out' as the district court held, but this seems a mere euphemism for political defeat at the polls" (403 U.S. 124, p. 153). Indeed this exact language was quoted by Justice White in *Davis v. Bandemer* (p. 2812) as part of his explanation of why the district court's findings in *Bandemer* used an impermissibly low threshold test for partisan gerrymandering (see below).
2. This, too, has been alleged by some critics of the *Bandemer* opinion, sometimes in the same breath that they allege that the screening of partisan gerrymanders would create an impossible and politically contaminating workload for the courts.
3. When the State of Indiana appealed *Bandemer* to the Supreme Court, black plaintiffs in the consolidated case *Indiana NAACP Branches v. Orr* chose not to cross appeal, but instead entered a brief defending the district court's ultimate conclusion that "the challenged plans are unconstitutional in their discrimination against Democrats and blacks as Democrats" (Brief of Appellees Indiana Branches of NAACP in *Davis v. Bandemer*, in the U.S. Supreme Court, October Term, 1985, p. 3).
4. The firm, Market Opinion Research, has strong ties to the Republican Party and was involved in redistricting consulting for Republicans in other states (e.g., Colorado). The district court (*Bandemer*, p. 1485) as-

serted that "Sophisticated computer equipment obviously provided more flexibility to mapmakers."

5. However, the district court majority goes on to say that "the deposition testimony of the legislative principals involved makes clear that Supreme Court guidelines summarized as 'one person, one vote' were carefully followed. The defendents also now state that a policy of 'no retrogression' also guided the decisions made by the legislative mapmakers. 'No retrogression' was an effort to preserve the constituencies for black members of the General Assembly that existed prior to the 1980 Census. The census figures revealed a certain migration of minority citizens from inner city areas in which they commanded considerable voting strength."
6. With this assertion the district court effectively rejected the claim of Senator Bosma that preserving "communities of interest" had been one of the criteria used by Republican legislators. The district court defined "community of interest" as "generally speaking, the inclusion of citizens in a given legislative district who share a geographic area, with similar concerns and needs to be met by their state legislators."
7. The district court went on to hold, "It is obvious that political considerations figured highly in the perpetuation of this sort of districting approach" (*Bandemer*, p. 1489).
8. Justice White, speaking for the plurality, is, however, sensitive to a dispute in the record over how to define the class of Democratic voter, but asserts that since the case has been settled on other grounds, the dispute "need not now be resolved" (*Davis v. Bandemer*, p. 2811, n. 15). I will have considerable more to say about this point in the section on "manageable standards" below.
9. In the "manageable standards" section of this paper I will consider the phrases *consistently degrade* and *non de minimis* in more detail.
10. This was one of the points made by Judge Pell in his stinging dissent in *Bandemer*. According to Pell "(a) comparison between the percentage of Democratic votes cast statewide for legislative candidates and the number of seats actually won, standing alone, fails to prove dilution" (*Bandemer*, p. 1501). Pell went on to observe:

    > According to authorities that Justice Stevens cited approvingly in Karcher, "This method of identifying gerrymandering has major flaws . . . (T)he approach fails to account for the fact that the difference between the percentage of votes and number of seats captured may in fact be the result of natural advantages—the inordinate concentration of partisans in one place—rather than any deliberate partisan districting scheme." (*Bandemer*, p. 1501, quoting Backstrom, Robins, and Eller, 1978)

11. In the district court majority's own words: "No party to this lawsuit has attempted to state that the figures [of 1982 votes or election outcomes, by districts and aggregated statewide] have any value as a predictor of future election outcomes, and the Court makes no such reading of the statistics" (*Bandemer*, p. 1486).
12. This is a point I made in my trial testimony in *Bandemer* and in Grofman (1985a, p. 120). I was especially pleased to see it explicitly made in the Supreme Court plurality opinion.
13. The Indiana Senate plan is a staggered plan. The claim was made at trial (by plaintiffs' witness Mr. Dreyer) that, if one looked not just to the districts up for election in 1982 but also to those that would be decided in

1984, the Senate plan should be labeled a gerrymander. In rejecting the possibility of reliable projections of future election results (see fn. 10 above) the trial Court majority effectively foreclosed this line of attack on the Senate plan.

14. In particular, the district court reaffirmed that "the present districting is replete with 'uncouth' and 'bizarre' configurations that beg for some rationale, yet the state has set forth none" (1493) and that "repeated examples exist of bizarre district configurations, drawn with no recognition or adherence to political subdivisions such as municipalities and counties" (*Bandemer*, p. 1493). On pp. 1493–1494 the district court elaborates on examples.
15. My own assessment is that Democratic plaintiffs brought *Bandemer* on a relative shoestring financially.
16. This point was conveniently neglected by attorneys for plaintiffs in their posttrial brief, that made use of charts prepared by Mr. Dreyer, and then provided the attorneys' own interpretations of what the charts meant.
17. I should note, moreover, that my own testimony in *Bandemer* was not that there was no political gerrymandering in Indiana, but rather that the evidence offered by Mr. Dreyer was too flawed on a basis on which to rest a claim of unlawful gerrymandering effects.
18. In most cases there will not be the overwhelming intent evidence found in *Bandemer*. However, a good number of the many indicia identified in *Bandemer* (see, e.g., numbered items 1–16 above) could be missing without ruling out the possibility of intent being shown.
19. "(A)ppellees' claim as we understood it is that Democratic voters over the state as a whole, not Democratic voters in *particular districts*, have been subjected to unconstitutional discrimination" (*Davis v. Bandemer*, p. 2807, emphasis added). References to statewide vote are found elsewhere in the opinion (e.g., p. 2809).
20. Why the Supreme Court chose not to remand the case back to the district court for adjudication under the proper legal standard is a puzzle. My guess is that it may have had something to do with the fact that *Badham* was known to be in the pipeline and might be riper for a more detailed discussion of evidentiary issues. Also, there really was no credible evidence on the record for the unconstitutionality of the Senate plan, albeit the remand could have been for the House only. In particular, the *Bandemer* record did not provide much guidance as to how a remedy should be fashioned to deal with the plan's supposed defects (cf. "We have counselled before against striking down an entire appointment when the constitutional evil could be cured by lesser means," *Davis v. Bandemer*, p. 2813 n. 16, references omitted).
21. In this context it is worth noting that in *Badham v. Eu* (D. Calif, 1984), No. C-83-1126, the Republicans' challenge to California congressional districting in Federal District Court, plaintiffs "claim discrimination both statewide and in individual districts" (Memorandum of Points and Authorities in opposition to Motions to Dismiss Third Amended Complaint, November 21, 1986, p. 18 n. 8).
22. Also see *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, pp. 1108–1112 (N.D. Illinois, 1982), where fragmentation claims were at the heart of a vote dilution suit.

