

1-1-1985

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Gerrymandering, Unfairness, and the Supreme Court, 33 UCLA L. Rev. 227 (1985)

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GERRYMANDERING, UNFAIRNESS, AND THE SUPREME COURT

Martin Shapiro*

This Commentary appraises the contribution to this Symposium by Lowenstein and Steinberg¹ with references to the works of Niemi² and Grofman³ inserted at the appropriate points.

I. ON WRONGS AND RIGHTS

The fundamental premise on which Lowenstein and Steinberg build is that something cannot be constitutionally unfair, unequal, and wrong unless there is a standard or measure of what is fair, equal, and right. They believe, therefore, that once they have shown that there is no single, objective, neutral set of electoral district boundaries for a given state with a given geography and demography, they will have shown that courts should not concern themselves with the constitutionality of district boundaries.

The fundamental premise is not, however, jurisprudentially sound nor does it reflect the actual, historical behavior of the Supreme Court. To argue that Supreme Court intervention against gerrymandering will violate this premise is unlikely to persuade the Justices to keep out of the districting controversy.

At the level of jurisprudence, the extensive writings of Edmond Cahn⁴ best summarize the position that judges, and

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1. Lowenstein & Steinberg, *The Quest For Legislative Districting In the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985).

2. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185 (1985).

3. Grofman, *Criteria For Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985).

4. E. CAHN, *THE MORAL DECISION* (1955); E. CAHN, *THE SENSE OF INJUSTICE* (1949).

indeed all those called upon to make ethical decisions, are often in a position to identify *a* wrong without being able to define *the* right. Finding themselves in this position, they are ethically entitled to, and in fact do, intervene against the wrong. The same point is made in a policy-making context by the whole body of writing about incremental decision making and satisfying.⁵ Individual and organizational decision makers often do, and indeed often must, move away from a wrong position without being able to specify precisely what ideal position they are moving toward.

Since the very beginnings of American constitutional law, the Supreme Court has made this stance a central feature of major areas of its constitutional jurisprudence. This is evident in the Court's "negative commerce clause" decisions,⁶ foreshadowed in *Gibbons v. Ogden*,⁷ initiated in *Willson v. Blackbird Creek Marsh Co.*,⁸ and supposedly rendered into a principle in the *Cooley* rule of selective exclusiveness.⁹ Throughout its history, the Supreme Court has continuously struck down some and upheld other exercises of state power that impinged upon interstate commerce. These negative commerce power cases have never been resolved into a coherent pattern either by the Court itself or by the myriad commentators. In the absence of congressional guidance, no one has ever successfully stated the rule, principle, standard, or ideal schema for determining which commercial activities require uniform national rules. Nor has anyone defined the considerations necessary to establish exactly what kinds and levels of state intervention are required in interstate commerce that is not subject to uniform national rules. There is absolutely no question that the Court will go on merrily striking down "wrong" state regulations of commerce without ever drawing its map of the correct boundaries between federal and state commerce powers.

Examples like this could be multiplied by any student of constitutional law. Let me add only two brief references.

5. For a summary of this body of literature and its application to legal decision making, see M. SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 73-91 (1968); Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393 (1981).

6. See G. GUNTHER, *CONSTITUTIONAL LAW* 230-335 (11th ed. 1985).

7. 22 U.S. (9 Wheat.) 1 (1824).

8. 27 U.S. (2 Pet.) 245 (1829).

9. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852).

From *Twining v. New Jersey*¹⁰ in 1908 through *Palko v. Connecticut*¹¹ in 1937 and on to the moment before its quite unanticipated 1961 decision in *Mapp v. Ohio*,¹² the Court had used the so-called "fair trial rule" to enforce the due process clause of the fourteenth amendment in state trials. As we all know, the "fair trial rule" never told us what a *fair* trial would look like. It only told us, case by case, which criminal proceedings looked so *unfair* to the Justices that they violated their "fundamental sense of ordered liberties." The Justices never told us the precise positive content of their fundamental sense of ordered liberties. What they were really talking about was the sense of injustice identified by Cahn. This sense of injustice was all the Court needed to operate in this area for over fifty years. Finally, the Court has recently announced that it is the Mikado and will decide what punishments fit what crimes.¹³ But no one is naive enough to believe that its announcement will be followed by the publication of a table or formula that allows us to determine precisely what punishments the Court thinks are constitutionally *proportionate* to precisely what crimes. Instead we have already gotten and will continue to get only decisions which say that in a certain instance a majority of the Court has found a certain penalty to be *disproportionate* to a particular crime. Some constitutional scholars may be embarrassed by the Court's proclivity for striking down wrongs without stating what is right, but the Justices will continue to do so and do so with gusto.

II. ON RACE, PLACE, AND TWO POLITICAL THEORIES

Lowenstein and Steinberg themselves cannot resist doing precisely the same thing when a big enough wrong comes along. At the very beginning of their article they offer one great big exception to their position, the racial gerrymander both negative and affirmative.¹⁴ Courts, according to Lowenstein and Steinberg, should intervene both to insure that racial minority voters are not disadvantaged by district boundary line drawing and to insure that lines are

10. 211 U.S. 78 (1908).

11. 302 U.S. 319 (1937).

12. 367 U.S. 643 (1961).

13. See *Solem v. Helm*, 463 U.S. 277 (1983).

14. Lowenstein & Steinberg, *supra* note 1, at 6 n.15.

drawn in such a way as to insure a decent chance that some blacks are elected. Why do Lowenstein and Steinberg grant this exception? They themselves say that many of the objections that they have to judicial intervention against gerrymandering in general apply to racial gerrymandering.¹⁵ Clearly, the paradox of the affirmative racial gerrymandering absolutely resists any objective noncontroversial standard of fairness. The affirmative racial gerrymander concentrates blacks in a few districts that will surely elect black representatives, thus assuring black presence in the legislature. It may also be interpreted to be a negative racial gerrymander, however, that "stacks" minority voters into a few districts, allowing nonminority voters to absolutely control the maximum number of districts. Of course Grofman, a strong proponent of the positive racial gerrymander, proposes a wisdom of Solomon, or perhaps a "have your cake and eat it too" solution to the paradox: Let us maximize the number of minority competitive districts, that is, districts in which there are just enough (but not too many) minority voters to give minority candidates a fighting chance of winning.¹⁶ This solution is too obviously a pragmatic attempt to boost minority political clout to make much claim to being a constitutional principle. Even as a pragmatic measure, it is a stab in the dark. We cannot really predict whether the placement of relatively small minority populations in a large number of districts will result in more minority political power in legislatures than will larger concentrations of minorities in fewer districts. In part, outcomes depend on how many small clumps of minorities in overwhelmingly nonminority districts would find themselves in a crucial "swing" position between white voters almost equally divided between Republican and Democratic allegiance. At one extreme, an all-white legislature in which 100 of the 120 seats represented districts that were 40% white Republican, 40% white Democrat, and 10% black independent, might give blacks far more power than a legislature that had 100 white seats and 20 seats that blacks had a 50% chance of winning. Exactly what will maximize minority political power varies

15. *Id.*

16. These proposals are not central to Grofman's contribution to this Symposium but are to be found at great length in the literature cited in footnote four of his contribution. Grofman, *supra* note 3, at 78 n.4.

from place to place and time to time. My guess is that Grofman is right on the average and over time. But even at a pragmatic level, and even if we were to accept the premise that the Constitution is designed to maximize black political power, what we have is a best guess about how to reach that goal, not a mandated principle or standard.

