The Burger Court Opinion Writing Database

Davis v. Bandemer

478 U.S. 109 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 14, 1985

Re: No. 84-1244 - Davis v. Bandemer

Dear Byron:

Your November 13 proposal is entirely acceptable.

Regards,

WEB

Justice White

Copies to the Conference

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: JUN 24 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

CHIEF JUSTICE BURGER, concurring in the judgment.

I join JUSTICE O'CONNOR's opinion.

It is not surprising that citizens who are troubled by gerrymandering turn first to the courts for redress. De Tocqueville, that perceptive commentator on our country, observed that "[s]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate." 1 A. De Tocqueville, Democracy in America 330 (Schocken ed. 1961). 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. As Justice Frankfurter wrote when the Court entered this political arena:

> "The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 13, 1985

No. 84-1244

Davis v. Bandemer

Dear Byron,

I agree that we should grant the stay and enter the order you propose.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 17, 1985

Davis v. Bandemer
No. 84-1244

Dear Byron,

As you know, I took a different approach to this case than you at Conference. However, after reading your memorandum, I am persuaded that yours is the better approach. My position at Conference--to apply rational basis scrutiny to allegations of partisan gerrymandering--would require courts to look the other way in cases where even minimally searching scrutiny would disclose an improper purpose. And while, for good reason, this is often the case under a rational basis test, it will happen more frequently in the apportionment context than it does with economic legislation precisely because--as you note in your draft--political concerns, usually partisan, determine every reapportionment scheme. Your approach, which concedes this fact, is thus less fictitous than mine, and I wholeheartedly join it. May I at this stage suggest some things that are not said that I hope you will consider adding?

(1) My understanding is that, as the District Court assumed, an Equal Protection claim ordinarily requires only proof of an adverse effect in addition to proof of purposeful discrimination. Your memorandum, as I read it, would establish a special rule for apportionment cases, requiring plaintiffs to prove a particular, heightened effect to make out an Equal Protection violation. That burden is appropriate in apportionment cases I think because, as your memorandum shows, the apportionment process is

unique. But should we not avoid any suggestion that the burden may apply outside the apportionment context, and is not some of the language in your memorandum susceptible to a reading that it does, or may, apply in other contexts? For example, would it not be open to the defendant in a case like last Term's Hunter v. Underwood, 105 S. Ct. 1916 (1984), to argue that although the law disenfranchising misdemeanants was purposely intended to injure Blacks, the Black plaintiffs had not established that the law "visited a sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause," Mem. at 15, if the number of disenfranchised Blacks is not appreciably greater than the number of disenfranchised Whites? Even though this case could be distinguished by quoting the language emphasizing the uniqueness of the apportionment process, that emphasis might be ignored by judges relying on this decision to extend the burden to other contexts. Could not the risk be avoided by expressly stating in the opinion that the rule we announce applies only to apportionment cases because of their unique characteristics? For myself, I would prefer that course.

(2) Should not the opinion encourage a reading that will discourage the bringing of suits alleging partisan gerrymandering? If that is desirable (and I definitely think that it is), would you consider expanding the statement of the facts (or perhaps section II C) to include a fuller description of the evidence introduced by the Democrats to demonstrate the effects of the Indiana law? The object would be to discourage

lower courts from too readily relying upon a supposed paucity of such evidence as a reason to distinguish the case. I suggest this even though we must acknowledge that the District Court declined to rely on this evidence, the point being to demonstrate that we too were not persuaded by it.

(3) Should we not also be careful to use use language that avoids making it more difficult than it already is to prove racial gerrymandering? (Although the 1982 amendments to the Voting Rights Act make this issue less important just now, must we not guard against any erosion of the constitutional standards?) To that end, ought we not emphasize that nothing in the opinion alters the holdings of our race cases, and that where, as in White v. Regester and Rogers v. Lodge, intent to discriminate is established by proof of disparate impact (under the appropriate standards), this evidence also establishes the effect required for an unconstitutional gerrymander? Indeed, I wonder if we ought not expand the treatment of this issue: Although claims of political and racial gerrymandering are similar in many respects, do not some differences deserve mention? On the one hand, for example, our basis for virtually presuming intent to discriminate in partisan gerrymandering cases is not present in race cases because the institutional pressures are different; in this sense, a claim of racial gerrymandering is harder to establish than a claim of partisan gerrymandering. On the other hand, however, the opportunities for minority groups to "influence the political process," Mem., at 18, are naturally more limited than the opportunities available to a major

political party. As a result, minority groups are more susceptible to being closed out of the political process and the effect of a racial gerrymander is likely to be greater. Courts should therefore be more sensitive to potential adverse effects on such groups--perhaps we should say that a lower threshold might suffice to meet the constitutional standard? Of course, this lower threshold would only come into play where intent to discriminate is established, in whole or in part, by direct evidence rather than solely by evidence of disparate impact. This is because the effects by way of disparate impact that must be shown in order to prove intent are already so high.

