

## Book Reviews

**POLITICAL GERRYMANDERING AND THE COURTS.\*** Edited by Bernard Grofman.<sup>1</sup> New York: Agathon Press. 1990. Pp. xiv, 335. \$36.00.

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*Political Gerrymandering and the Courts* is a collection of essays by sixteen districting experts on the question "What can social scientists offer to help courts solve the problem of egregious partisan gerrymanders?" The question implies its own subsidiary questions, such as:

- 1) Are there such things as egregious partisan gerrymanders?
- 2) If so, how can you tell how egregious they are?
- 3) What can courts do about it?
- 4) And what can political scientists do about it?

Since the Supreme Court came closest to considering these questions in *Davis v. Bandemer*,<sup>3</sup> the book may also be considered a series of reflections on the meaning of that case. It is also some-

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\* This collection consists of the following essays: Bernard Grofman, *Unresolved Issues in Partisan Gerrymandering Litigation*; Gordon E. Baker, *The Unfinished Reapportionment Revolution*; Bernard Grofman, *Toward a Coherent Theory of Gerrymandering: Bandemer and Thornburg*; Daniel Hays Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*; Bruce E. Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer*; Charles Backstrom, Leonard Robins, and Scott Eller, *Establishing a Statewide Electoral Effects Baseline*; Richard G. Niemi, *The Swing Ratio as a Measure of Partisan Gerrymandering*; Michael D. McDonald and Richard L. Engstrom, *Detecting Gerrymandering*; Gordon E. Baker, *The "Totality of Circumstances" Approach*; Richard Morrill, *A Geographer's Perspective*; Peter Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*; Richard Niemi and John Wilkerson, *Compactness and the 1980s Districts in the Indiana State House: Evidence of Political Gerrymandering?*; Richard Niemi and Stephen G. Wright, *Majority-Win Percentages: An Approach to the Votes-Seats Relationship in Light of Davis v. Bandemer*; Thomas Hofeller and Bernard Grofman, *Comparing the Compactness of California Congressional Districts Under Three Different Plans: 1980, 1982 and 1984*; Samuel Kernell and Bernard Grofman, *Determining the Predictability of Partisan Voting Patterns in California Elections, 1978-1984*; Gordon E. Baker, *Lessons from the 1973 California Masters' Plan*.

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3. 478 U.S. 109 (1986).

thing of a reunion of contributors to a 1985 *UCLA Law Review* Symposium on gerrymandering.<sup>4</sup>

All the contributors seem to agree that there are such things as gerrymanders, electoral districts drawn up to give some people advantage over others. Almost all seem to agree that some gerrymanders are egregious, in the sense of shocking the conscience and calling for some kind of remedial action. Thirteen of the contributors are shocked by egregious partisan gerrymanders, believe courts should do something about them, and believe that political scientists can provide courts with standards to single out and curb the worst cases. This group, led by the editor, Bernard Grofman, and by Gordon Baker (whose pioneering book, *Rural Versus Urban Political Power*,<sup>5</sup> set the stage for the reapportionment revolution) interprets *Bandemer* as commendably favorable to such intervention.

Two of the three remaining contributors, Daniel Lowenstein and Bruce Cain, are shocked by racial but not by partisan gerrymanders. They deny that political scientists or courts can find satisfactory standards for identifying *partisan* gerrymanders, far less regulating them—though neither of these dissenters seems to have much trouble identifying and regulating *racial* gerrymanders of the wrong sort, and replacing them with benign, “affirmative action” racial gerrymanders. Lowenstein, in particular, sees *Bandemer* as commendably closed to intervention against partisan gerrymanders.

The final dissenter, Peter Schuck, reads *Bandemer* as favorable to intervention, but unduly so because he considers intervention a grave error, a cure worse than the disease. He has little to say about racial gerrymanders, either in his chapter or in the article from which it is extracted.<sup>6</sup> But he elsewhere reveals himself as an admirer of Abigail Thernstrom’s *Whose Votes Count?*<sup>7</sup> and hence must be counted a critic of massive judicial intervention against racial gerrymanders.<sup>8</sup>

In sum, the book is dominated by a large, interventionist majority on the one hand, confident that they can help courts identify and control both partisan and racial gerrymanders, and thinking they have a green light from the Supreme Court in *Bandemer*. A

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4. 33 *UCLA L. Rev.* 1 (1985).