The more one follows Grofman's highly sophisticated analysis of affirmative racial gerrymanders, even on such seemingly narrow and measurable phenomena as "racial polarization,"¹⁷ the more one sees that the whole process of constructing such gerrymanders fails to meet Lowenstein and Steinberg's general demand that courts should stay out of gerrymandering unless they can construct a clear, precise, neutral, objective, and noncontroversial test. Indeed, Grofman's constant reference to the "dilution" of minority voting power signals the depth of the problem. The questions of what constitutes "dilution," when "dilution" is a mere incidental effect of nonracially motivated districting schemes, and how severe such incidental effects have to be before creating constitutional problems, lead us back precisely to the kind of computer-aggravated morass that Lowenstein and Steinberg want courts to avoid in the general gerrymander area. Grofman insists that the opposite of dilution (which he sometimes calls racial unfairness)¹⁸ is neither proportionality of elected minority candidates to minority voters, nor maximization of the number of black legislators. He enumerates and criticizes a number of measures of dilution and finds one promising. Clearly all this is into the thicket with Grofman and computer, and the racial gerrymander thicket is clearly just as thick as the overall gerrymander thicket.

Why then do Lowenstein and Steinberg allow the exception? The answer is obvious, because minorities in general and blacks in particular have been so wronged by American society. Even Lowenstein and Steinberg, strong supporters of judicial self-restraint in the absence of clear constitutional standards, can be lured into the standardless pit of racial vote "dilution" by the scent of evil—the scent of evil in a place where the ideal model of the good is pecu-

17. Grofman, *supra* note 3, at 136-43.

18. *Id.* at 147-48.

liarily obscure. What can they expect from mere judges who scent the disgusting spore of the dreaded gerrymander?

I do not concentrate on the racial gerrymander simply for the fun of accusing Lowenstein and Steinberg of apostasy from their own religion. Race, and I will argue in a moment "place," gerrymanders are the crucial chinks in the armor of gerrymander nonjusticiability, and because of them, Lowenstein and Steinberg may be too late to keep the Supreme Court from entering the field.

In a sense the game was already over in *Reynolds v. Sims*.¹⁹ In that case Chief Justice Warren not only enshrined the equal *voting* one-person-one-vote standard but also said that "fair and effective representation for all citizens" was "the basic aim of legislative apportionment."²⁰ It makes little difference that what he said contradicted his own logic. The one-person-one-vote standard yields an underrepresentation of those citizens who for various reasons are isolated in permanent minority positions rather than a fair and effective representation for all citizens. For better or worse, Warren made the fatal step from mere equal *voting* to fair *representation*.

The significance of that fatal step becomes clear in *City of Mobile v. Bolden*,²¹ and particularly in Justice Marshall's dissent,²² which today represents the position of Congress,²³ and, I believe, of a majority of the Court. Justice Marshall understood and was willing to face up to the controversy that Chief Justice Warren either never understood or deliberately avoided. The one-person-one-vote standard rests on nineteenth century liberal political theory which used individuals as the basic units of politics. From the perspective of twentieth century liberal theories, which use groups as the basic units of politics, the notion that a one-person-one-vote standard will assure fair representation is nonsense. Some of those "one" persons belong to groups well represented in the legislature, and others do not. Nevertheless, the one-person-one-vote norm has been the core of the courts' electoral districting doctrine and an extremely effective, popular

19. 377 U.S. 533 (1964).

20. *Id.* at 565-66.

21. 446 U.S. 55 (1980).

22. *Id.* at 103 (Marshall, J., dissenting).

23. See Grofman, *supra* note 3, at 98-99.

defense of judicial intervention in the political process. Who but a handful of dyspeptic political scientists could stand against the self-evident truth that one person should have one vote?

When Justice Marshall and others decide they want to treat politics as group politics and strengthen the hand of certain groups, they find the silly but appealing individualism of the old Chief Justice an impediment. The Warren Court's main defense of its entry into the political thicket was that voting is an *individual* right, and wherever individual rights were concerned, the American tradition demanded a "damn the torpedoes, full speed ahead" approach by courts. Marshall wants to continue the magnificent individual rights cover for judicial intervention. He realizes full well, however, that it is a group's political interests he wants to further, and individualist political theory stands in the way. He, therefore, invents a wonderful one-horse shay with an individualist top and pluralist wheels—the individual right of a citizen to enjoy adequate representation in the legislative body for the group to which he or she belongs. He can cite enough language from earlier cases to make a pretty good case for the proposition that the Court has already committed itself to openly protecting groups, at least minority groups, even while proclaiming its allegiance to individual rights.

The various opinions in *Karcher v. Daggett*²⁴ are full of this melding of individual and group theories. This is clearest if we shift from race to place—that is, from groups that are handicapped because they are composed of persons of minority race to those handicapped because they are composed of persons who live in isolated and/or sparsely settled rural areas.

*Brown v. Thomson*²⁵ is a peculiarly clear example of the shift from the individual theory of the Warren Court to pluralist group theory because it accepts precisely the vision that the Warren Court rejected in *Lucas v. Forty-Fourth General Assembly*.²⁶ In *Lucas*, through a popular referendum, the people of Colorado had explicitly disapproved a pure one-person-one-vote basis approving an upper house with at

24. 462 U.S. 725 (1983).

25. 462 U.S. 835 (1983).

26. 377 U.S. 713 (1964).

least a minimum of representation to sparsely settled rural counties (although that led to considerable deviation from one person, one vote). The voters of Colorado had declared that their state's political geography was peculiar. Most voters were concentrated in two urban, industrial counties. The rest were thinly scattered over mountains and deserts, often physically isolated from the population centers and sharing few economic, social, or cultural interests with them. Applying a one-person-one-vote standard simply would have meant that Colorado government would have been run for the benefit of the residents of the flat urban areas and everyone else would have been, both literally and figuratively, left out in the cold. To all of this the Chief Justice simply responded: one person, one vote. In *Brown*,²⁷ Wyoming, responding to the same kind of geographic considerations, guaranteed each county at least one seat in the legislature, even though that arrangement resulted in a glaring discrepancy between the population of the largest and smallest legislative district. The Court split badly, but upheld the Wyoming plan. Its opinions were guarded. Nonetheless, it recognized what Chief Justice Warren had steadfastly refused to recognize—that political geography exists. Here again, a combination of individual and group theory was attempted.