(4) Although the memorandum does state at page 13 that the focus of the Equal Protection claim is "somewhat different" in the context of statewide and single-district challenges, should we not also spell out what these differences are? The explanation of what is required to establish an unconstitutional gerrymander, beginning in the middle of page 17 and continuing through to page 19, seems to apply in both contexts. Should not the distinction be clarified?

(5) Should the focus of the effects inquiry at pages 17-19 also be clarified? First, is it clear whether a court should focus on the impact of a gerrymander on a group's power to influence the political process <u>vel non</u>, or on <u>electoral power</u> in relation to a group's ability to influence the political process? Could a defendant argue, for example, that whatever effect a gerrymander may have had on the power of a particular political or racial group to elect representatives, that effect was

insufficient to render an apportionment plan unconstitutional because the group had other means of input (lobbying, press access) into the political process? I assume you would reject that argument, for I read your memorandum as focusing the effects inquiry on electoral power. If so (and I agree) should you delete the phrase "and political" found 6 lines from the bottom of page 17 and again 4 lines from the top of page 18? And should you not also add the phrase "by electing representatives" at the end of the carryover paragraph on page 18? Also, may not the statement made 9 lines from the bottom of page 17--that an effect may not be shown even where the losing group loses "election after election"--go too far? Where a group repeatedly loses elections over a long period of time, may not the representative from that district begin to ignore the group's interests since his repeated victories will have established that the group's votes are not needed to win and there will be no incentive to compromise the interests of those who vote for him.

More generally, however, I am not clear on what exactly is the test a lower court should apply in determining whether a gerrymander rises to the level of unconstitutionality. Among the candidates are: (a) that the votes of a group are rendered "essentially impotent," Mem., at 17; (b) that the "electoral [and political] system is arranged in a manner that will consistently degrade a voter's or a group of voter's influence on the political process as a whole," ibid.; (c) that "the electoral [or political] system substantially disadvantages certain voters in their ability to influence the political process effectively,"

id., at 18; and (d) that there has been "continued frustration of the will of a majority of the voters or effective denial to a minority of voters of the ability to influence the political process [by electing representatives]," ibid. May I paraphrase the basic argument of your memorandum as I understand it?

> Our holdings in prior apportionment cases establish that merely because a particular apportionment scheme makes it more difficult to elect representatives and thereby influence the political process is insufficient to render the scheme constitutionally infirm. This is because the power to influence the political process is more complicated than merely winning elections so that a group's power to influence that process is not impaired merely because winning elections is made more difficult. [I would add here an argument to the effect that it is very difficult for a court to ascertain whether a group's power to influence the political process has been impaired because winning elections may have been made more difficult.] Consequently, a court can conclude that impairment has occurred only when evidence establishes that the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voter's influence on the political process as a whole. Merely failing to attain proportional representation does not do this.

If my understanding is correct, I think this passage--unquestionably of dispositive importance--might be reworked to make the point perfectly clear.

(6) Would you mind deleting the sentence at the bottom of page 18 and carrying over to the top of page 19. In part, of course, this is because I do not agree that unjustified deviations from the 1-man, 1-vote principle are permissible. But also, it seems to me that the rationale which allows deviations from the 1-man, 1-vote principle does not support requiring a

plaintiff to show significant effects in an intentional discrimination case. Ordinarily, only an adverse effect need be shown in intentional discrimination cases because the gravamen of the injury in such cases is the invidious purpose motivating the discriminatory classification. The gravamen of the injury in a 1-man, 1-vote case, on the other hand, is the unequal distribution of a fundamental interest. If variation from exact compliance with the 1-man, 1-vote principle is justified at all, it is on the theory that no injury exists so long as the fundamental interest in an equally weighted vote is distributed within tolerable limits. That rationale is inapplicable in an intentional discrimination case. In any event, the point does not appear to be particularly necessary to your opinion.

(7) While I do not disagree with the several points you make in part III of the opinion, Mem., at 22-23, are these necessary to the holding; indeed, do they not depart from the rest of your reasoning? If that is so, should you not delete this section entirely to avoid confusing lower courts and breeding more problems for us? But, I suggest we save (perhaps in a footnote) the point in the last paragraph of part III, that it is improper to strike down an entire plan when lesser means of curing the constitutional fault are available.

Only the importance of this case (perhaps the most important of the Term) can justify the length of my comments. You have done a superb job, and I fully expect that I will join your opinion when it is circulated. Acceptance of these suggestions, or at least some of them, will make my join even easier.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 16, 1986

No. 84-1244

Davis v. Bandemer

Dear Byron,

I have joined your circulation today. I am, of course, delighted that you found the suggestions helpful.

Sincerely,

Bill

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 16, 1986

No. 84-1244

Davis v. Bandemer

Dear Byron,

Although at Conference I rested on a different ground, I find your memorandum most persuasive, and if it becomes a Court opinion please join me. I may be adding a comment or two of my own.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 21, 1986

Davis v. Bandemer

No. 84-1244

Dear Byron,

I am still with you.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 13, 1985

MEMORANDUM TO THE CONFERENCE

Re: 84-1244 - Davis v. Bandemer

As you know, appellants have reapplied for a stay in this case, and we put the matter over at the last Conference. I suggest that we take it up this Friday and that we grant the stay.