5. Gordon E. Baker, *Rural Versus Urban Political Power* (Doubleday, 1955).

6. Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 *Colum. L. Rev.* 1325, 1326 (1987).

7. Abigail M. Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (Harv. U. Press, 1987) (“*Whose Votes Count?*”).

8. Peter H. Schuck, *What Went Wrong With the Voting Rights Act*, 19 *Washington Monthly* 51 (Nov. 1987).

small trio of dissenters is divided both as to whether *Bandemer* gives a green light against partisan gerrymanders, and as to whether it is wise in principle for courts to intervene against racial gerrymanders. But the dissenters are united in their belief that courts should keep hands off partisan gerrymanders.

In some ways the actual gist of *Bandemer* is less interesting now than it was in 1987 when this book took shape, though Grofman was not wrong at the time to call it "potentially the most important districting case since *Reynolds v. Sims*." *Bandemer* on its face could be read to support either the green-light or the red-light interpretation. On the one hand, the Court declined to strike down a blatant gerrymander, which gave Republicans half again as many seats per vote as Democrats in the 1982 elections to the Indiana House. On the other hand, a plurality of the Justices declared in dictum in favor of the intervention against egregious gerrymandering which would "consistently degrade a voter's . . . influence on the political process." Surely this dictum could constitute at least a yellow light for intervention, especially considering the land-office business the courts and the Justice Department were doing at the same time in striking down supposed racial gerrymanders and replacing them with other racial gerrymanders thought to be more favorable to blacks and hispanics.<sup>9</sup>

But whatever hint of a green light *Bandemer* may once have flashed must have been extinguished by the Court's refusal to hear *Badham v. Eu*<sup>10</sup> in 1988—after *Political Gerrymandering and the Courts* had been sent to the printer. One may argue whether *Bandemer*, which involved one gerrymandered election in one house, was the *second* most egregious partisan gerrymander of the 1980's, but there is no doubt which one was first. That distinction belongs to the California gerrymanders created in part by Professor Cain,<sup>11</sup> attacked by Republicans in *Badham*, and defended in an amicus brief by Professor Lowenstein, among others.<sup>12</sup> *Badham*

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9. See, for example, *Thornburg v. Gingles*, 478 U.S. 30 (1986), decided the same day as *Bandemer*, on evidence supplied by Bernard Grofman. Abigail Thernstrom provides a comprehensive survey of the drastic change in the Voting Rights Act's emphasis from enfranchising Southern blacks to giving blacks and hispanics across the nation a statutory right to court-ordered gerrymanders guaranteeing "representation" proportional to their numbers. Thernstrom, *Whose Votes Count?* (cited in note 7).

10. 694 F. Supp. 664 (N.D. Cal. 1983), *dismissed for lack of jurisdiction*, 488 U.S. 804 (1988).

11. Bruce E. Cain, *The Reapportionment Puzzle* (U. of California Press, 1984). He was special consultant to the California Assembly Elections and Reapportionment Committee in 1981.

12. Bernard Grofman, ed., *Political Gerrymandering and the Courts* 104 n.3 (Agathon Press, 1990) ("*Political Gerrymandering*"). He was consultant to the Democratic members of the House of Representatives in districting litigation throughout the 1980's (id. at xiii).

involved four or five successive elections and a pro-Democrat, pro-incumbent gerrymandering so tight that only one district of 135 changed party hands. District boundaries wandered wildly across mountains, deserts, and bays, chopping up cities and counties. Some districts were spliced together with narrow strips of beach or highway dividers.<sup>13</sup> For a decade, Democrats had half again as many seats per vote in Congress as Republicans.

The moment the Court decided not to hear *Badham*, any thought of judicial control of gerrymanders under *Bandemer* evaporated. *Bandemer* in 1987 was at least a pitcher's scowl at the baserunner to threaten a pick-off if he was too far off-base. Ignoring the *Badham* gerrymander was as clear a signal as the Court could give (short of saying so) that there will never be any pick-offs, even for the most brazen attempts to steal a base. Savvy coaches like Professors Cain and Lowenstein, and the other architects and defenders of the California gerrymander, sensed this years before *Badham*, gave the steal sign, and got away with it—just as the chief gerrymanderer, the late Congressman Philip Burton (D, Calif.) had predicted. "Who will stop us?" he crowed.