From *Brown*, and indeed from *Karcher v. Daggett*²⁸ as well, emerges a familiar doctrinal form—the rule and exception. The rule is individualist, applying a one-person-one-vote standard, but the Court will grant exceptions when good reasons derived from group theory can be offered. This is not a bad reconciliation of the theoretical conflict, although it of course leaves the Court free to choose which groups²⁹ will be favored and how much deviation is permissible from equal population.

In short, the Court has already moved from a naive and absolute individualist *voting* theory to a pluralist *representation* theory. This is the crucial step in destroying the distinction between district population size and district shape as it relates to judicial intervention. Gerrymandering is as crucial a

27. 462 U.S. at 837.

28. 462 U.S. 725 (1983).

29. Justice Marshall tried desperately in *Mobile* to confine the Court to racial groups, but *Brown* says "place" as well as "race," and Pandora's box is open.

means of disadvantaging voting groups as is population mal-apportionment. Moreover, the Court has also taken the crucial step of looking beyond the purely formal measure of population size to the substantive characteristics of districts. If race and place are relevant to districting, then the Court is already looking beyond numbers to content, to the complex realities of group political geography. If the Court has already accepted the group theory of representation in the context of granting exceptions to the one-person-one-vote standard, and if the Court has already signalled that it might support or even require affirmative racial gerrymanders, it is already willy-nilly in the gerrymandering game.

Lowenstein and Steinberg do oppose the doctrine of *Karcher* and *Brown*,³⁰ particularly the compelling state interest exception to the one-person-one-vote rule. Their opposition, however, is not clearly stated at a theoretical level, and cannot be so long as they favor judicial intervention against racial gerrymanders. That intervention must be based on pluralist theory. They are, therefore, driven to attack the exception only on the basis that no interest other than race is truly compelling. Lowenstein and Steinberg are, of course, quite right to fear the compelling interest exception. Previous experience with the free speech and other Court invented balancing of interests tests makes it clear that "compelling" is soon worn down to "substantial" and so on, until it ends up meaning any state interest that the Justices find "good enough."

In supporting the justification for judicial intervention in racial gerrymanders, however, Lowenstein and Steinberg, like the Justices, are actually accepting the compelling state interest exception and choosing their favorite interest—race—as compelling. But having chosen one compelling interest, they cannot prevent legislatures and courts from choosing others. Once one interest is compelling, the question of what constitutes a compelling interest is open. Other interests will have to be judged case by case, with all the pressures to expand the category that we have experienced in such areas as fundamental rights and suspect classifications.

Thus Lowenstein and Steinberg's failure to deal explic-

30. Lowenstein & Steinberg, *supra* note 1, at 19-20.

itly with the political theory dimension coupled with their acknowledgement of the legitimacy of intervention against racial gerrymandering deprive them of the best barrier to judicial intervention in gerrymandering in general. That barrier lies in the following theoretical argument. A one-person-one-vote standard rests on a purely formal individualist theory of voting. In spite of Warren's words to the contrary, it rests on no theory of representation at all. However wrong and naive such a theoretical position is, it "works" in terms of defining a bounded, definable and popular judicial role—the enforcement of numerical population equality among voting districts. Any movement to group theory destroys that neatly bounded and defensible judicial role. Judicial intervention against gerrymandering requires such a move. Therefore, the Court should not intervene against any kind of gerrymandering.

Because Lowenstein and Steinberg are unwilling to give up intervention in racial gerrymandering, they cannot make this theoretical argument. Instead, they must resort to ad hoc pragmatic arguments which allow them to do just what interventionist Justices want to do: Pick and choose which gerrymanders to attack. We now turn to their ad hoc arguments.

III. CLEAR STANDARDS FOR COMPACTNESS

Lowenstein and Steinberg's ad hoc arguments focus on the "compactness" standard because the classic idea of the gerrymander was the oddly shaped district. I am unpersuaded by their arguments which rest essentially on a showing that there is no single, clear standard of compactness. Such a position is merely a replay of the general, and incorrect, argument that courts may not intervene against wrongs unless they can specify the right. In fact, courts may choose to intervene to place constraints on legislative bad behavior without specifying good behavior. The one-person-one-vote requirement already acts as a constraint on legislative power to gerrymander. The traditionally accepted requirement that districts be contiguous acts as another. A requirement of compactness would act as yet another constraint, pushing the legislature one small step further toward "random" or party-blind, incumbent-blind apportionment.

If the only reason to oppose compactness is that there is

no simple test for it as there is for equal population, then we can easily overcome this obstacle by thinking in terms of constraints rather than ideals. Niemi claims that no single correct solution to the compactness problem exists.³¹ But his work also shows that political geographers can generate a series of alternative state mappings based on a series of alternative measures of compactness. Courts might mandate that states follow one of these mappings with an automatically allowed 10% deviation and a maximum 20% deviation if adequate reasons are given.³² Total exemptions might be permitted for some states with highly irregular state boundaries and/or residential configurations. Such a standard would not end gerrymandering, given the capacities of computers, but it would be at least a small push toward randomness.

IV. ON COMPACTNESS, REPUBLICAN ADVANTAGE AND ER VERSUS ING

Lowenstein and Steinberg's central criticism of a compactness requirement is also their crucial objection to any and all judicial intervention against gerrymandering.

There are two ways of stating this objection, a polite way and an impolite way. Let me start with the impolite way. Lowenstein and Steinberg disparage compactness because they find that it will end up favoring Republicans over Democrats. In academic law and academic political science, there was a time, not so very long ago, when such a finding would have been sufficient to condemn any phenomenon. That something aids evil and destroys good is a sufficient reason to oppose it. The academic world has changed a bit. There are now often as many as three Republicans on a major political science faculty, and there may be as many as a dozen Republicans on major law faculties outside of Chicago. More importantly, of the Justices of the Supreme Court, over half might conceivably be Republicans at the crucial moment. Proving that a government policy favors Republicans is no longer the knock-out blow it once was.

Of course Lowenstein and Steinberg may be taken as

31. Niemi, *supra* note 2.

32. These figures are roughly borrowed from leeways from equal population measures allowed by the Supreme Court in apportionment cases.

not merely partisan. They may be saying that the Court will suffer if it appears to be siding with Republicans against Democrats. I shall return to the problem of perceived judicial partisanship later. Here it is enough to say that the case-by-case nature of the Court's work and the inadequacy of mass media coverage of the Court will preserve its nonpartisan image. If and when the Court attacks gerrymandering, some of its decisions will strike down Democratic gerrymanders and others will strike down Republican gerrymanders. The media will report the results case by case, and the public will not discern any favoritism for either party. Ten years down the pike some scholarly articles may show Lowenstein and Steinberg to be right. But by then, it will be too late, and nobody reads scholarly articles anyway.