The Conference vote indicated that the District Court should not have invalidated the entire statute. Since I am now convinced, somewhat contrary to my Conference vote, that the District Court erred in striking down any part of the statute, there may be a majority of the Court of that mind, although the reasons for reaching that result may vary. Also, unless the judgment below is stayed, its implementation will require that Indiana be reapportioned prior to the 1986 elections, either by the legislature or by the District Court. The normal filing date for that election falls in the spring. The state would thus be required to abandon its present districting scheme and to hold an election under a statute or a court order that, at least as of now, it is very doubtful there is any need to formulate. It seems to me that all of the requirements are present, even if the end we agree with the District Court in whole or in part.

I suggest that a brief order along the following lines be entered:

> The appellants having reapplied for a stay in this case pending its final resolution in this Court and it appearing that all of the requirements for the issurance of a stay are satisfied, the application is granted and it is ordered that the judgment of the District Court for the Southern District of Indiana is stayed until further order of the Court.

B.R.W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 13, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Bill,

I have revised the memorandum in this case to accommodate, wholly or partially, all but one of the helpful suggestions made in your letter of December 17. The one exception is that I have not expanded the statement of the facts. The attached version is being circulated.

Sincerely yours,

Justice Brennan

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: JAN 13 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[January ——, 1986]

Memorandum of JUSTICE WHITE.

The Indiana Legislature, also known as the "General Assembly," consists of a House of Representatives and a Senate. There are 100 members of the House of Representatives, and 50 members of the Senate. The members of the House serve two-year terms, with elections held for all seats every two years. The members of the Senate serve four-year terms, and Senate elections are staggered so that half of the seats are up for election every two years. The members of both Houses are elected from legislative districts; but, while all Senate members are elected from single-member districts, House members are elected from a mixture of single-member and multi-member districts. The division of the State into districts is accomplished by legislative enactment, which is signed by the Governor into law. Reapportionment is required every ten years and is based on the federal decennial census. There is no prohibition against more frequent reapportionments.

In early 1981, the General Assembly initiated the process of reapportioning the State's legislative districts pursuant to the 1980 census. At this time, there were Republican majorities in both the House and the Senate, and the Governor

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Stylistic changes and
pp. 24-28 added

Circulated: _____

Recirculated: MAR 17 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[March ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In this case, we review a judgment from a three-judge District Court, which sustained an Equal Protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats. 603 F. Supp. 1479 (1984). Although we find such political gerrymandering to be justiciable, we conclude that the District Court applied an insufficiently demanding standard in finding unconstitutional vote dilution. Consequently, we reverse.

I

The Indiana Legislature, also known as the "General Assembly," consists of a House of Representatives and a Senate. There are 100 members of the House of Representatives, and 50 members of the Senate. The members of the House serve two-year terms, with elections held for all seats every two years. The members of the Senate serve four-year terms, and Senate elections are staggered so that half of the seats are up for election every two years. The members of both Houses are elected from legislative districts; but, while all Senate members are elected from single-member districts, House members are elected from a mixture of single-member and multi-member districts. The division of the State into districts is accomplished by legislative enactment,

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

pp. 13-15, 26-27, 30-31
and stylistic

Circulated: _____

Recirculated: JUN 16 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In this case, we review a judgment from a three-judge District Court, which sustained an Equal Protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats. 603 F. Supp. 1479 (1984). Although we find such political gerrymandering to be justiciable, we conclude that the District Court applied an insufficiently demanding standard in finding unconstitutional vote dilution. Consequently, we reverse.

I

The Indiana Legislature, also known as the "General Assembly," consists of a House of Representatives and a Senate. There are 100 members of the House of Representatives, and 50 members of the Senate. The members of the House serve two-year terms, with elections held for all seats every two years. The members of the Senate serve four-year terms, and Senate elections are staggered so that half of the seats are up for election every two years. The members of both Houses are elected from legislative districts; but, while all Senate members are elected from single-member districts, House members are elected from a mixture of single-member and multi-member districts. The division of the State into districts is accomplished by legislative enactment,

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

Circulated: _____

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In this case, we review a judgment from a three-judge District Court, which sustained an equal protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats. 603 F. Supp. 1479 (1984). Although we find such political gerrymandering to be justiciable, we conclude that the District Court applied an insufficiently demanding standard in finding unconstitutional vote dilution. Consequently, we reverse.

I

The Indiana Legislature, also known as the "General Assembly," consists of a House of Representatives and a Senate. There are 100 members of the House of Representatives, and 50 members of the Senate. The members of the House serve two-year terms, with elections held for all seats every 2 years. The members of the Senate serve 4-year terms, and Senate elections are staggered so that half of the seats are up for election every two years. The members of both Houses are elected from legislative districts; but, while all Senate members are elected from single-member districts, House members are elected from a mixture of single-member and multi-member districts. The division of the State into districts is accomplished by legislative enactment, which is

Undated

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June 30, 1986]

JUSTICE WHITE announced the judgment of the Court and delivered the opinion of the Court as to Part II and an opinion in which JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN joined as to Parts I, III, and IV.

