Supplementary Material

Chapter 10: The Reagan Era—Democratic Rights/Voting/Gerrymandering

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Davis v. Bandemer, 478 U.S. 109 (1986)

The state legislature of Indiana in 1981 passed a reapportionment bill that significantly advantaged Republicans, who at the time had a majority in both houses of the state legislature. The Speaker of the House in Indiana publicly declared that one purpose of the reapportionment was "to save as many incumbent Republicans as possible." In the first election held after the reapportionment, Democrats gained 52 percent of the statewide vote for the lower house of the state legislature, but won only 43 of the 100 seats contested. Before that election, Irwin Bandemer and other Democrats filed a lawsuit against Susan Davis and other members of the Indiana State Election Board, claiming that the reapportionment violated the equal protection clause of the Fourteenth Amendment. After the election took place, the local federal district court agreed with Bandamer's contentions and forbade state officials from using that apportionment in future elections. Davis appealed to the Supreme Court of the United States.

The Supreme Court reversed the lower court and reinstated the 1981 state election districts. The justices by a 6–3 majority ruled that controversies over partisan gerrymanders were justiciable, but by a 7–2 vote ruled that the Indiana gerrymander did not violate the equal protection clause. Why did the justices disagree over whether partisan gerrymanders are justiciable? Who had the better of the argument? Why did the justices who believed that gerrymanders are justiciable dispute whether an unconstitutional gerrymander took place in Indiana? Who had the better of that argument? During the 1980s, both Democrats and Republicans eagerly gerrymandered when their party controlled the state legislature. How, if at all, did this "bipartisanship" influence the voting alignments on the Supreme Court?

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court as to [justiciability] and an opinion in which JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join.

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Since *Baker v. Carr* (1962), we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. . . .

Our past decisions also make clear that even where there is no population deviation among the districts, racial gerrymandering presents a justiciable equal protection claim. . . .

In the multimember district cases, we have also repeatedly stated that districting that would "operate to minimize or cancel out the voting strength of racial or political elements of the voting population" would raise a constitutional question. . . .

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Disposition of this question does not involve us in a matter more properly decided by a coequal branch of our Government. There is no risk of foreign or domestic disturbance, and in light of our cases since *Baker* we are not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided.

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[T]hat the claim is submitted by a political group, rather than a racial group, does not distinguish it in terms of justiciability. That the characteristics of the complaining group are not immutable or that the

group has not been subject to the same historical stigma may be relevant to the manner in which the case is adjudicated, but these differences do not justify a refusal to entertain such a case.

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Having determined that the political gerrymandering claim in this case is justiciable, we turn to the question whether the District Court erred in holding that the appellees had alleged and proved a violation of the Equal Protection Clause.

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[I]n order to succeed the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group. . . .

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.

. . . Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.

. . .

In cases involving individual multimember districts, we have required a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution. Only where there is evidence that excluded groups have "less opportunity to participate in the political processes and to elect candidates of their choice" have we refused to approve the use of multimember districts.

These holdings rest on a conviction 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 constitutionally infirm. This conviction, in turn, stems from a perception that 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. This is true even in a safe district where the losing group loses election after election. . . .

As with individual districts, where unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination. Again, without specific supporting evidence, a court cannot presume in such a case that those who are elected will disregard the disproportionately underrepresented group. Rather, 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.

Although this is a somewhat different formulation than we have previously used in describing unconstitutional vote dilution in an individual district, the focus of both of these inquiries is essentially the same. In both contexts, the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. In a challenge to an individual district, this inquiry focuses on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate. Statewide, however, the inquiry centers on the voters' direct or indirect influence on the elections of the state legislature as a whole. And, as in individual district cases, an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such 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.

. . .

[E]ven if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, we do not believe that there has been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls.

. . . In the individual multimember district cases, we have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had essentially been shut out of the political process. In the statewide political gerrymandering context, these prior cases lead to the analogous conclusion that equal protection violations may be found only where a history (actual or projected) of disproportionate results appears in conjunction with similar indicia. The mere lack of control of the General Assembly after a single election does not rise to the requisite level.

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. . . The equal protection argument would proceed along the following lines: 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 district lines in accordance 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.

This course is consistent with our equal protection cases generally and is the course we follow here: We assumed that there was discriminatory intent, found that there was insufficient discriminatory effect to constitute an equal protection violation, and therefore did not reach the question of the state interests (legitimate or otherwise) served by the particular districts as they were created by the legislature. Consequently, the valid or invalid configuration of the districts was an issue we did not need to consider.

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CHIEF JUSTICE BURGER, concurring in the judgment.

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It is not surprising that citizens who are troubled by gerrymandering turn first to the courts for redress. . . . What I question is the Court's urge to craft a judicial remedy for this perceived "injustice." In my view, the Framers of the Constitution envisioned quite a different scheme. They placed responsibility for correction of such flaws in the people, relying on them to influence their elected representatives. . . .

