

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - X

3   RICHARD VIETH,                   :

4   NORMA JEAN VIETH,               :

5   AND SUSAN FUREY,               :

6                   Petitioner               :

7           v.                               : No. 02-1580

8   ROBERT C. JUBELIRER,           :

9   PRESIDENT OF THE               :

10   PENNSYLVANIA SENATE, ET AL.   :

11   - - - - - X

12   Washington, D. C.

13   Wednesday, December 10, 2003

14                   The above-entitled matter came on for oral  
15   argument before the Supreme Court of the United States at  
16   11:08 a.m.

17   APPEARANCES:

18   PAUL M. SMITH, ESQ., Washington, D. C.; on behalf of the  
19                   Petitioners.

20   JOHN P. KRILL, JR., ESQ., Washington, D. C.; on behalf of  
21                   Respondents Jubelirer and Perzel.

22   J. BART DeLONE, ESQ., Senior Deputy Attorney General,  
23                   Harrisburg, Pennsylvania; on behalf of Respondents  
24                   Cortes and Accurti.

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P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1580, Richard Vieth, et al. v. Robert Jubelirer.

Mr. Smith.

ORAL ARGUMENT OF PAUL M SMITH  
ON BEHALF OF THE PETITIONERS

MR. SMITH: Mr. Chief Justice, and may it please the Court:

This Court held 17 years ago in Davis v. Bandemer that a claim of partisan gerrymandering is actionable under the Federal Constitution. But the lower courts have since effectively overruled Bandemer by requiring factual showings of plaintiffs in these cases that are both impossible and, I submit, irrational. As a result, the state -

QUESTION: Well, do you - do you - do you think the lower courts then didn't follow Bandemer? I mean, Bandemer set a very, very high standard.

MR. SMITH: Well, the standard that I think was - the proper reading of Bandemer does not require that you show that your members of your party have been completely disenfranchised, to the extent that African-Americans once were in the South, or that - that your party has

1 effectively been banned. The standard that was applied  
2 here required that you show that you're being prevented  
3 from registering to vote, from raising money, from  
4 campaigning, from showing up at the polls.

5 Those kinds of constitutional violations don't  
6 make sense as an element of a partisan gerrymandering  
7 claim, because they're not about gerrymandering, and of  
8 course, they never occur. So if you're going to say the  
9 claim is justiciable, it doesn't make sense simultaneously  
10 to require people to establish those kinds of independent  
11 violations.

12 QUESTION: Three of us in Bandemer thought the  
13 claim was not justiciable.

14 MR. SMITH: Yes, Your Honor, and I would submit  
15 to you that - that - that history suggests that - that it  
16 - the Court should not go that direction, because -

17 QUESTION: I was thinking history showed that was  
18 the way to go.

19 MR. SMITH: Well, what - what we've seen, Your  
20 Honor, because of the - the fact that the lower courts  
21 have effectively read - rendered -

22 QUESTION: They couldn't - they can't reach a  
23 decision under that Bandemer standard. It's impossible.  
24 So maybe the way to go is to just stay hands off these  
25 things.

1                   MR. SMITH: Well, we've never had a - an  
2 opportunity for the lower courts to actually apply a  
3 standard that says when does the map become so unfair that  
4 it's anti-democratic? What they have done instead is  
5 apply this shut-out standard, which doesn't allow any real  
6 scrutiny of the map.

7                   QUESTION: Let - let me tell you my concern with  
8 - with fairness. If - if you look at British  
9 parliamentary history, begin with Walpole and go to  
10 Disraeli and Gladstone and Pitt and Churchill, and then if  
11 you come to this country and you think about Dirksen and  
12 Cannon and Webster and Clay, I don't recall any of them  
13 ever talking about this issue from a standpoint of  
14 fairness. I don't know what I'm supposed to look to.  
15 Legislate - there's just no sources on which we could -  
16 from - from which we can draw.

17                   I would concede that what happens here is unfair  
18 in some common - common parlance. It - it - it looks  
19 pretty raw. But I don't recall legislators talking about  
20 what neutral standards ought to be. Now, we have in our  
21 own juris - people talk about contiguity, geographical  
22 compactness, but I just don't think we have a - a large  
23 source on which to draw. We know about numbers, one - one  
24 person, one vote. But beyond that, I - it - it seems to  
25 me that we're at sea.

1                   MR. SMITH: Well, Your Honor, what we - what we  
2 try to do is articulate a standard which is tied to the  
3 basic democratic values that are at stake and to the - and  
4 to the article I standard that says the people should  
5 ultimately be deciding who's going to be representing them  
6 in Congress, not the states. The one thing that's clear  
7 from the constitutional -

8                   QUESTION: Well, since we're talking about  
9 article I, it also says that the times, place, and manners  
10 of holding elections for Senators and Representatives  
11 shall be prescribed in each state by the legislature, but  
12 the Congress may, at any time, by law, make or alter such  
13 regulations. That suggests to me it's none of our  
14 business.

15                  MR. SMITH: Well, Your Honor, this Court held in  
16 *Wesberry v. Sanders*, and has since twice done - applied  
17 that again, both in *Cook v. Gralike* and the - and in the  
18 Term Limits case, that there are judicially enforceable  
19 limits on the extent to which a state, in exercising the  
20 procedural power to establish the times, places, and  
21 manners of congressional elections, can create an uneven  
22 playing field and attempt to try to dictate the outcome of  
23 an election.