Is this as it should be? The arguments on either side may be briefly summarized. In one sense, Gordon Baker is perfectly right: the reapportionment revolution was about "achieving fair and effective representation for all citizens," (*Reynolds v. Sims*) and debasing or diluting people's votes by gerrymandering is hardly less unfair than doing it by disfranchisement or malapportionment.<sup>14</sup> And Grofman, Morill, Niemi, Backstrom, Engstrom, Hofeller, and the other districting-expert contributors, are right that dozens of technical criteria exist to measure compactness, group polarization, electoral effects baselines, swing ratios, and so on. There are also dozens of technical remedies which a court could order, if so disposed, to limit gerrymandering. Some of these have been used to detect and curb racial gerrymanders. Why not put some of them to work to curb the most egregious partisan gerrymanders?

Professors Lowenstein and Cain are less forthright on this question in this book than in their earlier works. The 1985 Lowenstein rebuttal to the reformers was an assertion that neutral-looking, anti-gerrymandering criteria were not neutral in practice; that compactness and contiguity standards, for example, amounted to a "Republican Trojan horse," which would pack already-overconcentrated

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13. See, for example, the illustrations in Ward Elliott, *Review of The Reapportionment Puzzle*, 2 Const. Comm. 203, 206 (1985).

14. Gordon E. Baker, *The Unfinished Reapportionment Revolution*, Ch. 2 in Grofman, ed., *Political Gerrymandering* at 11-25 (cited in note 12).

trated minority populations into safe but vote-wasting ghettoized districts.<sup>15</sup> As Gordon Baker notes, this assertion was “not based on any concrete evidence” and was refuted by California’s actual experience with court-ordered, criteria-driven districts in the 1970’s.<sup>16</sup> The 1990 Lowenstein position is that, under his tidied-up interpretation of *Bandemer*, the whole issue has been settled by the Supreme Court, obviating the need for further discussion on the merits, save for the possibility that a future resurgence of “some variant of McCarthyism” might call for protecting “outcast political groups” where other constitutional protections were not available.<sup>17</sup> Surely no major political party could be considered an outcast so defined.

Bruce Cain in 1984 defended his gerrymander on much the same grounds as Lowenstein; it was an “affirmative action gerrymander” to protect “weak” Democrat client groups, while giving extra stability and governing power to the ruling Democratic coalition—which, he argues, should be the sole judge of the wisdom and fairness of any apportionment plan.<sup>18</sup> I have elsewhere criticized this line as transparently partisan,<sup>19</sup> and he does not repeat it in the Grofman symposium. His 1990 treatment is more abstract and open-ended, with much weighing and balancing of individual and group rights, and of symmetrical and asymmetrical ways of treating racial and partisan gerrymanders, and less of a preference for letting regnant Democratic legislators make all the decisions. He does come out for legitimacy, stability, and workability, and against proportional representation (PR) as antithetical to all three. He recommends a “‘subjective’ bipartisan” process for redistricting, involving input by both parties, and a supermajority rule to give the minority party some leverage.<sup>20</sup>

Peter Schuck, the farthest removed of the contributors from the California battle lines, is also the most forthright and Frankfurterian in opposing intervention on the merits. “A court,” he argues, “cannot determine whether and to what extent a districting plan ‘will consistently degrade a . . . group of voters’ influence

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15. Daniel Lowenstein and Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. Rev. 1, 27, 34 (1985).

16. Gordon F. Baker, *Lessons from the 1973 Master's Plan*, Ch. 16 in Grofman, ed., *Political Gerrymandering* at 302 (cited in note 12).

17. Daniel Lowenstein, *Bandemer's Gap: Gerrymandering and Equal Protection*, Ch. 4 in Grofman, ed., *Political Gerrymandering* at 102 (cited in note 12).

18. Cain, *The Reapportionment Puzzle* at 77, 188-91 (cited in note 11).

19. Elliott, 2 Const. Comm. at 207 (cited in note 13).

20. Bruce E. Cain, *Perspectives on Davis v. Bandemer: Views of the Practitioner, Theorist, and Reformer*, Ch. 5 in Grofman, ed., *Political Gerrymandering* at 128-40 (cited in note 12).