The more polite way to put the Lowenstein and Steinberg objection is that compactness, while purporting to be a "neutral" standard, is not really neutral. It favors the Republican party, whose adherents are relatively evenly spread over a lot of districts, over the Democratic party, whose voters are concentrated in certain urban and suburban districts. One of the commonest forms of deliberate gerrymandering is "stacking"—that is, creating a few districts with an overwhelming majority for one party so that many districts can be created with a thin majority for the other. In this way, one party's votes are efficiently distributed to gain a small majority in each of a large number of districts, while the other party's votes wastefully pile up a big majority in a few districts. The result, of course, is a legislature with a far larger number of representatives from the "efficient" party and a far smaller number from the "wasteful" party than would otherwise occur. Because of the actual distribution of Republican and Democratic voters, a compactness requirement will itself result in stacked Democratic districts and efficiently spread Republican voting. Does the fact that such pro-Republican stacking will occur under a compactness criterion condemn the criterion and indeed any and all attempts to introduce "party-blind" district boundary drawing? Any party-blind distribution will result in this kind of stacking. One might state this as a paradox: Only an affirmative gerrymander in favor of the Democratic Party will result in ungerrymandered districts.

This paradox can be resolved once we understand that

it involves shifting, as Lowenstein and Steinberg constantly do without acknowledging they are doing so, between two different definitions, or rather grammatical forms, of the word gerrymander. A comparable shift occurs in the use of the word "monopoly" in antitrust law. In antitrust it makes a crucial difference whether the evil to be cured is monopolizing or monopoly. Monopolizing is a set of *actions* by human *actors* that bring about a certain market structure. If we are concerned with monopolizing, we seek to constrain the actions of those actors. Monopoly is a market structure that varies in certain ways from an imagined ideal free market structure. If we are concerned with monopoly, we aim at changing the existing market structure in the direction of the free market ideal. Similarly, it makes a great deal of difference whether we are concerned with gerrymandering, that is, the action of legislators in drawing boundaries that favor themselves, or the gerrymander, that is, a district boundary structure that varies from some ideal structure.

There are very strong reasons for focusing on the former, not the latter. First, only a "pathology of democracy" argument will activate the Supreme Court. Without the argument that the Court should intervene in a partisan political process because that process cannot cure its own ills, that a legislature controlled by a partisan majority cannot resist the temptation to district in its own behalf, the Court will not intervene. As in reapportionment, judges intervene only when they are persuaded that the patients cannot cure themselves and there is no other doctor around. If the inability of the legislature to act rightly is what moves the judges, then we must focus on the actions of legislators, not the structure of districts.

There is, of course, a second reason to focus on action not structure. All the contributors to this Symposium agree that there is no single ideal districting structure against which an existing structure can be measured or toward which it could be pushed. As political scientists, not economists, they are unwilling to engage in the "Alice in Wonderland" model building that allows the economists to build their purely imaginary model of a free market against which they measure monopoly. Without such a model, it is surely far better to do action analysis than structure analysis.

That is why Grofman consistently treats the stacking

that occurs exclusively because of voter residence distribution as a "natural" phenomenon that will continue to exist even when courts ban all gerrymandering.³³ Indeed, that is why he condemns proportional representation as an antigerrymandering standard. Proportional representation is a structural measure, not a measure that will tell us that the legislature has stopped acting badly.

Lowenstein and Steinberg argue that districting plans that leave pro-Republican stacking untouched because of residence clustering are not "neutral" because such stacking is not "natural." They claim it is not "natural" because residential clustering is itself the result of ghettoizing caused by economic and social forces and by the choice of the Democratic party to serve the people of the ghettos. The history of political thought has long since taught us that resting any argument about humans on a concept of "natural" simply leads to an endless debate about what is and is not natural. If Lowenstein and Steinberg assert that ghettos are not "natural," I assert that they are. When we deal with humans, economic, social, and political forces are natural forces. They create our social ecology. Ghettos are a distinctive feature of this ecology. Although the parties themselves are involved in the creation and maintenance of ghettos, they are involved in nearly everything that happens in society. The two parties are only minor causal factors in the creation of ghettos. The major causes are "natural"—far beyond the conscious control of the two parties or even of the government as a whole. All of this is just a start down the endless and fruitless road of quibbling about what is "natural" for beings whose very nature it is to manipulate their environment.

Neither party chose to represent whom they did because of their geographic stacking or dispersion or with an eye to how their choice would affect their electoral fortunes if the world were suddenly to come ungerrymandered. If geography favors the Republicans in an ungerrymandered world, that is a purely fortuitous result, unforeseeable by either party when it chose its ideologies and clienteles. Such stacking ought to be treated as extraneous to the goal of constraining the self-serving actions of legislatures.

33. Grofman, *supra* note 3, at 121-22, 151-55.

If stacking is not treated as extraneous, we fall into the paradox discussed earlier. If a legislature were to purge itself of all gerrymandering and adopt purely party-blind and incumbent-blind districting, Lowenstein and Steinberg would accuse it of having created a gerrymander favoring Republicans. It could satisfy Lowenstein and Steinberg's demands only by gerrymandering in favor of the Democratic party. But how much should it gerrymander in favor of Democrats? Either there is no clear measure or standard of how much, or the measure is proportional representation, which Lowenstein and Steinberg themselves do not favor.

Thus, Lowenstein and Steinberg are telling the courts not to impose compactness as a criterion and ultimately not to intervene against gerrymandering because the results might be precisely what they would be if a legislature could cure itself and district in a party- and incumbent-blind, non-self-serving way.

Lowenstein and Steinberg conclude that any districting criterion that "systematically favors one of the two major parties . . . must sustain a heavy burden of persuasion" ³⁴ By the time of *Reynolds*, ³⁵ the Democrats had enjoyed a majority position among voters for state and national legislatures for over thirty years. Nothing could have more clearly favored the Democratic over the Republican party than a one-person-one-vote standard, which is, after all, the ultimate majority-serving standard and was so intended. Why did the one-person-one-vote standard sustain its "heavy burden of persuasion?" Because it placed a major constraint on the inevitable and otherwise incurable tendency of legislators to feather their own electoral nests. If compactness or any other standard serves to constrain self-serving majority party and incumbent legislative behavior, then it meets its burden of persuasion even if it incidentally provides Republicans with even a little of the advantage that the one-person-one-vote standard gives Democrats.