24                  QUESTION: All right. But then the problem is  
25 that I think I have and others is, what are these

1 standards? Now, you propose, one, look to the mind of the  
2 legislature. We'll do that. They'll always want party  
3 advantage, always. Look to the extent to which they  
4 depart from historically drawn lines. Well, the  
5 historically drawn lines themselves are random. Third,  
6 history. Why is history the key? Third, look to see  
7 whether or not the minority party might get the majority  
8 of votes, but the minority of seats. Whether they might  
9 in the future, that depends how people vote in the future.

10 There's no set of lines where you couldn't  
11 imagine results that could come out that way. So how do  
12 we do it?

13 MR. SMITH: Your Honor, that's - with - with all  
14 respect, I - I - first of all, we don't suggest that you  
15 should somehow look at the departure from historical  
16 lines. That's not part of our -

17 QUESTION: You said look to see whether the  
18 traditional criteria are predominantly ignored.

19 MR. SMITH: That's -

20 QUESTION: That's what I'm referring to.

21 MR. SMITH: Okay. That's part of the intent -  
22 yes.

23 QUESTION: I've read it. I understand it.

24 MR. SMITH: Our - our standard on effects is that  
25 - does not suggest that politics should be taken out of

1 this process. As this Court recognized in Gaffney -

2 QUESTION: No, no. I - my question is, how do  
3 your standards possibly work?

4 MR. SMITH: The standard would be, under our -  
5 under our submission, can you demonstrate that it is  
6 absolute - that it is very clear that you could get more  
7 than half the votes and have no chance.

8 QUESTION: Always can.

9 MR. SMITH: No.

10 QUESTION: You can't draw a set of lines such  
11 that I couldn't imagine a voting pattern such that that  
12 wouldn't happen.

13 MR. SMITH: But, you see, our standard is  
14 precisely the opposite. You have to show that it would -  
15 under any voting pattern, it would happen. There is no  
16 possibility that with more than half the votes you could  
17 get anywhere near half the seats.

18 QUESTION: You're - you're just pulling this -  
19 you're just pulling this thing out of a hat, so to speak.  
20 I mean, you've got phrases in the Constitution that  
21 Congress may do it or the states may do it. You've got  
22 the Equal Protection Clause, which was - came into being,  
23 you know, in 1868, not in the original Constitution. And  
24 they - they just don't intimate anything like what you're  
25 talking about.



1           MR. SMITH: Well, Your Honor, we - we focus on  
2 this 50/50 point, this majoritarian standard for two main  
3 reasons.

4           QUESTION: What - what -

5           MR. SMITH: One is a - is a matter of principle,  
6 which is to say, when does consideration of politics go  
7 too far? It goes too far when we're no longer operating a  
8 democracy -

9           QUESTION: Well - well -

10          MR. SMITH: - we're having a minority party  
11 control the majority of seats.

12          QUESTION: Well, when you say, you know, the -  
13 the Constitution doesn't ever use the word democracy.

14          MR. SMITH: Yes, but we - but we have a - we have  
15 a -

16          QUESTION: Not to mention party.

17          QUESTION: Yeah.

18          MR. SMITH: We have a commitment though to the -  
19 to the fact that the House of Representatives is supposed  
20 to mirror the people and is supposed to be -

21          QUESTION: Well -

22          MR. SMITH: - representative of the people.

23          QUESTION: Well, you - but -

24          MR. SMITH: And we -

25          QUESTION: The - the - the Constitution

1 originally provided that the - the standard for the state  
2 vote would be the standard for the Representatives in  
3 Congress. And in other - it - it was simply left up to  
4 the states. And there were property qualifications for  
5 many years, so it didn't represent the people in that  
6 sense.

7 MR. SMITH: The reason we are focusing on the  
8 majority standard, the 50/50 standard, is in part because,  
9 as this Court has recognized in Wesberry and it's  
10 recognized in - in - in Cook and it's recognized in  
11 Thornton, the states are not supposed to be deciding for  
12 themselves who's going to be representing the people. The  
13 people are supposed to decide.

14 The second reason is that 50/50 you don't have  
15 these problems of distortions, which, as an empirical  
16 matter, happen in a winner-take-all, single-member  
17 district system. When you get to 60/40, the party that  
18 has 60 percent of the vote ordinarily would expect to get  
19 more than 60 percent of the districts. That's why you  
20 don't - you don't ever want to have a rule of proportional  
21 representation.

22 QUESTION: It happens under a system of  
23 presidential electors too, as we recently saw. Is that  
24 unconstitutional also?

25 MR. SMITH: No, Your Honor. The electoral

1 college is not a majoritarian standard in the same way  
2 that we - we have here. Because of the Great Compromise,  
3 it includes two Senators are counted, two votes for the  
4 Senators in every state across the board, so there - that  
5 - that is the disparity between the popular vote and the  
6 electoral college. But in the - but the House of  
7 Representatives was supposed to be the mirror of the  
8 people and the - this Court has constantly policed the  
9 efforts by the states to encroach from procedure into  
10 substance, to try to decide in advance, as Pennsylvania  
11 did here. We would rather have two out of three of our  
12 Representatives be Republicans, even though we're a 50/50  
13 state, and regardless of how people vote, we're going to  
14 determine -

15 QUESTION: Yeah, but it's not - let - let me -  
16 you've got me up to the point of this 50/50 business. Now  
17 I'm thinking. Let's use party names. It helps for  
18 clarity. Suppose the Democrats have, under the  
19 districting, they're - they're the ones who are the  
20 victims. Now, let's suppose that they did get 55 percent  
21 of the state vote for Congress in the next election. Now,  
22 you're saying that if it were true by this map that  
23 they're getting that vote, 55 percent, meant that  
24 nonetheless, they had to get fewer than half the  
25 Congressmen, then it's bad.