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the judgment.

. . . I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended. . . .

. . . The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term.

To turn these matters over to the federal judiciary is to inject the courts into the most heated partisan issues. It is predictable that the courts will respond by moving away from the nebulous standard a plurality of the Court fashions today and toward some form of rough proportional representation for all political groups. . . .

. . .

The step taken today is a momentous one, which if followed in the future can only lead to political instability and judicial malaise. If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims. Federal courts will have no alternative but to attempt to recreate the complex process of legislative apportionment in the context of adversary litigation in order to reconcile the competing claims of political, religious, ethnic, racial, occupational, and socioeconomic groups. Even if there were some way of limiting such claims to organized political parties, the fact remains that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in federal court. Apportionment is so important to legislators and political parties that the burden of proof the plurality places on political gerrymandering plaintiffs is unlikely to deter the routine lodging of such complaints. Notwithstanding the plurality's threshold requirement of discriminatory effects, the Court's holding that political gerrymandering claims are justiciable has opened the door to pervasive and unwarranted judicial superintendence of the legislative task of apportionment. There is simply no clear stopping point to prevent the gradual evolution of a requirement of roughly proportional representation for every cohesive political group.

In my view, this enterprise is flawed from its inception. The Equal Protection Clause does not supply judicially manageable standards for resolving purely political gerrymandering claims, and no group right to an equal share of political power was ever intended by the Framers of the Fourteenth Amendment. . . .

. . .

Baker v. Carr does not require that we hold that the right asserted in this case is similarly within the intendment of the Equal Protection Clause and determinable under the standards developed to enforce that Clause. The right asserted in *Baker v. Carr* was an individual right to a vote whose weight was not arbitrarily subjected to "debasement." The rights asserted in this case are group rights to an equal share of political power and representation, and the "arbitrary and capricious" standard discussed in Baker v. Carr cannot serve as the basis for recognizing such rights.

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[T]he individual's right to vote does not imply that political groups have a right to be free from discriminatory impairment of their group voting strength. Treating the vote dilution claims of political groups as cognizable would effectively collapse the "fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community." . . .

In my view, where a racial minority group is characterized by "the traditional indicia of suspectness" and is vulnerable to exclusion from the political process, individual voters who belong to that group enjoy some measure of protection against intentional dilution of their group voting strength by means of racial gerrymandering. As a matter of past history and present reality, there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process. In these circumstances, the stronger nexus between individual rights and group interests, and the greater warrant the Equal Protection Clause gives the federal courts to intervene for protection against racial discrimination, suffice to render racial gerrymandering claims justiciable. . . .

Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties are the dominant groups, and the Court has offered no reason to believe that they are incapable of fending for themselves through the political process. . . . [E]ach major party presumably has ample weapons at its disposal to conduct the partisan struggle that often leads to a partisan apportionment, but also often leads to a bipartisan one. There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves. Absent such proof, I see no basis for concluding that there is a need, let alone a constitutional basis, for judicial intervention.

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Vote dilution analysis is far less manageable when extended to major political parties than if confined to racial minority groups. First, an increase in the number of competing claims to equal group representation will make judicial review of apportionment vastly more complex.

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Second, while membership in a racial group is an immutable characteristic, voters can—and often do—move from one party to the other or support candidates from both parties. Consequently, the difficulty of measuring voting strength is heightened in the case of a major political party. . . .

Moreover, any such intervention is likely to move in the direction of proportional representation for political parties. . . .

. . . Because the most easily measured indicia of political power relate solely to winning and losing elections, there is a grave risk that the plurality's various attempts to qualify and condition the group right the Court has created will gradually pale in importance. What is likely to remain is a loose form of proportionality, under which some deviations from proportionality are permissible, but any significant, persistent deviations from proportionality are suspect. . . .

Of course, in one sense a requirement of proportional representation, whether loose or absolute, is judicially manageable. . . . The flaw in such a pronouncement, however, would be the use of the Equal Protection Clause as the vehicle for making a fundamental policy choice that is contrary to the intent of its Framers and to the traditions of this Republic. . . .

. . .

[T]he plurality opinion ultimately rests on a political preference for proportionality-not an outright claim that proportional results are required, but a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes. . . .

Once it is conceded that "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult," the virtual impossibility of reliably predicting how difficult it will be to win an election in 2, or 4, or 10 years should, in my view, weigh in favor of holding such challenges nonjusticiable. Racial gerrymandering should remain justiciable, for the harms it engenders run counter to the central thrust of the Fourteenth Amendment. But no such justification can be given for judicial intervention on behalf of mainstream political parties, and the risks such intervention poses to our political institutions are unacceptable. . . .

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

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The plurality expresses the view, with which I agree, that a partisan political gerrymander violates the Equal Protection Clause only on proof of "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."

. . .