In this case, we review a judgment from a three-judge District Court, which sustained an equal protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats. 603 F. Supp. 1479 (1984). Although we find such political gerrymandering to be justiciable, we conclude that the District Court applied an insufficiently demanding standard in finding unconstitutional vote dilution. Consequently, we reverse.

I

The Indiana Legislature, also known as the "General Assembly," consists of a House of Representatives and a Senate. There are 100 members of the House of Representatives, and 50 members of the Senate. The members of the House serve two-year terms, with elections held for all seats every 2 years. The members of the Senate serve 4-year terms, and Senate elections are staggered so that half of the seats are up for election every two years. The members of both Houses are elected from legislative districts; but, while all Senate members are elected from single-member districts,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 24, 1986

MEMORANDUM TO THE CONFERENCE

Re: Case held for Davis v. Bandemer, No. 84-1244

Rappleyea v. Cuomo, No. 85-1170

Jurisdiction WSF Q

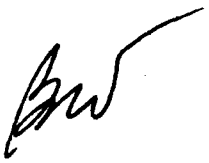
This appeal involves a challenge to the constitutionality of a 1982 reapportionment of state legislative districts in New York. Suit was originally brought suit in N.Y. state court alleging that the reapportionment constituted a political gerrymander in violation of the Fourteenth Amendment. The plaintiffs also raised state law claims that are not relevant to this appeal. The trial judge granted summary judgment against the plaintiffs, stating in relevant part that their federal constitutional claim presented a nonjusticiable issue. See App. to Juris. Stmt. at A16. In reaching this conclusion, the trial court asserted that although apportionment cases involving numerical disparities between districts were susceptible of easy disposition, cases involving gerrymandering claims lacked judicially manageable standards. Having found the claim nonjusticiable, however, the trial court went on to state that, even assuming that the claim were justiciable, the plaintiffs had failed to meet their burden of proof on the issue, having offered no evidence in support of the allegation that the plan was designed to maximize the political power of a particular party. Id., at A19. The trial court also denied a motion for discovery into the process by which the districting plan was formulated.

The plaintiffs appealed this ruling, and appellant here (the Minority Leader of the State Assembly) intervened in support of the appeal. The Appellate Division of the Supreme Court affirmed in a brief per curiam. The court first held, citing WMCA, Inc. v. Lomenzo, 382 U.S. 4, 5-6 (1965) (Harlan, J., concurring), that the claim that the law amounted to a partisan political gerrymander was nonjusticiable. In any event, the court concluded, insufficient evidence of partisan intent or of the existence of preferable plans (providing for both more compact districts and greater population equality) was presented to support the claim even if it were held to be justiciable.

The N.Y. Court of Appeals affirmed by order for the reasons given by the Appellate Division.

Appellant now urges the Court to note probable jurisdiction to address the question whether the political gerrymandering claim is in fact justiciable, contrary to the holding of the N.Y. courts. Appellant repeats in large part the arguments made by the appellees in Davis v. Bandemer and the reasoning incorporated in the proposed opinion for the Court on this issue. The appellees, in their motion to dismiss or affirm, argue that regardless of the substantiality of the question of political gerrymandering in the abstract, this case should be affirmed because the facts presented in support of the claim on the merits are woefully inadequate. Appellees argue in this regard that the judgment of the court below did not rest merely on nonjusticiability but also alternatively on the state courts' invocation of "longstanding and legitimate rules of procedure designed to dispose summarily of insubstantial claims." Motion to Dismiss or Affirm at 5. Here, the plaintiffs failed to produce evidence of vote dilution of an identifiable political group, and the record in fact demonstrated that the redistricting plan was objective and neutral.

This is a proper appeal since the state courts rejected the federal challenge to the state law on federal rather than on independent and adequate state grounds. Given the holding on justiciability, which conflicts with the Court's holding in Bandemer, this would seem a strong candidate for a "vacate and remand." But the alternative holding below rested on inadequate proof; and absent the nonjusticiability holding, I would have DWSFQ'd. This is also my recommendation even with the erroneous holding on justiciability. If it is felt that this would be misleading, I would not oppose a GVR on Davis.



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 14, 1985

Re: No. 84-1244-Davis v. Bandemer

Dear Byron:

I agree with your proposed order.

Sincerely,

T.M.

Justice White

cc: The Conference

W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 16, 1986

Re: No. 84-1244-Davis v. Bandemer

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 14, 1985

Re: No. 84-1244, Davis v. Bandemer

Dear Byron:

I agree with the order you propose in your memorandum of November 13.

Sincerely,

Harry

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 14, 1986

Re: No. 84-1244, Davis v. Bandemer

Dear Byron:

Please join me.