1                   And my problem with that is, I don't see how  
2 we're going to know in advance, unless this is going to be  
3 done by some experts coming in and measuring prior votes  
4 and getting into an argument. And if that's what's going  
5 to happen, I keep thinking of Ken - John Kenneth  
6 Galbraith, who says, I'd rather be governed by 400 people  
7 chosen at random from the telephone book than the Harvard  
8 faculty. All right, now -

9                   (Laughter.)

10                  QUESTION: That's a joke, but nonetheless, is a  
11 serious point.

12                  QUESTION: William - Will - William F. Buckley,  
13 Jr., not - not - not Galbraith.

14                  QUESTION: Now, do you see my -

15                  (Laughter.)

16                  MR. SMITH: Other side of the aisle. Your Honor  
17 -

18                  QUESTION: Now, I've exposed the entire problem  
19 I want you to respond to it.

20                  MR. SMITH: Your Honor, experts will in all  
21 likelihood be involved as we - we have an example of the  
22 kind of expert testimony that can be given here. But this  
23 is not, to use another expression, rocket science.  
24 Experts testify in voting rights cases about how districts  
25 will behave. They use prior election returns plugged into

1 those districts to make estimates about how they will  
2 behave, and it'll be the burden on the plaintiffs to  
3 establish - they have the burden of proof - that, in fact,  
4 it is true that if you get - that - that the - this  
5 favored party, with more than 50 percent of the vote, will  
6 have essentially no chance of getting half the districts.  
7 That is -

8 QUESTION: Were the experts on which you rely,  
9 were they presented as witnesses in the district court?

10 MR. SMITH: We had a trial on the one person, one  
11 vote claim, Your Honor, after the partisan gerrymandering  
12 claim was defeated, was dismissed. And the - the state  
13 tried to justify the deviation by talking about neutral  
14 principles that governed this map, and so we had the  
15 opportunity to put a kind of preview of our partisan  
16 gerrymandering evidence on -

17 QUESTION: Yes, but Mr. Smith, isn't it true that  
18 what the issue is sufficiency of your complaint?

19 MR. SMITH: That's - that's correct, Your Honor.  
20 At this point -

21 QUESTION: And may I ask you a question that -  
22 that troubles me about the complaint? It seems to me your  
23 complaint was drafted on the theory that you agreed with  
24 Justice Powell's position in Bandemer, but the position  
25 you've come up with in this Court is entirely different

1 and not the one that I read into the complaint. Your  
2 majority analysis theory is - is really quite different  
3 from - from that theory. You - you seem to have abandoned  
4 Justice Powell.

5 And I - what I wanted to ask you is, under the  
6 theory of the complaint, as opposed to the theory on which  
7 you're arguing in this Court, if you were - you allege  
8 that there were no neutral justifications whatsoever for  
9 any district line. And if you put in proof to that effect  
10 and the - and the other side prove there were neutral  
11 justifications for half the districts, say, but the - that  
12 there were a half that did fit your allegations, would -  
13 would - in your view, would the district court have the  
14 authority to review the districts that were totally  
15 unjustified without meeting your majority analysis claim?

16 MR. SMITH: I think the court does have to look  
17 at the effects of the deviate - departures from  
18 traditional district criteria -

19 QUESTION: Assume the effects, say you've got two  
20 plaintiffs, one from district 6 and one from 16, I think.

21 MR. SMITH: Yes.

22 QUESTION: If, for example, the - the court  
23 thought that district 6 had absolutely no justification,  
24 it's wildly, you know, the shape is so terrible and so  
25 forth, but the rest of the map was okay. Under your

1 complaint, could the judge do anything about that?

2 MR. SMITH: I - I think it - the - certainly  
3 under our complaint and under the - our conception of the  
4 case, you don't look at one district in isolation and say,  
5 this district is too ugly or too much of a departure -

6 QUESTION: I know your complaint is drafted as a  
7 all-or-nothing, but I'm just wondering, within the -  
8 within the allegations, would - would it be open to the  
9 judge to say, well, they lose on the total picture, the  
10 majority theory is - is just too - too novel for me, but  
11 what they've said about district 6 pans out 100 percent.  
12 Is that -

13 MR. SMITH: That - that's not our case, Your  
14 Honor, and - and the reason for it is, I don't think that  
15 this Court is going to come in and start imposing,  
16 particularly districting criteria, when an ugly-looking  
17 district -

18 QUESTION: In particular districts?

19 MR. SMITH: - an ugly-looking and odd -

20 QUESTION: They did that in the racial  
21 gerrymandering context - situation.

22 MR. SMITH: Only when - only when it's talking  
23 about race on either side of the line, and - and it could  
24 be that the Court would ultimately get to the point of  
25 saying a district that's too ugly and - and divides

1 Democrats from Republicans ought to be viewed in the same  
2 way.

3 But our submission is more like the racial vote  
4 dilution case, that not only are there departures would  
5 show partisan intent, but you have to look, as the Court  
6 said in Bandemer, statewide and see whether, in fact, the  
7 - the - the legislature has created a situation where a  
8 Republican votes counts twice as much as a Democratic vote  
9 in this state because -

10 QUESTION: Race does not change. You - you are  
11 the race you are, and you're not going to change it next  
12 year. Political party doesn't work that way. How do -  
13 how - how - how do you decide what, you know, what - what  
14 is the Republican vote? Is it just registered Republicans  
15 -

16 MR. SMITH: No, Your Honor -

17 QUESTION: - and is everybody that's registered a  
18 Republican now have to stay - maybe we should make them  
19 stay registered Republicans so that we can have good  
20 districts, right? I mean, it - it - I just don't  
21 understand how you run this scheme. You cannot really  
22 tell until after the election is done how many Republicans  
23 and how many Democrats there are in each district.