on the political process as a whole.’” The political process is too complicated to be settled with the kind of simple rules a court must use to be understandable. “Representation” and “fair representation” can mean too many different things. PR, the simple, straight road to proportionality, was also the simple, straight road to political paralysis for the Weimar Republic, the Fourth French Republic, and Italy today. No one should want it. Nor should anyone want its not-so-straight, not-so-simple surrogates, which could be both dangerous and incomprehensible. The Court properly rejected proportionality as a standard, but offered no other standard in its place. “In effect, the court would be prescribing the partisan configuration of the legislature—the most political of tasks—and doing so on the basis of inevitably conflicting, inconclusive expert testimony about the uses and implications of such tests. This is surely a chilling prospect.”<sup>21</sup>

What can one take away from this book? (1) A compendium of political-science techniques for identifying and dealing with gerrymanders. (2) Intriguing surveys of the extent of gerrymandering in various states. (3) Discussions of the California and Indiana experiences. (4) Some gifted and occasionally dazzling exegesis of *Bandemer*, a case which, however, has been overtaken by events. And (5) the beginnings, but only the beginnings, of a debate over the proper scope of the reapportionment revolution.

What is missing from the book? (1) Four-fifths of Peter Schuck’s article. (2) Discussion of the extent to which the refusal to hear *Badham v. Eu* made *Bandemer* a dead letter. (3) Discussion of the secondary effects of partisan gerrymandering in states like California. Has it lessened competitiveness? Cohesiveness? Workability? Responsiveness? Has it polarized the legislature? Has it increased recourse to initiatives and referenda? (4) Discussion of the extent to which Madisonian checks and balances can curb the excesses of a gerrymandering faction, absent judicial intervention. The record, even in California, is not as bad as some think. (5) A serious rejoinder by the anti-interventionists to Gordon Baker’s question about why courts are considered so well suited to control malapportionment, but so poorly to control gerrymanders. And (6) a serious rejoinder to Grofman’s question about why courts are considered so well suited to control racial gerrymanders, but so poorly for partisan.

Felix Frankfurter thought representation questions were a thicket and a quagmire, too standards-resistant and too “political”

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21. Peter H. Schuck, *Partisan Gerrymandering: A Political Problem Without Judicial Solution*, Ch. 11 in Grofman, ed., *Political Gerrymandering* at 241 (cited in note 12).

for a court to tackle. The majority in *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964) thought not. Which was right? The Court has had many subsequent opportunities to intervene in representation questions, many of which are discussed in this book. It will doubtless have many more in years to come. This book tells us much about an important branch of the representation debate. But what does the branch tell us about the tree?

**UNFINISHED BUSINESS: A CIVIL RIGHTS STRATEGY FOR AMERICA'S THIRD CENTURY.** By Clint Bolic.<sup>1</sup> San Francisco, Calif.: Pacific Research Institute for Public Policy. 1990. Pp. xiii, 158. Cloth, \$24.95; paper, \$12.95.

**PROPERTY AND THE POLITICS OF ENTITLEMENT.** By John Brigham.<sup>2</sup> Philadelphia, Penn.: Temple University Press. 1990. Pp. xi, 223. Cloth, \$39.95.

**REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS.**<sup>3</sup> Edited by G. Richard Hill.<sup>4</sup> Chicago, Ill.: Section of Urban, State and Local Government Law, American Bar Association. 1990. Pp. xix, 422. Paper, \$49.95.

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As these books demonstrate, judicial and scholarly interest in

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3. This collection consists of the following essays: C. Thomas Williamson, III, *Constitutional and Judicial Limitations on the Community's Power to Downzone*; Robert E. Manley, *Inverse Condemnation Under 42 U.S.C. Section 1983*; Margaret V. Lang, *Penn Central Transportation Co. v. New York City: Fairness and Accommodation Show the Way Out of the Takings Corner*; Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Money Damages for the Overregulation of Land*; Robert H. Freilich, *Solving the "Taking" Equation: Making the Whole Equal to the Sum of Its Parts*; Ray Mulligan, *Loretto v. Teleprompter Manhattan CATV Corporation: Another Excursion into the Takings Dilemma*; Jonathan B. Sallet, *Regulatory "Takings" and Just Compensation: The Supreme Court's Search for a Solution Continues*; Robert H. Freilich, Alison M. Francis, and Steven L. Popejoy, *Excerpt from State and Local Government at the Crossroads: A Bitterly Divided Supreme Court Reevaluates Federalism in the Bicentennial Year of the Constitution*; Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*; David L. Callies, *Property Rights: Are There Any Left?*; John Mixon, *Compensation Claims Against Local Governments for Excessive Land-Use Regulations: A Proposal for More Efficient State Level Adjudication*; Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*.

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