23. We should expect electoral predictions to be probabilistic in nature. Politics is necessarily about probabilities not certainties; nonetheless, as I argue below, sophisticated computer-aided gerrymandering, making use of incumbent displacement and heavy safety margins, can provide a high probability of a lock-in of partisan control for an entire decade. However, we need not wait for the decade. What is needed is evidence that, *if present electoral patterns persist, long-lasting effects of gerrymandering can be expected.*
24. Some scholars who have compared plans in terms of expected long-run effects have made use of computer simulations to determine the range of realistically possible electoral outcomes (Engstrom and Wildgen, 1977; O'Loughlin, 1976, 1982a,b). This can be thought of as a variant of method 1. See also Backstrom, Robins, and Eller (1978).
25. For example, Lowenstein's argument is not consistent with Justice White's view that unconstitutional gerrymandering can be shown by the "effective denial to a *minority of voters* of a *fair chance* to influence the political process" (*Davis v. Bandemer*, p. 2811, emphasis added).
26. Lowenstein (chapter 4) argues that the political gerrymandering cases are not to be adjudicated on the same "principles" as were enunciated in *Reynolds v. Sims* and subsequent "one person, one vote" cases and that these are cases of individual, not group, rights. While true in a narrow sense, this is a misleading statement. Had the principle of judicial intervention to remedy voting rights discrimination in the redistricting process not been established in *Baker* and *Reynolds*, courts would not have challenged redistricting plans that "operated to minimize or cancel out voting strength of racial or political groups" (*Fortson v. Dorsey*, 379 U.S. 433 (1965)). More important, only the politically naive would believe that lack of equal population districts would have ever been the subject of so much concern if it were not that different segments of society, in particular urban versus rural interest, were being differentially affected in their ability to have their views represented in the legislature.
27. Thus, I believe that at-large election plans in which partisan minorities are submerged may be struck down under *Davis v. Bandemer* in the way that racial submergence in at-large plans have been struck down in cases such as *Rogers v. Lodge* (458 U.S. 613 (1982)). In *Rogers* the necessary proof was shown by indirect factors and by the maintenance of a system whose discriminatory effects could be foreseen.
28. In the racial vote dilution minority cases, levels of (voting age) population (discounted for present and past levels of minority registration and turnout) are used to determine makeup of districts needed to provide minorities effective majorities, that is, a realistic opportunity to elect candidates of choice, in situations characterized by racial bloc voting. (See Brace, Grofman, Handley and Niemi, 1988, and case cites therein for details.)
29. Directly analogous are the provisions of parts (a)–(g) of Section 51.59 of the revised procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (28 CFR Part 51, January 6, 1987).
30. In Indiana there was no evidence for differential treatment of Democratic as compared to Republican incumbents.
31. Justice Brennan, in a footnote to this quote (p. 2770, n. 25), remarks that "the number of elections that must be studied in order to determine

whether voting is polarized will vary according to pertinent circumstances."

32. "The requirement of a threshold showing is derived from the peculiar characteristic of the political gerrymandering claims. We do not contemplate that a similar requirement would apply to our Equal Protection cases outside of this particular context" (*Davis v. Bandemer*, p. 2811, n. 14).
33. I have not dealt to any extent with the opinions of Justice Powell or Justice O'Connor in *Davis v. Bandemer* since I believe it likely that in the next case to be decided Justice White's plurality opinion will (after some melding with the views of Stevens and Powell) become the basis for a majority opinion.
34. Egregious political gerrymandering condemns political groups to permanent minority status almost regardless of their electoral strength or of changes in voter preferences (*Reynolds v. Sims*, pp. 565–566, cited in *Davis v. Bandemer*, p. 2806).

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ADDENDUM: REPLY TO LOWENSTEIN

In the Addendum to his essay Professor Lowenstein accuses me of "wishful thinking" in my interpretation of *Davis v. Bandemer*. Lowenstein's view is that *Davis v. Bandemer* is a case that sets out Fourteenth Amendment protections against some hypothetical future case involving "outcast political groups" subject to McCarthy-era-like discrimination. My view is the commonsense one that a case about partisan gerrymandering involving Republicans and Democrats is a case about partisan gerrymandering involving Democrats and Republicans, and that the plurality opinion (and all the other opinions) refers

to just that situation. Since Lowenstein holds the view that partisan gerrymandering ought not to be justiciable (Lowenstein and Steinberg, 1985), it seems clear to me which of us is engaged in wishful thinking; but, of course, only time will tell.