24 MR. SMITH: Well -

25 QUESTION: Are - are you going to -



1 MR. SMITH: - the way you identify -

2 QUESTION: - count on party registration? Is  
3 that the basis for divvying it up?

4 MR. SMITH: No, Your Honor. It's how people have  
5 voted and how -

6 QUESTION: In the last election.

7 MR. SMITH: Yes. And it - it would again be the  
8 burden of the plaintiff to show that there are predictable  
9 voting patterns, that there's a large chunk of people who  
10 are consistent Democratic or Republican supporters who are  
11 being injured in their voting rights by means of a - of a  
12 deliberate scheme by the legislature.

13 Now, the idea that these people are hard to  
14 identify is a little hard to square with a map, in which  
15 you have these incredibly complicated peninsulas going out  
16 to find -

17 QUESTION: Any particular election, they are very  
18 hard to identify in any particular election, which is why  
19 the parties go about selecting their candidates very  
20 carefully. If it didn't make any difference, they'd pick  
21 any old body -

22 MR. SMITH: What the evidence -

23 QUESTION: - and run them and - and you'd get all  
24 of the same Republican and the same Democrat votes.  
25 That's not the way the world works.

1                   MR. SMITH: Well, what the plaintiff would have  
2 to show in such a case is that there's a sufficiently  
3 consistent pattern of voting in the state that a racial -  
4 that a political gerrymander is possible and it has  
5 occurred and it - and that it will - and that, in fact, in  
6 the future there will be an injury to one class of voters  
7 who have been packed into a small number of 90 percent  
8 Democratic districts, while there's a much larger number  
9 of relatively safe Republican districts.

10                   Now, you can say that's not true or we can't  
11 know it, but we all sit here knowing - know that's what  
12 they did.

13                   QUESTION: Mr. Smith -

14                   QUESTION: Well, what is it -

15                   QUESTION: To - to what extent - what - to what  
16 extent, Mr. Smith, does your - does your theory depend on  
17 the registration of the voters?

18                   MR. SMITH: Registration might be an indication  
19 of voting patterns, but our theory is - is you look at  
20 voting patterns and decide in advance of the next  
21 election, will there in fact be a - a situation where it's  
22 impossible for - if the Democrats got half the votes or  
23 the Republicans got half the votes, it would be impossible  
24 for them to get close to half the seats.

25                   QUESTION: Well, what is the -

1 QUESTION: The point is it -

2 QUESTION: - particular vice of - of

3 redistricting, just on the basis of politics? Suppose you  
4 did it on the basis of isolating or - or fracturing union  
5 votes, or - or the gay vote or the environmentalist vote  
6 or farm subsidies?

7 MR. SMITH: Well -

8 QUESTION: Where - where - where does your - your  
9 - your principle particularly elect political parties? In  
10 - in - in fact, it seems to me that parties might - might  
11 well conclude - include some of these groups that I've  
12 mentioned.

13 MR. SMITH: This Court has - has made clear in a  
14 number of cases that the Government has no business  
15 discriminating against people based on their partisan  
16 affiliation or their political viewpoint, in contracting,  
17 in jobs. And it seems to us it would - it should be clear  
18 that at some point, a level of discrimination in designing  
19 the machinery of democracy, the electoral process itself,  
20 a - a form of discrimination that's equivalent to saying,  
21 in two-thirds of the district we're going to count all the  
22 Republican votes twice, in one-third of the districts  
23 we're going to count all the Democratic votes twice.

24 QUESTION: But certainly you allow for some  
25 discrimination? I mean, that - that's the way

1 legislatures go at it.

2 MR. SMITH: Well, as this - this Court has made  
3 clear, both in the race area and the politics area,  
4 redistricting is a little different from other areas. It  
5 doesn't make any sense to demand purity and a complete  
6 non-consideration of these factors, but there has to be an  
7 outer boundary. If there's no outer boundary, then -

8 QUESTION: Mr. - Mr. Smith, you're - you're  
9 essentially asking how much is too much. You say you have  
10 this decision that said people have this claim that they  
11 can bring, Bandemer. But that was a case where the bottom  
12 line was, and you have no claim on the merits. Now, if a  
13 judge, a district judge, in - in one of these cases said,  
14 well, here's the Indiana plan and the court said that that  
15 was okay, and this one doesn't look any worse to me. Is  
16 there a difference between the Pennsylvania plan and the -  
17 a significant difference between those two?

18 MR. SMITH: There's a -

19 QUESTION: With our precedent, I mean, you have  
20 to take the whole of it, not just half. The half standing  
21 to sue you like, the bottom line, but the Indiana plan,  
22 egregious as it may look, is okay.