V. PRESERVING LOCAL BOUNDARIES

Lowenstein and Steinberg move from "compactness" to "preserving local boundaries" as an antigerrymandering cri-

34. Lowenstein & Steinberg, *supra* note 1, at 27.

35. 377 U.S. 533 (1964).

terion. If I were a big fan of judicial intervention against gerrymandering, I would applaud much of what the authors say in this section. If we ignore local boundaries, we ease the path toward an objective, simple, straightforward, computer-generated grid system for ending gerrymandering that would be almost the equivalent of a one-person-one-vote rule. If we admit the legitimacy of local boundary preservation, we are going to have to approve districting maps with some squiggles—and how do we tell good squiggles from bad? If we ignore local boundaries, then computers can generate a series of equal population grids, or other geometric solutions. Then we can let the legislature choose among them, thus somewhat constraining its behavior. Or we can constrain absolutely the legislature's behavior by having the computer itself choose at random among them. In short, in denigrating local boundary preservation as a tool of judicial intervention, Lowenstein and Steinberg tend toward clearing the path for those favoring the most radical kind of Supreme Court intervention, one that has historically proven attractive to the Court. I am, of course, referring to the kind of intervention in which all local peculiarities are swept away in service to a single, "simple" national norm.

In all honesty I must admit that the authors have made two possible errors in this part. First, once again they run into trouble with their own racial exception. All the arguments about whether it is better to have one representative who worries about nothing but place X, or many representatives each of whom worries a little about place X, work just as well if we read "race" for "place" throughout. In other words, if they think these problems can be worked out for race, Lowenstein and Steinberg can hardly argue that they cannot be worked out for place. And if they can be worked out, then it may be worth taking the interests of local groups into account for the same reasons it may be worth taking the interests of racial groups into account. In addition, it may substantially aid voters who live within a well understood, long-standing place designation to identify who their representative is if that whole place is represented by one person rather than fragmented among a number of them.

Lowenstein and Steinberg use the data on low voter identification with districts to argue that we should not care

about district boundaries.³⁶ The data may also be used to argue for preserving local boundaries so as to increase voter identification, or at least to reduce the information costs of low-identifying voters. When everyone living within a historically self-identifying community is in the same district, it is easier for the least attentive among them to learn who the district candidates are by simply asking friends and neighbors or overhearing their conversations. At least all of those who live in what the voter perceives as his community will be talking about the same candidates. There is a good deal of evidence that voters get much of their information in this way. Professor Niemi makes this argument and cites new empirical studies of his own to support it.³⁷

If I were Lowenstein and Steinberg, I would turn their local boundaries argument on its head. Preserving local boundaries is important, but preserving them makes it impossible to use simply compactness or geometric approaches. State legislatures are more knowledgeable about local boundaries than is a national court. Therefore, because simple geometric solutions are wrong, and right solutions depend on local sensitivity, the Supreme Court should stay out of district boundary line-drawing.

VI. RESULT-ORIENTED CRITERIA

Lowenstein and Steinberg now move on to a discussion of result-oriented criteria. This whole section rests on the premise that because such criteria are themselves controversial, they should be decided "politically, not prepolitically."³⁸ But the same argument can be made here as is made in reapportionment. Once the electoral mechanism is fatally loaded in favor of some criteria and not others, the self-correcting capacities of politics fail and judicial intervention is necessary to save democracy.

Lowenstein and Steinberg argue that since all antigerry-mandering schemes will result in more favorable outcomes for Republicans, courts should not intervene. Again let us turn the argument on its head. Because of historical factors comparable to those causing *Baker*-style³⁹ malapportionment-

36. Lowenstein & Steinberg, *supra* note 1, at 35-36.

37. Niemi, *supra* note 2, at 189 & n.17.

38. Lowenstein & Steinberg, *supra* note 1, at 37.

39. *Baker v. Carr*, 369 U.S. 186 (1962).

ment, the Democrats have seized absolute control of the electoral mechanism. The mitigation and self-correction that usually flow from weak party discipline and interest group power do not solve the problem that James Madison defined in his early writings on the democratic system.⁴⁰ Indeed, this is an instance of what Madison considered the fatal flaw in democracy—a majority of the moment seizing control of government and using that control to make its interests permanently dominant.⁴¹ Districting is one issue on which party discipline is extremely good. It is not enough to say that when a sufficient number of voters want to vote Republican, the voters can always throw the Democratic majority out. The current majority party has substantial advantages in recruiting attractive candidates and raising money which are likely to preserve its majority status.

Isn't it precisely the instance of democratic political pathology, of the inability of the political process to cure itself, that warrants judicial intervention? Isn't this point proven by the fact that such intervention would overwhelmingly help the minority party to achieve the strength in the legislatures commensurate with its popular vote, of which the majority party has deprived it?

Lowenstein and Steinberg's argument that individual voting rights are not affected by competitiveness⁴² cannot survive once the right of an individual to have the class to which he belongs adequately represented is recognized. In other words, the Court has already constitutionalized racial competitiveness. All other types of competitiveness follow once the right of an individual to have his class represented is acknowledged. The only remaining argument is the determination of what constitutes a constitutionally relevant class. Why stop at race and place—why not Republicanism?

Lowenstein and Steinberg admit that a system that maximizes noncompetitive districts is undesirable because "all but the most extreme voter shifts from one party to the other will have minimal effect on the composition of the legislature."⁴³ But Lowenstein and Steinberg say we should not jump from this conclusion to judicial intervention.

40. See THE FEDERALIST No. 10 (J. Madison).

41. *Id.*

42. Lowenstein & Steinberg, *supra* note 1, at 37-44.

43. *Id.* at 38.

Their arguments, however, are not arguments against judicial intervention, but against maximizing the number of competitive districts. Judicial intervention need not be aimed at maximizing competitiveness, but only at striking down districting schemes that unreasonably minimize it. If the argument then is that such a criterion for judicial intervention is too vague, it is, as we have noted, simply historically wrong. In nearly every area in which the Court has intervened, it has been guided by vague reasonableness criteria. The one-person-one-vote rule is an exception. But just because the Court's first intervention in districting was on an absolutist, not a reasonableness, basis does not mean its later ones cannot be grounded in reasonableness. In fact, the Court is currently in the process of turning even that intervention into a "rule and reasonable exception" approach.

When Lowenstein and Steinberg turn to "weak competitiveness" criteria,⁴⁴ they *admit* the attractiveness of forbidding a majority party to minimize competition, but then engage in a whole series of quibbles which only persuade us again that courts ought not to order maximum competitiveness the way they ordered one person, one vote. They do not persuade us that courts ought not to intervene against majority gerrymanders that defy rationalization. If we ask what the criteria for such intervention would be, the answer is easy within the American judicial tradition. The districting must not be a "crazy-quilt"⁴⁵ that could be defended only on such unacceptable grounds as maximizing majority representation and/or absolutely protecting incumbents.