I am convinced that appropriate judicial standards can and should be developed. [The] definition of unconstitutional gerrymandering properly focuses on whether the boundaries of the voting districts have been distorted deliberately and arbitrarily to achieve illegitimate ends. In this case, the District Court examined the redistricting in light of such factors and found, among other facts, that the boundaries of a number of districts were deliberately distorted to deprive Democratic voters of an equal opportunity to participate in the State's legislative processes. . . .

The Equal Protection Clause guarantees citizens that their State will govern them impartially. . . . Since the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.

The Court's decision in *Reynolds v. Sims* (1964) illustrates two concepts that are vitally important in evaluating an equal protection challenge to redistricting. First, the Court recognized that equal protection encompasses a guarantee of equal representation, requiring a State to seek to achieve through redistricting "fair and effective representation for all citizens." The concept of "representation"

necessarily applies to groups: groups of voters elect representatives, individual voters do not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, as a group, the opportunity to elect the number of representatives to which their voting strength otherwise would entitle them. . . .

Second, at the same time that it announced the principle of "one person, one vote" to compel States to eliminate gross disparities among district populations, the Court plainly recognized that redistricting should be based on a number of neutral criteria. . .

. . . [E]xclusive or primary reliance on "one person, one vote" can betray the constitutional promise of fair and effective representation by enabling a legislature to engage intentionally in clearly discriminatory gerrymandering. . . .

. . .

[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 campaigns. . . . I cannot accept the plurality's apparent conclusion that loss of this "crucial" position is constitutionally insignificant as long as the losers are not "entirely ignored" by the winners.

. . .

Our cases have construed the Equal Protection Clause to require proof of intentional discrimination, placing the burden on plaintiffs to trace the "'invidious quality of a law claimed to be racially discriminatory . . . to a racially discriminatory purpose.'" . . . If a racial minority established that the legislature adopted a redistricting law for no purpose other than to disadvantage that group, the plurality's new and erroneous standard would require plaintiffs to wait for the results of several elections, creating a history of discriminatory effect, before they can challenge the law in court.

Justice STEVENS [has previously] described factors that I believe properly should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges. The most important of these factors are the shapes of voting districts and adherence to established political subdivision boundaries. Other relevant considerations include the nature of the legislative procedures by which the apportionment law was adopted and legislative history reflecting contemporaneous legislative goals. To make out a case of unconstitutional partisan gerrymandering, the plaintiff should be required to offer proof concerning these factors, which bear directly on the fairness of a redistricting plan, as well as evidence concerning population disparities and statistics tending to show vote dilution. No one factor should be dispositive.

In this case, appellees offered convincing proof of the ease with which mapmakers, consistent with the "one person, one vote" standard, may design a districting plan that purposefully discriminates against political opponents as well as racial minorities. . . . [T]he District Court carefully reviewed appellees' evidence and found that the redistricting law was intended to and did unconstitutionally discriminate against Democrats as a group. We have held that a district court's ultimate determination that a redistricting plan was "being maintained for discriminatory purposes," as well as its "subsidiary findings of fact," may not be set aside by a reviewing court unless they are clearly erroneous.

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The legislative process consisted of nothing more than the majority party's private application of computer technology to mapmaking. The Republican State Committee engaged the services of a computer firm to aid the conferees in their task. According to the Conference Committee Chairman, the only data used in the computer program were precinct population, race of precinct citizens, precinct political complexion, and statewide party voting trends. . . .

[T]he District Court found that the maps "conspicuously ignore[d] traditional political subdivisions, with no concern for any adherence to principles of community interest." The court carefully described how the mapmakers carved up counties, cities, and even townships in their effort to draw lines beneficial to the majority party. . . .

. . . [T]he mapmakers' partisan goals were made explicitly clear by contemporaneous statements of Republican leaders who openly acknowledged that their goal was to disadvantage Democratic voters. As one Republican House member concisely put it, "[t]he name of the game is to keep us in power." . . .

In short, the record unequivocally demonstrates that in 1981 the Republican-dominated General Assembly deliberately sought to design a redistricting plan under which members of the Democratic Party would be deprived of a fair opportunity to win control of the General Assembly at least until 1991, the date of the next redistricting.

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Appellees further demonstrated through a statistical showing that the House plan debased the effectiveness of their votes. In 1982, all 100 House seats were up for election. Democratic candidates received about 51.9 percent of the vote, and Republican candidates received about 48.1 percent. Forty-three Democratic representatives were elected; 57 Republicans were elected. Appellees offered startling statistics with respect to House results in Marion and Allen Counties, two areas in which multimember districts were used. In these counties, Democratic candidates earned 46.3 percent of the vote, but won only 3 of 21 House seats.

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The District Court found, and I agree, that appellants failed to justify the discriminatory impact of the plan by showing that the plan had a rational basis in permissible neutral criteria. [A]dherence to "one person, one vote" [does not] excuse the mapmakers' failure to honor established political or community boundaries. It does not excuse the irrational use of multimember districts, with their devastating impact on the voting strength of Democrats. . . .