23 MR. SMITH: Well, the facts shown in the Indiana  
24 case, in the Bandemer case, were much less severe than  
25 those we alleged here, in terms of - here we had

1 allegations which were ultimately supported by expert  
2 testimony in the one person, one vote trial, that they  
3 would get a large super-majority of the districts with  
4 only half the - with half the votes or less.

5           And in - in Bandemer, the facts as they were  
6 presented, there was no such expert analysis. Instead,  
7 they relied on the results of one election in which one of  
8 the bodies actually came out the right way and one of them  
9 came out slightly the wrong way. They had not supplied  
10 the Court with the same kind of evidence that we would  
11 propose to supply, and - and did not meet, at least as an  
12 evidentiary matter, the standard that we propose here.

13           It might be that, in fact, if somebody looked at  
14 that Indiana map, it might have met that, but nobody  
15 studied it in that way. They were simply saying, look,  
16 it's really ugly, they've got these unfair, multi-member  
17 districts in certain cities, and, in fact, the way the  
18 vote came out in the House, the Democrats got more than  
19 half the votes and got only 43 percent of the seats. That  
20 I - that, I submit, is not a sufficient basis to establish  
21 the outer boundary that we would suggest you have to meet.

22           QUESTION: But if you're going to say it's not  
23 fair, fairness in what sense? If we say it's not fair to  
24 draw lines that will pack and crack one party or another,  
25 you're going to end up with no geographical boundaries,

1 because all geographical boundaries do that. A random  
2 system in Pennsylvania would give the Democrats no  
3 Representatives -

4 MR. SMITH: What -

5 QUESTION: - purely random

6 MR. SMITH: Well, that's -

7 QUESTION: So - so it's, I mean, my point is that  
8 politicians and the public, in fact, in fact has one idea  
9 of what's fair and it's very hard for a judge to turn that  
10 idea into judicially administrable rules.

11 MR. SMITH: Your Honor, with - with respect, I -  
12 I think that it is perfectly possible for somebody to look  
13 at a map and decide whether or not it does or does not  
14 unfairly discriminate against one of the political  
15 parties. Courts draw maps themselves fairly - fairly  
16 frequently. They collect testimony from experts, the map  
17 in Pennsylvania that was -

18 QUESTION: You - you can tell whether it  
19 discriminates against one political party, I guess on the  
20 basis of - of - of projections that may turn out to be  
21 wrong. You - nobody can say for sure. But what - what you  
22 can say, what you can guess about, is simply that it will  
23 favor one party over another, yes. But - but is it so  
24 easy to tell that it will unfairly favor one party over  
25 another? And that's what you're arguing here.

1                   How unfair is unfair? I don't know. What is  
2 it, 60/40?

3                   MR. SMITH: If it gets to the point where one  
4 party's getting two-thirds of the seats with less than  
5 half the votes, in a democracy, I submit that's the place  
6 where it crosses the line.

7                   QUESTION: Okay. Mr. Smith, you - is - is that  
8 the - the - the force of your argument, I take it, is not  
9 that this happens in one electoral year, because there may  
10 be all sorts of reasons. It's something, your argument  
11 is, it happens over time.

12                  MR. SMITH: It -

13                  QUESTION: Let's - let's - let me start with that  
14 assumption. Let's assume that we come up with a rule in  
15 which we - we come up with a wait-and-see rule, and we  
16 say, it's not enough for you to prove a - a violation to  
17 predict in advance. You've in fact got to prove a  
18 violation by looking back and establishing through the  
19 course of three or four elections that - that this pattern  
20 is emerging. And let's assume we say, if you can do that,  
21 you win.

22                  My question, which then goes to the substance of  
23 what you're going to win, and ultimately the substance of  
24 what your claim must be is, what is the principle that the  
25 district court must apply in a case like that to reform or

1 - or redraw the districts? Does he - does he come up with  
2 a principle that says anything that follows traditional  
3 redistricting principles, you know, compactness, et  
4 cetera, is okay? That won't necessarily solve your  
5 problem

6 Has he got to come up with a scheme that says  
7 there's a presumption that all districts have got to be  
8 competitive? If he does that, there's going to be a clear  
9 break with tradition because there are loads of places  
10 where you can't have competitive districts. What is the  
11 principle on which he's going to reform it?

12 MR. SMITH: Well, let - let - I will - let me  
13 directly answer that question in a moment, but let me just  
14 comment. I think the idea of a rule that says you have to  
15 wait three or four election cycles to - to prove your  
16 case, it would essentially be - mean that the claim is  
17 worthless, because you're going to redraw the districts  
18 every 10 years, and there's an enormous amount of  
19 irreparable harm, as you suggest.

20  
21 QUESTION: Two elections.

22 MR. SMITH: As you suggest, there's already  
23 irreparable harm. Once you've thrown out all the  
24 incumbents of the disfavored party, they have new  
25 incumbents that have come in now. It doesn't mean that



1 you can't have a remedy, and it would seem to me the very  
2 first thing you'd want to do, just as you do in a race  
3 case under section II is - is have a map which does not  
4 inherently pack and crack the disfavored group to the  
5 point where they don't have the opportunity to -

6 QUESTION: The - the trouble is, in the race  
7 case, you have a relatively simple objective in mind. And  
8 that is, the relatively simple objective is that once you  
9 identify the political party of the racial voter, the  
10 minority voter, that minority voter ought to have, in  
11 effect, the same opportunity as a non-minority voter of  
12 that political party.

13 Here, we have a different problem. What is the  
14 force or power that a member of a given political party  
15 ought to have? It's not as simple as the race case.