Lowenstein and Steinberg's section on votes and seats⁴⁶ contains a very persuasive set of arguments for why courts should not seek a district boundary criterion comparable to a one-person-one-vote rule. At the same time, however, Lowenstein and Steinberg provide a whole series of items courts could use to analyze existing district lines to determine whether they fell *far* beyond *any* result satisfactory under *any* of a *range* of criteria of fairness. This is, of course,

44. *Id.* at 41-44.

45. This standard is borrowed from Mr. Justice Clark's concurrence in *Baker v. Carr*, 369 U.S. 186, 254 (1962) (Clark, J., concurring).

46. Lowenstein & Steinberg, *supra* note 1, at 49.

the central theme of Grofman's whole contribution. I will not elaborate upon it here.

In dealing again with computer-generated random districting, Lowenstein and Steinberg stumble over "fairness," as they do earlier in their discussion of neutrality, naturalness, and stacking. They say, "Since [the overall distribution of possible plans generated at random subject only to equality of population and contiguousness] tends strongly to favor the Republican party over the Democratic party and majorities generally over minorities, random districting has no claim to fairness"47 They had already shown that there is no correct districting scheme. Proportional representation yields the most accurate reflection of popular votes in the membership of the legislature, but results in a legislature that tends to be too fragmented to govern effectively. Single-member district systems tend to result in legislatures more capable of governing, but also lead to widely varying ratios of legislative votes to popular votes depending on how the voters of each party are distributed among the districts. Thus, if random districting has "no claim to fairness," neither does any other districting arrangement. The issue is not what is fair, but what is unfair. That randomness would yield the Republicans more seats and the Democrats fewer seats than they presently enjoy is only unfair if whatever distribution we have now is optimally fair—and no one claims it is.

Random districting may be less unfair because it reduces the ability of an entrenched majority to manipulate future outcomes so as to further entrench itself. The Supreme Court is surely capable of fashioning a rule that allows the legislature to pick any system it wants, as long as the system is randomly generated. Under such a framework, majority party and incumbency advantage would be reduced. Courts could go even further and knock out some randomly generated districtings as unreasonable for various ad hoc or principled reasons (e.g., a given plan for fragmented cities provided for twice as many Democrats as any of the other schemes). Lowenstein and Steinberg will not persuade courts that they cannot create a less unfair state of

47. *Id.* at 64.

the world because they cannot create a perfectly fair state of the world.

Finally, Lowenstein and Steinberg admit that if gerrymandering does indeed constitute a pathology of democracy by which a majority of the moment can perpetuate its control forever by minimizing competition, that may well be a decisive objection to their plea for judicial nonintervention.⁴⁸ They quickly add that whether gerrymandering can perpetuate the control of a current majority is a factual question on which we do not have adequate research findings, but for various reasons their best estimate is that perpetuation is unlikely. They seem to conclude that unless and until strong evidence for perpetuation can be gathered, courts should not intervene. But one might conclude that given the potential seriousness of the alleged pathology, courts should treat it like a suspected but not certain cancer: So long as convincing proof of *nonperpetuation* has not yet been found, intervention ought to occur, but only in those particular instances in which the risk of the disease seems to the judges to be particularly high.

Lowenstein and Steinberg's knock-out punch against judicial intervention really has nothing to do with fairness or rights or reasonableness or any of that constitutional "stuff." It is simply that in the United States today, removing districting from the hands of the majority parties in state legislatures and placing it under any mechanism that is primarily concerned with population and compactness will favor Republicans and disfavor Democrats. As I indicated earlier, this argument is not likely to convince Republican commentators or judges. More importantly, so long as we cling to an individualist theory of voting rights, or indeed any theory of voting *rights*, we cannot accept the position that any judicial intervention in defense of voting rights that also happens to advance the electoral fortunes of one of the political parties is impermissible. Once we accepted a one-person-one-vote standard it was too late. The very quality of an individual constitutional right is that it is to be judicially vindicated no matter what the policy consequences. Surely we ought not decide free speech rights cases in favor of the speaker only when we estimate that an approximately equal number of

48. *Id.* at 65.

Republicans and Democrats are potential exercisers of the particular right in question. The trouble with Republican-Democrat arguments is that they prove too much. The wonders of modern, computer-aided, political science analysis will always give us a Republican-Democrat win/loss box score for any judicial intervention in the election game. If courts were required to maintain the partisan status quo, all judicial intervention would be forbidden. The Supreme Court is already too deeply involved in the elections game to pull out entirely. It may well say, "Damn the Republicans and the Democrats, full speed ahead for voting *rights*."

VII. TWO HYPOTHETICALS

Before moving on to some concluding remarks, I want to present two hypothetical cases designed to show that the horse has probably already logically fled as Lowenstein and Steinberg rush to the barn.

In case one, a state introduces a random computer-generated grid system after an amendment to the state constitution requiring nonpartisan districting by a commission. The impact is to reduce the number of blacks in the state legislature. A suit is filed under the amended Voting Rights Act.⁴⁹ The state shows that neither its chosen grid nor any alternative grid will achieve a number of black legislators as large as the existing number because the existing number resulted from past gerrymanders favoring Democrats and incidentally, therefore, favoring blacks. The state argues that it ought to be allowed to end gerrymandering even if an incidental impact will be to reduce black representation. In such a case would not the Supreme Court order a racial gerrymander?

In case two, a state affirmatively racially gerrymanders and in doing so creates a 12% size variation between its largest and smallest districts. A standard malapportionment suit is filed. The state argues that, in order to achieve below 10% population variance and adequate racial representation, absolutely outlandish district boundaries would have to be drawn, and the state constitution requires compactness. (The hypothetical is even more striking if we use congressional districts where the Court allows no population vari-

49. See Grofman, *supra* note 3, at 98-99.

ance.) The Court must either grant or not grant an exception to its normal rule of less than 10% variance.

The Court has already become involved in judging the "reasonableness" of variations of the one-person-one-vote standard designed to achieve place representation. My hypotheticals indicate that it may soon get into the "reasonableness" of variations on one person, one vote and compactness to achieve race representation. Once courts begin looking at the substantive justification for the shape of districts in race cases, are they going to be able to resist in nonrace cases? The judicial restraint barrier will be broken.

VIII. MY VERDICT

My verdict on the case that Lowenstein and Steinberg have presented is that it remains unproved. My verdict rests on two basic evaluations. First, it is insufficient to tell the Supreme Court that it ought not to intervene in a certain area because it cannot construct an objective, general standard of the right, the fair, and the just in that area. The Court often has been willing to act on the basis of identifying the wrong, the unfair, and the unjust, and it surely can identify those qualities in many districting maps. Second, it is insufficient to tell the Court that a seemingly neutral intervention nonetheless is to be avoided because it will aid the Republican Party. Such an argument either is a partisan appeal addressed to the wrong partisans or depends on a series of definitions of gerrymander, natural and neutral, that the Court need not accept.