Sincerely,

Harry

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 14, 1985

No. 84-1244, Davis v. Bandemer

Dear Byron,

Though I plan to dissent from your proposed disposition of this case, I do not dissent from the Court's decision to grant a stay.

Sincerely,

L.F.P.

L.F.P., Jr.

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 13, 1986

84-1244 Davis v. Bandemer

Dear Byron:

In due time I will circulate a dissenting view.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 29, 1986

MEMORANDUM TO THE CONFERENCE

84-1244 Davis v. Bandemer

In the New Jersey reapportionment case, Karcher v. Daggett (1983), we agreed that an understanding of the issues would be facilitated by reproducing in color the maps of the new districts.

We have a similar problem in Bandemere. Without the reproduction of the maps in color it is quite difficult to understand this case. I do not recall whether this is a decision for the Chief Justice, the Conference or whether - if a majority of you agree - the reporter can be requested to make the necessary arrangements.

LFP, JR.

L.F.P.

LFP/vde

cc - Reporters Office

February 21, 1986

84-1244 Davis v. Bandemer, et al

Dear John:

Here is a Chamber's draft of my proposed opinion in this case.

As we were together at Conference, I would be grateful if you would review the draft prior to circulation, and give me the benefit of your thoughts.

Sincerely,

Justice Stevens

LFP/vde

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: FEB 25 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[March ——, 1986]

JUSTICE POWELL, concurring in Part I of the Memorandum Opinion, and dissenting.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, JUSTICE WHITE's memorandum opinion 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." *Ante*, at 13. The memoran-

[1] This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 U. C. L. A. L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

02/26

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

p. 1

From: **Justice Powell**

Circulated:

Recirculated: FEB 27 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[March ——, 1986]

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in Part I of the Memorandum Opinion, and dissenting.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, JUSTICE WHITE's memorandum opinion 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 discrimi-

[1] This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 U. C. L. A. L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

03/03

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

Stylistic Changes Throughout

From: **Justice Powell**

Circulated: _____

Recirculated: MAR 3 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[March ——, 1986]

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in Part I of the Memorandum Opinion, and dissenting.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, JUSTICE WHITE's memorandum opinion 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 discrimi-

[1] This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 U. C. L. A. L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

March 18, 1986

PERSONAL

84-1244 Davis v. Bandemer

Dear Chief:

Before you come to rest in this difficult case, I would welcome the opportunity to have you take a look at the original maps put in evidence in this case.

The Clerk's Office obtained these and I have them in my Chambers. They are dramatic, and - support the old adage - that a "picture" is more effective than a thousand words. When you read Byron's opinion and my dissent, bear in mind that this may be the last chance the Court will have to escape the straitjacket of "one person one vote" regardless of all other relevant factors.

I am making a substantial reply to Byron's latest circulation, and think you will find that he wholly ignores critical factual findings of the District Court in a desire to consider only whether redistricting comports with one person one vote, and does not result in any statewide lack of proportionality.

You can see the maps in 10 minutes, and you would be welcome.

Sincerely,

The Chief Justice

lfp/ss

April 7, 1986

84-1244 Davis v. Bandemer

Dear Byron:

The printer has lent me the two colored maps that will accompany my opinion.

I think that Roland and Wilma have done a superb job in reproducing these maps that were a part of the record below. They are generally along the lines of the maps appended to the Karcher opinion.

Roland hopes we can return these promptly. There are no other copies.

Sincerely,

Justice White

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

pp. 9, 11, 12, 13, 14, 17, 20, 21, 22, 23

From: **Justice Powell**

Circulated:

Recirculated: APR 8 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[April ——, 1986]

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in Part I of the Court's opinion, and dissenting.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, the Court 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." *Ante*, at 13. The Court acknowledges that the record in this case

[1] This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 U. C. L. A. L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

April 16, 1986

PERSONAL

84-1244 Davis v. Bandemer

Dear Chief:

In a letter you recently wrote me about another case, you expressed the view that it probably was the most important case before you as a judge since you went on the bench in 1955.

By comparison, in terms of the effect on our system of government, I think upon reflection you will agree that this Indiana redistricting case is similarly important. I have shared your view that the "one person, one vote" rule (it is neither a principle nor a standard) is simply a manipulable formula that does no credit to this Court. The total rigidity with which four Justices are now willing to apply this rule eliminates all judicial discretion.

I invite you again to spend ten minutes looking at the original exhibit maps here in my Chambers. The undisputed record shows that these voting districts were redrawn by mapmakers using computers, and hurriedly adopted by party line vote on the last day of the legislative session. Concededly, their only objective was to entrench the party in power. Under Byron's opinion all that will be necessary in many states - to establish monopoly control by a party for perhaps ten years - is for hired personnel (with the relevant data and computers) to draw the kind of district lines shown on the maps in this case.

Byron's opinion rejects, not as erroneous but as irrelevant, all of the findings of fact made by the three-judge District Court. Despite his finding of justiciability, Byron's opinion effectively eliminates any justiciable issue. As will be clearer when you see the maps, and reread the findings of the District Court, one cannot conceive of a more egregious gerrymandering than this case presents.