16 MR. SMITH: Well, I think the inquiry would  
17 essentially be the same though. They - the parties would  
18 have to come with the remedial map, the - presuming the  
19 legislature would have an opportunity to draw on in the  
20 usual situation, in which they could show that it is no  
21 longer the case that there is such packing and cracking of  
22 Democrats that - that at 50 percent, they would have no  
23 chance of getting 50 percent of the seats.

24 QUESTION: What - what if you have more than two  
25 parties? I mean, like Minnesota, where you have besides

1 the Republicans and the Democrats a very strong farmer  
2 labor party?

3 MR. SMITH: I assume that the experts could deal  
4 with that. In - in reality, in this country -

5 QUESTION: I - well, I - I'm sure they can. What  
6 - what - what test do you want them to apply?

7 MR. SMITH: Well, the -

8 QUESTION: Each proportional representation for  
9 each of the parties?

10 MR. SMITH: No, Your Honor. The - the - the test  
11 we're talking about here is - is if one of the parties  
12 would get to 50 percent, would they have an opportunity to  
13 - to have a majority of the delegation?

14 QUESTION: Do you take into account at all in -  
15 in this picture, this is not something that could have  
16 been adopted by the Republicans in the state legislature  
17 alone. It took quite a number of Democratic votes to put  
18 it through.

19 MR. SMITH: Well, Your Honor -

20 QUESTION: Is that - is that relevant?

21 MR. SMITH: It - it might be relevant at trial if  
22 we ever get to trial. Our claim was dismissed. What we  
23 would attempt to show at trial, and I think we would show  
24 at trial, is first of all, not a single Democratic Senator  
25 voted for it. There were some Democratic House Members

1 who voted for it, and the reason for that is because there  
2 are five Members of Congress who are Democrats in the  
3 State of Pennsylvania who are real, real happy with the  
4 districts they got.

5           And the General Assembly, the Republican  
6 leadership said, well, if you guys want these districts,  
7 you know what - you know what the price you have to pay  
8 for, you need to get us some votes. So that - there are  
9 dynamics that take place, and in any partisan gerrymander  
10 there's going to be some really good districts for the  
11 disfavored party, just not enough, not - not a fair - fair  
12 allocation, not one that would allow the party to have a  
13 majority control.

14           QUESTION: Mr. Smith, over a period of years, can  
15 you identify any state where your test of partisan  
16 gerrymandering has persisted over a period of time, five  
17 years or more? Can you give us examples of states where  
18 it's persisted over a period of years?

19           MR. SMITH: I'm not sure that I - that I have  
20 enough knowledge of political history going back decades  
21 to be able to tell you whether that's the case or not. It  
22 certainly will persist through a decade as long as the  
23 whole leadership of the state doesn't shift over to the  
24 other party, as long as the party that committed the - the  
25 crime, so to speak, maintains either the governorship or

1 one house of the legislature to be able to -

2 QUESTION: Because in how many states do we have  
3 a situation currently where both houses of the legislature  
4 and the Governor are of one political party?

5 MR. SMITH: There's quite a number of states,  
6 including, as it happened in - in this round, a number of  
7 very competitive states, the - which caused quite a - had  
8 quite a consequential impact on the Congress, Florida,  
9 Michigan, Ohio, Pennsylvania, and now more recently, Texas  
10 has come into play and decided to play this game.

11 QUESTION: I suppose typically we would expect  
12 that over any period of time that condition wouldn't  
13 remain. You'd - one branch would be in the hands of the  
14 other party in time. Certainly if - if you had something  
15 like 50 percent of the voters -

16 MR. SMITH: Which, in order to fix the problem,  
17 once it already exists, you have to get both houses and  
18 the governorship back to - to pass a second bill.  
19 Otherwise, it's in place for the 10 years and then what  
20 also happens in most states is the state legislatures, of  
21 course, gerrymander themselves as well as the - the  
22 congressional seats, in order to keep themselves in a  
23 position where 10 - 10 years hence they'll still be around  
24 and in control of the process again.

25 So there is a - a fundamental - fundamentally

1 anti-democratic part of this, which means in - in the long  
2 run, you are - you do have very competitive states with  
3 extremely skewed congressional delegations. The - the  
4 delegation from Florida is 18 to 7 in a state that has a  
5 robust two-party democracy. Now, that - that ultimately  
6 is not democracy. That's our submission.

7 I'd like to save the balance of my time, Your  
8 Honor.

9 QUESTION: Very well, Mr. Smith.

10 Mr. Krill, we'll hear from you.

11 ORAL ARGUMENT OF JOHN P. KRILL, JR.

12 ON BEHALF OF RESPONDENTS JUBELIRER AND PERZEL

13 MR. KRILL: Mr. Chief Justice, and may it please  
14 the Court:

15 Because politics is inherent in redistricting,  
16 any test, including the appellants' proposed test in their  
17 reply brief, requires inherent political choices to be  
18 made, choices that we submit are inappropriate for the  
19 judiciary to make.

20 Appellants' latest test, for example, has hidden  
21 political choices in it that are outcome determinative.  
22 For example, they use 10 years of statewide races rather  
23 than using a single base race, as recommended by the  
24 source they cite in footnote 5 of the -

25 QUESTION: May I ask you kind of a preliminary

1 question? Let's assume that them - that their theory  
2 won't fly, this majority theory is just too impractical  
3 and so forth. But what about the theory advanced in their  
4 complaint that the - some of the districts, and perhaps  
5 all - they allege all - were - were drafted by relying  
6 exclusively on a principle of maximum partisan advantage?  
7 And supposing the evidence shows that no neutral criteria  
8 at all were used except let's do the best we can to help  
9 our own party get as many seats as we can. Would that  
10 raise a question at all in your mind?