IX. GROFMAN AND EVERYMAN

My verdict is supported by the contribution of Grofman—not by its arguments, but by the fact of its existence. Grofman, whom I have trouble calling Grofman, by the way, because we are old brethren in that unique institution, the School of Social Sciences at the University of California, Irvine, is perhaps the most qualified person in the nation to evaluate the role of courts in electoral matters. A very sophisticated member of the new public choice wing of the political science profession, he has also served as an expert witness in a whole series of districting cases. No one knows better the complexities surrounding every measure,

standard, criterion, and element of proof employed in this field and the difficulties of translating this complexity from the mind of the political scientist to the opinion of a judge. Indeed he says:

[M]y own worst fear [is] that even though statistical methods to detect gerrymandering do exist, courts will be unable to grasp the sophisticated nuances of seats/votes relationships and the need for multifaced tests. In trying to simplify the measurement of partisan gerrymandering to make it manageable, courts may end up not simplifying but simply writing bad law, which could throw the reapportionment process into chaos.⁵⁰

And what, according to Grofman, would be good law? Grofman's good law would acknowledge that there are no uncontroversial, neutral districting criteria.⁵¹ His law would distinguish between the "normal workings of political competition," which is permissible, and "invidious partisan lust,"⁵² which is not. The line between these two categories would be determined by a test constructed from no less than twelve "indicators" plus three "flags."⁵³ The law would not seek a random or party-blind or nonpartisan districting because "nonpartisan districting" "cannot be done" and "should not be done."⁵⁴ Grofman rejects what might appear to be the one easy-to-apply nonpartisan measure—proportional representation. "[I]t is an almost inescapable feature of single-member district plurality elections that there will be a discrepancy between a group's share of the statewide vote and its share of the seats in the legislature."⁵⁵ Seconding Niemi, he believes that a "quite promising . . . approach" to the identification of gerrymandering and its avoidance is a concern for the "symmetry" of "responsive range" in the "swing ratios" of the two major parties.⁵⁶

Grofman has, of course, led us into a terrible morass. Each of his criteria requires statistical analyses about which experts will quibble and sputter endlessly and which judges will not understand. And even if all the experts absolutely

50. *Id.* at 159.

51. *Id.* at 111.

52. *Id.* at 124.

53. *Id.* at 117-19.

54. *Id.* at 124.

55. *Id.* at 122-23.

56. *Id.* at 147, 151.

agreed on the statistical analysis, at the final step that analysis is brought to bear to discover a distinction that is impossibly vague and blurred, the distinction between inevitable partisan "competition" and evitable partisan "lust." Even if a whole herd of social scientists could get their act together, we would be using an atomic clock to measure whether someone was "late" or "very late."

In the face of all the pitfalls that he knows better than anyone, Grofman nonetheless concludes, "I believe intentional political gerrymandering ought to be justiciable."⁵⁷ Justiciability, of course, is a question of judicial role. But the reasons Grofman offers in support of this statement and immediately following it are almost entirely concerned with how bad gerrymandering is, rather than how good courts would be at fixing it. When he returns to this topic,⁵⁸ he says that districting is basically a legislative task and that identifying and correcting gerrymanders would be a complex task for the judiciary and would lead to inexact results. He responds to his own admissions by saying that courts should intervene in the legislative task only when the evil is extreme, that courts are called upon to do complex statistical analyses in some other areas of law, and that if courts do not take on this statistical complexity, it "becomes a smokescreen behind which gerrymandering can be hidden."⁵⁹ But his major point is not that courts are good, but that gerrymandering is bad.

In my view Grofman is also Everyman. In the final analysis, the pathology of democracy problem is so overwhelming that—for most Americans of good will, including those who happen to be judges—it overcomes judicial role and capacity problems. Gerrymandering is a bad, bad thing. And there is nobody around to fix it except courts. They may have a lot of trouble doing it, and it may get them into a lot of trouble, but they must do it anyway because there is no one else who can.

In the face of this most sophisticated political science Everyman, is there anything we can say to persuade the judicial Everyman to stay out of the slew? I doubt it, but let me try.

57. *Id.* at 111.

58. *Id.* at 153-54.

59. *Id.* at 154.

X. PERORATION ADDRESSED TO THE SUPREME COURT OF
THE UNITED STATES

Generals who win one big battle keep trying to fight that one over and over again. Before the Supreme Court entered the malapportionment war, it was warned that to do so would be to enter an impenetrable thicket which it could not clear and which would entangle it in partisanship damaging to its prestige. Instead, the Court won a great victory, equalizing district populations and enhancing its prestige. Many Justices no doubt think, in the face of the same kinds of warnings, that gerrymandering is the same kind of battle and that they can win it too. They are wrong. There are two plausible battle scenarios. The first results in a war of attrition with casualties too high for the Court to accept. The other results in nuclear disaster.

In the first scenario, the Court enters the gerrymandering battle with a *Baker*-like opinion, stressing that it will strike down Grofman's "partisan lust," that is, blatantly unfair, crazy-quilt districting. To demands that it be more precise, the Court responds with a more or less sophisticated version of Justice Stewart's "I know it when I see it" or, perhaps, with Grofman's fifteen possible symptoms and the usual judicial evasion that it is for the legislature to make good districting plans and for the Court to strike down unconstitutional ones. The next step is, of course, that the bar takes this new *Baker*, as it took the old one, as an invitation to litigate. There is a constant flow of cases to the Supreme Court.

If the Court persists in deciding this flow on "unfairness" grounds, citing many factors and considerations, the flow will increase. New Fred Korts will arise. (During the long period in which the Court used the fair trial rule, Kort devised a technique for cataloging all the factors that the Justices had taken into account in one or more of their past fair trial decisions. Kort would then determine how many of the factors at what level of severity had cumulated to tip a trial into the unfairness category in the past cases. Using these calculations he could predict with considerable accuracy the outcomes of future fair trial cases. His success did not, of course, indicate that the Court had evolved a stable doctrine. Quite the contrary; what he was doing was building an accurate cumulative measure of the Justices knee-jerk

responses to a wide range of police tactics and trial errors.⁶⁰)

Using Kort-like techniques, clever political scientists and political geographers will generate districting plans that yield the maximum partisan advantage without quite tipping over into the unfairness bin established by measuring the Court's past decisions.

Under this kind of pressure, future Justices might have the guts to stick with the unfairness analysis, but at the cost of constantly appearing arbitrary, hypocritical, naive, and inconsistent when they split over finding some districtings fair and others unfair without being able to articulate precisely why. And more importantly, the decisions will constantly occur in a highly charged partisan atmosphere in which the votes of the Justices will be constantly correlated to their former party affiliations. Let there be no mistake. The cumulative Republican and Democratic party batting averages for the Court as a whole and for each individual Justice will be published at the end of each term.