In order to agree that there is no justiciable issue, one would have to overrule Baker v. Carr, Reynolds v. Sims, and a half-dozen or more cases in which this Court has assumed jurisdiction and decided claims respecting redistricting and reapportionment. When I mentioned our precedents to Bill Rehnquist, he agreed that this line of cases

should be overruled but recognized the votes aren't here to do that. If I had been on the Court when Carr and Sims were decided, I probably would have agreed with the dissents of Harlan and Frankfurter on federalism grounds. In view of my respect for stare decisis, and for the integrity of this Court as an institution, I would not vote now to overrule them.

Yet, while proclaiming justiciability, there are four votes to affirm this Indiana case simply on the basis of "one person, one vote". All of the other relevant factors identified particularly in Reynolds v. Sims, and though found by the District Court to have been ignored by the Indiana legislature, are now said to be irrelevant.

The "one person, one vote" rule, when thus reduced to a mathematical and computerized exercise, has become no rule at all in any judicial sense. A few skilled teenagers, with the requisite data and a computer, will be able to accomplish a wholly partisan redistricting while complying perfectly with "one person, one vote." The legislature is then free to adopt the plan on party lines without even a public hearing.

In sum, your vote now - even if you join only the judgment to reverse - will establish a precedent under which redistricting is reduced to a simple mechanical procedure to be manipulated by the politicians who happen to be in control. This Court's decision would foreclose all effective judicial review. In a word, the considerations of public interest so clearly identified in Reynolds v. Sims will be ignored. And in my view, this Court will have abdicated its responsibility.

While I hope you will join my opinion, an option that you might consider is simply to vote to affirm - either on the basis of the findings of the District Court, or without any amplification of your vote.

Let me know if you still wish to see the maps, and I will have them all set for you.

Sincerely,

The Chief Justice

lfp/ss

May 6, 1986

Personal

84-1244 Davis v. Bandemer

Dear Chief:

As you indicated an intention to reread my opinion in this case, I enclose - for your convenience - a copy of the 4th Draft in which I replied to Byron.

You will note that none of the District Courts extensive findings of fact was found by Byron to be clearly erroneous. Also, in Part V (p. 24, 25) of my opinion, I make clear that although federal courts have a duty under the Equal Protection Clause to review cases of extreme gerrymandering, a heavy burden of proof rests on those who challenge any redistricting plan.

The colored insert maps that will accompany my opinion are not yet available.

Sincerely,

The Chief Justice

LFP/vde

June 4, 1986

PERSONAL

84-1244 Davis v. Bandemer

Dear Chief:

At long last, samples of the Indiana maps, that will be appended to my dissent, are available. I enclose a copy as it will be folded into the U.S. Reports. The Indiana Senate districts are on one side and the House districts on the other.

You will be particularly interested in the gerrymandering of the heavily populated areas around Indianapolis. This is true of both the House and Senate races.

Also, there are numerous other examples. Take a look at House districts 11, 12, 13 and 14 in northwest Indiana; at districts 5, 7 and 8 in northern Indiana; and at 71 and 72 in the southeast.

It is obvious that contrary to Reynolds v. Sims and its progeny, the Indiana legislature ignored all factors relevant to the validity of redistricting except "one person, one vote" as the DC found. Byron's opinion does not question the detailed factual findings of the DC.

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

pp. 4, 5, 12, 14, 25

From: **Justice Powell**

Circulated:

Recirculated: JUN 20 1986

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in Part I of the Court's opinion, and dissenting.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, the Court 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." *Ante*, at 13. The Court acknowledges that the record in this case supports a finding that the challenged redistricting plan was

[1] This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 U. C. L. A. L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated:

Recirculated: 6/24/86

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

JUSTICE POWELL, with whom JUSTICE STEVENS joins, concurring in Part II of the Court's opinion, and dissenting.

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, the Court 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." *Ante*, at 13. The Court acknowledges that the record in this case supports a finding that the challenged redistricting plan was

[1]This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 U. C. L. A. L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

June 27, 1986

84-1244 Davis v. Bandemer

Dear John:

In view of your perceptive suggestion, what do you think of a note along the following lines?

Suggested new note 12, p. 12 (call number to follow last word in text):

As is evident from the several opinions filed today, there is no "Court" for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional political gerrymander. The standard proposed by the plurality is explicitly rejected by two Justices, and three Justices also have expressed the view that the plurality's standard will "prove unmanageable and arbitrary" ante, at 12 (O'Connor, J., joined by Burger, CJ., and Rehnquist, J., concurring in the judgment).

Sincerely,

Justice Stevens

lfp/ss

Stylistic Changes Throughout.