11 MR. KRILL: No, Your Honor. First, because I  
12 don't think that that's a question that should ever come  
13 to trial. The legislative process is so complex. Every  
14 legislator -

15 QUESTION: Well, what if - what if they narrowed  
16 the allegation, said just district 6 or district 16 was  
17 clearly drawn for this purpose and no other, no neutral,  
18 no effort to be compact or contiguous or follow boundary  
19 lines or rivers or anything, we just want to get the  
20 maximum vote for one particular party here. Would you say  
21 that was permissible?

22 MR. KRILL: It - yes, I would, Your Honor. And -  
23 and I would also say that it - it is not only impossible  
24 to prove at trial, but improper to even attempt to prove  
25 at trial, because - and we'll - let's take district 6 in

1 Pennsylvania as an example. Because it would require  
2 inquiring into the legislative process in violation of  
3 legislative privilege.

4 QUESTION: No, it would just -

5 MR. KRILL: Legislators are pulled in a million  
6 directions.

7 QUESTION: It would just say to the - when you  
8 have a - a really strangely distorted district, the burden  
9 is on you to point out one neutral justification for it,  
10 and we'll assume that if you - you won't have to go into  
11 the minds of the legislature, just assume there is  
12 something we can point to, such as a boundary line or if  
13 it's fairly compact or it's - but you can't point to  
14 anything. You don't have to go into anybody's mind. You  
15 just say - you give them the opportunity to explain, and  
16 they - they say, well, we have no explanation. We did it  
17 just because we want to get that to be a democratic  
18 district.

19 MR. KRILL: If - if the entire legislature en  
20 masse came forward and admitted that -

21 QUESTION: Yes.

22 MR. KRILL: - every legislator said, that's why I  
23 voted for it, Justice Stevens, I would still say it's a  
24 permissible legislative choice. James Madison, after all,  
25 in the Constitutional Convention, acknowledged that they

1 were giving to state legislators the power under article  
2 I, section 4, quote, to so mold their regulations as to  
3 favor certain candidates, closed quote.

4 QUESTION: Is there any duty at all to - any duty  
5 at all in drawing districts to try to do it impartially?  
6 Your answer is no?

7 MR. KRILL: Not constitutionally, Your Honor, but  
8 there are -

9 QUESTION: Yeah.

10 MR. KRILL: - political forces that pull them in  
11 -

12 QUESTION: I understand that.

13 MR. KRILL: - in a multitude of directions.

14 QUESTION: But then on the Constitution, what  
15 about if the legislature decided that the salaries of the  
16 majority legislature should be 10 percent higher than the  
17 minority legislators?

18 MR. KRILL: I -

19 QUESTION: There'd be a good reason for it,  
20 because they have more work to do. They have to vote and  
21 they - they get statutes adopted and programs enacted, so  
22 would that satisfy the constitutional duty? If there is a  
23 duty to govern impartially, do you think it would?

24 MR. KRILL: I'm not sure that would prevent a -  
25 present a Federal question, Your Honor, but I'm - I'm



1 certain that our supreme court in Pennsylvania would  
2 address it. Our - my - my individual clients, the  
3 legislative leaders, in fact do have higher salaries,  
4 precisely for that reason.

5 QUESTION: But that the - all the members of the  
6 majority party?

7 MR. KRILL: No. I - I don't think so, Your  
8 Honor. I - I can't imagine that even happening.

9 QUESTION: Suppose I have in my -

10 QUESTION: Why not?

11 QUESTION: Oh, sorry. In - in my mind the, which  
12 I don't - I want you to assume for the sake of argument -  
13 that - that one thing the Constitution aims at, one thing  
14 though, it wants to leave all this up to the legislature  
15 as much as possible, et cetera. But one thing it aims at  
16 is majority rule. Therefore, if, over a period of time,  
17 we have a districting system where the minority - the  
18 majority who get the - the majority of votes end up with a  
19 minority of seats in a serious way, that undercuts the  
20 democracy that the Constitution foresees. And with  
21 computers, that might happen.

22 Now, suppose I start with that assumption, and  
23 I'm looking for a standard. So suppose I combine Justice  
24 Stevens' standard with the requirement to keep judges out  
25 of it, that this has really to have happened. It's not the

1 Harvard faculty. It really happened. And in fact, after  
2 really happening once, then we also have the experts who  
3 tell us it has to happen in the future.

4 Now, we have three things - three requirements  
5 there that really are designed to police the outer fringe.  
6 And if I start with that assumption of what the  
7 Constitution wants, why don't I say it imposes those three  
8 requirements?

9 MR. KRILL: All right. Accepting your  
10 assumption, Justice Breyer, I - first of all, I - I think  
11 that one would have to look at a lot of different things.  
12 The appellants' test, for example, assumes that Democrats  
13 are evenly disbursed across the state -

14 QUESTION: Oh, I've rejected their test.

15 MR. KRILL: Right.

16 QUESTION: I've rejected their test. I've  
17 borrowed from it, but rejected it.

18 MR. KRILL: But because -

19 QUESTION: All right. So the test has the three  
20 elements that I said. One, they're experts. Two, it  
21 really happened. And three, Justice Stevens' objective  
22 version of there-is-no-other-explanation requirement.