The appearance of partisanship will be far greater here than in reapportionment. In *Baker*, through a demographic quirk peculiarly favorable to the Court, reapportionment meant the transfer of seats from *both* conservative and Republican rural areas *and* liberal and Democratic central cities to the rapidly growing suburbs. Both parties felt they had a pretty good chance with suburban voters. Districting is different. It is hard-ball, often zero-sum, politics in which anything one party gains the other loses. It is in this context that Lowenstein and Steinberg's point about favoring Republicans becomes important. More "unfair" districting schemes are going to favor Democrats than Republicans, both because the Democrats control more state legislatures and because "fair," in the sense of party-blind districting schemes, favors Republicans because of the stacking of Democrats in central cities. Thus, if the Court sticks to a "fairness" approach, partisan batting averages will be compiled, and they will show Republicans batting higher than Democrats.

This is the war of attrition: a continuing stream of cases

60. See Kort, *Predicting Supreme Court Decisions Mathematically: A Quantitative Analysis of the "Right to Counsel" Cases*, 51 AM. POL. SCI. REV. 1 (1957); Kort, *Content Analysis of Judicial Opinions and Rules of Law*, in JUDICIAL DECISION-MAKING (G. Schubert ed. 1963).

in which the Court suffers increasing losses to its reputation for reasoned, neutral decision making, with its own decisions more and more a crazy-quilt, but a crazy-quilt that warms Republicans. The Court should not enter this battle because the casualties will be too high.

The far more likely Court response to these kinds of losses, however, is not persistence, but escalation. And that brings us to our nuclear disaster scenario. In this one, too, the Court eases into battle with a *Baker*-like unfairness decision and then begins feeling the pressure of continuing litigation. It finds it cannot bear the losses that persisting in unfairness jurisprudence entails, and it makes the fatal error of trying to repeat its reapportionment battle plan. It seeks to move from a *Baker*-style position to a *Reynolds*-style position, establishing a statistical measure of unfairness equivalent to a one-person-one-vote rule. It will try the symmetry of swing ratios that Grofman finds "promising." But what an ominous word promising is in the mouth of a social scientist. The Court will find that symmetry of ratios does not enjoy the ease of application of a one-person-one-vote standard. In the hands of dozens of smart, paid Republican and Democratic social scientists, symmetry of swing ratios is not going to turn out to be Chief Justice Warren's child-like arithmetic but, instead, an endless social science statistical methodology debate. And just as importantly, symmetry of swing ratios is not going to have the wonderful sloganistic ring that made one person, one vote a doctrine impossible to attack successfully in the forum of public opinion. Pity the Court that believes that it can defend itself in public with Grofman's sophistication the way it defended itself with Warren's naivete.

The next step in the scenario is clear. There is a judicial defense weapon in gerrymandering equivalent to one person, one vote in malapportionment. That weapon is proportional representation. It is as easy to calculate and it is as obviously democratic to the naive. It provides the equal representation to each citizen that the Chief Justice proclaimed as our goal in *Reynolds*.

Moreover, if the Court does go down the racial gerrymander path, as it almost certainly will (at least in legitimating voluntary affirmative racial gerrymanders by state legislatures), it will already be speaking the language of

group proportional representation in the racial gerrymander area by the time it finds it must get beyond symmetry of swing ratios in the partisan gerrymander area.

At that point, with symmetry not providing the simplistic solution it needs to cut its losses, and proportional representation already in the armory, the Court can easily explain away its old antiproportional representation language and go to proportional representation. It will simply say that, of course, as its old cases say, there is no constitutional requirement of exact proportional representation, but that an approximation of proportional representation is the best evidence that a districting scheme is not unfair.

None of the contributors to this Symposium, no matter what their position on judicial intervention, want proportional representation. Opposition to it results from an appreciation of how wonderful, mysterious, and unique is the American system of relatively stable, two-party democracy. After years of comparative study, we do not know why some countries enjoy stable democracies and others do not. We do not know exactly how and why two-party systems seem to contribute to more stable democratic government than multiparty systems. We do not know exactly how and why two-party systems arise and sustain themselves. We do suspect, however, that single-member district, winner-take-all electoral systems have something positive to do with it, and proportional representation systems are inimical to it. We quarrel endlessly about the condition of the two-party system in the United States. Is it still there? Half gone? All gone? Reviving? Declining?⁶¹ All we are sure of is that political systems are mysterious, delicate, and respond in unanticipatable ways to changes in the rules of the game.

All of this leads to the conclusion, "If it works, don't fix it." If the second scenario occurs, the Justices will have, on their own hook, made the most major and fundamental amendment to the Constitution since the fourteenth amendment. They will have fundamentally changed the most suc-

61. See Cavanagh & Sundquist, *The New Two-Party System*, in *THE NEW DIRECTION IN AMERICAN POLITICS* (J. Chubb & P. Peterson ed. 1985); Reichley, *The Rise of National Parties*, in *THE NEW DIRECTION IN AMERICAN POLITICS*, *supra*. The classic summary of the mysterious rise of the American two-party system is to be found in V. KEY, *POLITICS, PARTIES AND PRESSURE GROUPS* 183-310 (4th ed. 1958).

cessful democratic political system that the world has ever known without having any idea what they have done or whether the system can survive it. Proportional representation, once let loose as a constitutional standard, could not be confined to the two major parties. The result might be a multiparty system in a very geographically and ethnically diverse nation. This is constitutional revolution indeed. It might well end up another Lebanon. Surely the Court ought not to enter the districting arena if there is a substantial danger that it will end up creating this kind of risk.

Now judges are used to this kind of parade of horrors. Their response is invariably some version of "not while this Court sits." That is, they say, "We will not allow ourselves to be pushed to the extremes you claim are entailed by the action we propose to take." In this instance they will say that it is I who am wrongly refighting the *Baker-Reynolds* battle. The Supreme Court did not really adopt a one-person-one-vote standard because of post-*Baker* litigation pressure. A majority of the Justices had already secretly chosen one person, one vote at the time *Baker* was decided and were only tactically delaying their announcement of it until *Reynolds*. In reapportionment cases the Justices actually wanted the extreme simple standard and got it. In districting they do not want proportional representation and will not get it.

My response is a question to the sitting Justices. Are you sure that you, the other sitting Justices *and future Justices* will have the guts to hold to an unfairness standard under constant litigation pressure and under a constant barrage of claims that the Court is being inconsistent, arbitrary, and *partisan*, and is deciding each case as it likes with no real guiding and controlling doctrine at all? Are you *so* sure, that you are willing to risk disaster if you are wrong? If you are not *absolutely* sure that future Courts will have the will and the courage to *stop* at an unfairness standard, you ought not to start down the gerrymander road at all. And finally, is the game worth the candle even if it is played out according to the unfairness scenario? Would the half-baked melange of social science theory, statistics and knee-jerk reactions that make up a judicial unfairness standard necessarily do the country any good? Would it do the Court's reputation any good?