JUN 28 1986

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June 30, 1986]

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

This case presents the question whether a state legislature violates the Equal Protection Clause by adopting a redistricting plan designed solely to preserve the power of the dominant political party, when the plan follows the doctrine of "one person, one vote" but ignores all other neutral factors relevant to the fairness of redistricting.[1]

In answering this question, 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." *Ante*, at 15. The plurality acknowledges that the record in this case supports a finding that the challenged redistricting

[1] This opinion uses the term "redistricting" to refer to the process by which state legislators draw the boundaries of voting districts. The terms "redistricting," "apportionment," and "reapportionment" frequently are used interchangeably. Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn. L. Rev. 1121, 1121, n. 1 (1978); Grofman, Criteria for Districting: A Social Science Perspective, 33 U. C. L. A. L. Rev. 77, 78, n. 6 (1985). Technically, the words "apportionment" and "reapportionment" apply to the "allocation of a finite number of representatives among a fixed number of pre-established areas," while "districting" and "redistricting" refer to the drawing of district lines. Backstrom, Robins, & Eller, *supra*, at 1121, n. 1; see Grofman, *supra*, at 78, n. 6.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 13, 1985

Re: No. 84-1244 Davis v. Bandemer

Dear Byron,

I agree with your proposed stay order in this case.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 27, 1986

Re: No. 84-1244 Davis v. Bandemer

Dear Byron,

As I told both you and Sandra earlier, after reading your respective circulations, I agree with Sandra's idea that claims of political gerrymandering, at least when brought on behalf of a major political party, are not justiciable.

Sincerely,

WHR

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Sandra:

Please join me in your opinion concurring in the judgment.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 13, 1985

Re: 84-1244 - Davis v. Bandemer

Dear Byron:

Although I am not entirely sure that a stay is necessary, I believe your recommendation should be controlling on an issue of this kind and therefore join your proposed order.

Respectfully,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 17, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Byron:

Although I agree with a good deal of what you have written in your memorandum, I shall wait for Lewis' writing.

In general I agree with your view that claims of this kind are justiciable and that they should have to surmount a fairly substantial threshold. As you may surmise, however, I am inclined to think that the standards that I discussed in my separate writing in Karcher v. Daggett, may be more manageable than the "effects" approach that your memorandum seems to endorse.

Respectfully,

John

Justice White

Copies to the Conference

Ann - I think we have made these changes except w/respect to make.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 24, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Lewis:

Confirming my telephone conversation with you on Saturday, I think you have done a really excellent job in drafting your opinion in this case. These are the flyspecks that I mentioned on the telephone:

1. I think it is Part I rather than Part II of Byron's Memorandum that we will be joining.

2. In footnote 10 on pages 12-13, you refer to Judge Pell as a resident of Illinois. He just moved to Illinois at the time of his appointment to the Court of Appeals and has the same kind of connection with Indiana that you have with Virginia. He was president of the Indiana Bar Association and a practitioner in Indiana throughout his pre-judicial career.

3. We are going to check past history to see if the fact that there are one hundred House districts and fifty Senate districts may in the past have led the legislature to follow what would seem to be a natural pattern of placing two House districts in each Senate district.

4. At the end of the first sentence in the text on page 12, you might want to append a footnote citing to the maps in the Official Reports of Karcher v. Daggett, and also Gomillion v. Whitefoot, in which some truly grotesque shapes provide pretty convincing evidence of gerrymandering. (I may have failed to make this suggestion when we talked on Saturday.)

5. On page 21, I think you should omit the words "unless the Court is willing to reconsider" and perhaps substitute something like: "It is perfectly clear, however, that under the Court's precedents such as Baker v. Carr, ..." (I hope you can also make a comparable change in n. 18 on page 21.)

6. I'll study the opinion again in the light of Byron's writing, but you can definitely count on my joining you.

Respectfully,

John

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

(3)

February 26, 1986

Re: 84-1244 - Davis v. Bandemer

Dear Lewis:

Please join me.

Respectfully,

John

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 13, 1985

No. 84-1244 Davis v. Bandemer

Dear Byron,

I agree with your proposed order.

Sincerely,

Sandra

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543
January 15, 1986

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Re: 84-1244 Davis v. Bandemer

Dear Byron,

My vote at Conference was to reverse either on the grounds that political gerrymandering claims are nonjusticiable or on the grounds that the apportionment scheme at issue in this case survives a highly deferential rational basis scrutiny under the Equal Protection Clause. On reflection, and with the benefit of your helpful Memorandum, I am now inclined to think political gerrymandering claims should be held to be nonjusticiable because I do not think the Equal Protection Clause supplies any judicially manageable standard in this context.

Many of the reasons you offer for requiring plaintiffs bringing a political gerrymandering claim to make a threshold showing of serious effects requiring intervention by a federal court seem to me equally applicable to the prior question whether such claims are justiciable. Certainly this is so of your observation that it would be unwise to "embroil the judiciary in what has consistently been referred to as a political task for the legislature." Memorandum, at 19. The presumption you suggest that elected candidates will not ignore the interests of voters for the losing candidate, and your assertion that "the power to influence the political process is not limited to winning elections," Memorandum, at 17-18, support the view that political gerrymandering should not be seen as causing intolerable harm to the ability of political groups to advance their interests. As you note, we tolerate equivalent disproportionalities between a political group's voting strength and its direct representation in the legislature when caused by district-wide election systems. And 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," Memorandum at 18, it seems to me that the virtual impossibility of reliably distinguishing

between degrees of difficulty in winning elections cuts in favor of holding such challenges nonjusticiable. Moreover, I see no basis for treating supposed diminution of the statewide voting influence of a political group as constitutionally cognizable when a scheme that tended to "deny safe district minorities any realistic chance to elect their own representatives," Memorandum at 17, was upheld in Gaffney. Although Gaffney treated a political gerrymandering claim as justiciable, the opinion's observation that "districting inevitably has and is intended to have substantial political consequences," 412 U.S., at 753, and its reluctance to undertake "the impossible task of extirpating politics from what are the essentially political processes of the sovereign States," id., at 754, would equally support a holding that whatever harms political gerrymandering may sometimes occasion are inextricably associated with the business of redistricting. Legislative redistricting thus yields a variety of real benefits but it cannot be subjected to judicial supervision without great cost.

The standard you propose exemplifies the intractable difficulty in deriving a judicially manageable standard from the Equal Protection Clause. I know of no way to measure "a voter's or a group of voters' influence on the political process as a whole." Memorandum, at 18. To allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections or future apportionments invites "findings" on matters as to which neither judges nor anyone else can have any confidence. You reject proportionality between voting strength and electoral outcomes as a standard, but it seems to me all but inevitable that courts will look for "undue" disproportionality or the like if political gerrymandering claims are justiciable.

It seems to me these difficulties, and the even greater ones that would attend any imposition of supposedly neutral criteria on legislative choices as to apportionment, justify treating the vote dilution claims of mainstream political groups as nonjusticiable. Where a racial minority challenges an apportionment scheme, 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 such claims justiciable. As does your Memorandum, I would leave our current doctrine with respect to such challenges undisturbed. But to allow the proliferation of vote

dilution claims by mainstream political groups would essentially be "to conclude that political groups themselves have an independent constitutional claim to representation." Mobile v. Bolden, 446 U.S. 55, 79 (1980) (plurality opinion). Since I see no manageable way of conferring such a right on the very political groups that have shaped apportionment throughout our history, I am inclined to believe that the Equal Protection Clause does not compel treating political gerrymandering claims as justiciable.

Sincerely,

Sandra

Justice White

Copies to the Conference

To Anne

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 9, 1986

Re: 84-1244 Davis v. Bandemer

Dear Lewis,

I have finally finished my dissent in this case. After our conversation I reread both your opinion and Byron's. I concluded it was best to put off for another occasion any attempt to indicate I favor one approach over the other, given the decision that political gerrymandering cases are justiciable. My opinion simply deals with the issue of justiciability. My inclination is to favor the approach that sweeps in fewer cases for application of judicial review on the merits.

We are not often on opposite sides of a case, and perhaps I am swayed by my own experience as a legislator.

Sincerely,

Sandra

Justice Powell

Map enclosed

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: JUN 10 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

JUSTICE O'CONNOR, concurring in the judgment.

Today the Court holds that claims of political gerrymandering lodged by members of one of the political parties that make up our two-party system are justiciable under the Equal Protection Clause of the Fourteenth Amendment. Nothing in our precedents compels us to take this step, and there is every reason not to do so. 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. Accordingly, I would reverse the District Court's judgment on the grounds that appellees' claim is nonjusticiable.

There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change. 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 funda-

pp. 1 6

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 11 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring in the judgment.

Today the Court holds that claims of political gerrymandering lodged by members of one of the political parties that make up our two-party system are justiciable under the Equal Protection Clause of the Fourteenth Amendment. Nothing in our precedents compels us to take this step, and there is every reason not to do so. 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. Accordingly, I would reverse the District Court's judgment on the grounds that appellees' claim is nonjusticiable.

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Stylistic Changes Throughout

PP. 1, 3, 4, 9, 11-17

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 25 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June ——, 1986]

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

Today the Court holds that claims of political gerrymandering lodged by members of one of the political parties that make up our two-party system are justiciable under the Equal Protection Clause of the Fourteenth Amendment. Nothing in our precedents compels us to take this step, and there is every reason not to do so. 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. Accordingly, I would reverse the District Court's judgment on the grounds that appellees' claim is nonjusticiable.

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Stylistic Changes Throughout
pp. 2, 17

SUPREME COURT OF THE UNITED STATES

No. 84-1244

SUSAN J. DAVIS, ET AL., APPELLANTS *v.*
IRWIN C. BANDEMER ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

[June 30, 1986]

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

Today the Court holds that claims of political gerrymandering lodged by members of one of the political parties that make up our two-party system are justiciable under the Equal Protection Clause of the Fourteenth Amendment. Nothing in our precedents compels us to take this step, and there is every reason not to do so. 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. Accordingly, I would reverse the District Court's judgment on the grounds that appellees' claim is nonjusticiable.

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