23 MR. KRILL: All right. It - it really did happen  
24 in Pennsylvania in 2000. The - and this was under a  
25 judicially-drawn map. All right. The party that had a

1 majority of the popular vote got a minority of the  
2 congressional seats. The same thing happened again in a -  
3 in another - in a subsequent election, but it was exactly  
4 the reverse. You know, the Democrats and Republicans  
5 flipped.

6           So it - it can, in fact, happen, Your Honor.  
7 But if you allow the experts to control over the voters,  
8 then you'll never know the truth of what would really  
9 happen. And let me give you an example in Bandemer  
10 itself. The aftermath of - of the Bandemer case in  
11 Indiana is instructive, because two years after this Court  
12 handed down its decision in Bandemer, the Democrats, who  
13 would have had the Court believe that they were consigned  
14 to an eternity of Republican tyranny, actually won 50  
15 percent of the state House seats in Indiana. And only two  
16 years after that, in 1990, they won control, and control  
17 has flipped back and forth ever since in Indiana.

18           So, I believe that Justice O'Connor's concurring  
19 opinion in Bandemer was - was quite on point. The system  
20 is self-correcting. Now, the appellants test in using 10  
21 years, instead of a base race as their own academic source  
22 recommends, actually gives a lot of weight to the past  
23 preferences of voters, dead voters, voters who have moved.  
24 Naturally, this is a political choice, because any party  
25 that perceives this influence as waning over time will ask

1 you to adopt a test that gives weight to past choices.

2 They also use high profile offices in choosing  
3 their races instead of low-profile statewide races, non-  
4 charismatic races as their - as their academic source  
5 recommends. And, of course, we have such non-charismatic  
6 races in Pennsylvania. We call them statewide appellate  
7 judicial races. Nothing could be more non-charismatic.

8 QUESTION: Unkind of you to say it, sir, unkind  
9 of you.

10 (Laughter.)

11 MR. KRILL: And, of course, it - they've made a  
12 political choice in not using those races either, because  
13 in 2001, the year that our legislature was considering  
14 this plan, the Republicans took seven out of seven  
15 statewide appellate races. They also, as - as - as I  
16 mentioned, in their test assumed dispersion of Democrats  
17 uniformly, when, in fact, Democrats, as we all know, are  
18 compacted, self-compacted, into urban areas. So, the -  
19 the test is very tilted.

20 A curious thing that they do in their test is  
21 turn real races into hypothetical races by normalizing  
22 them so as to remove the popularity factor from those  
23 races. Well, that's curious, since politics is all about  
24 trying to achieve that popular edge. What they did not  
25 do, and this is another political choice in constructing

1 the test, is to use a very - a - a race that was  
2 practically 50/50 in Pennsylvania in 2000, a race, by the  
3 way, that's cited in their complaint. It's - it's the Al  
4 Gore race for President. Mr. Gore won 50.6 percent of the  
5 popular vote in Pennsylvania.

6 Now, the statistics show that he also would have  
7 won a majority of the congressional districts under the  
8 plan that's before this Court if he had been packaged as a  
9 congressional candidate. Actually, he would have won a  
10 majority, 10 out of 19 districts. The statistics are in  
11 the joint appendix, page 273.

12 QUESTION: May - may I again ask you just one  
13 question about the complaint? Do you think it states a  
14 cause of action under the theory espoused by Justice  
15 Powell in his Davis against Bandemer concurrence in the  
16 judgment? And if not, why not? And then the final  
17 question is, and if it does meet that standard, why isn't  
18 that adequate judicially manageable standards?

19 MR. KRILL: Yeah, I - I confess that I don't  
20 clearly remember Justice Powell's standard for  
21 justiciability in - in his concurrence, Justice Stevens.  
22 I do disagree, however, with - with his standard for - for  
23 remedial action. He called for a searching and sensitive  
24 inquiry. And I submit there really are no neutral -

25 QUESTION: Well, but the first question -

1 MR. KRILL: - principles.

2 QUESTION: - before you reach remedy is whether  
3 there's a violation.

4 MR. KRILL: Yes.

5 QUESTION: And his theory basically was, there's  
6 a violation if there are certain wildly - wildly-defined  
7 districts that have no neutral justification except to  
8 give partisan advantage to the people who had the power to  
9 draft them and who did not even consult the adversary  
10 party in drafting them That was his standard.

11 MR. KRILL: Well, that's impossible to prove and  
12 improper to prove. For example -

13 QUESTION: It's a matter of burden-shifting, and  
14 if they can't come up with any explanation whatsoever  
15 other than partisan advantage, that that's a violation of  
16 the - of the duty to govern impartially. And either there  
17 is no such duty or it is a violation.

18 MR. KRILL: Justice Powell's standard would  
19 require individual legislators to come in and say, here's  
20 why I voted. Here's - here's the - here's the -

21 QUESTION: Well, do you think - do you think it's  
22 impossible to prove that race was the predominant motive  
23 in a particular redistricting plan?

24 MR. KRILL: There are standards this Court has  
25 adopted, the Gingles standards for - for making - making

1 that case, Your Honor. However, I - I think -

2 QUESTION: Well, I mean, do you have to be a  
3 really tricky, astute, very clever fact-finder to figure  
4 out what was going on here?

5 MR. KRILL: Well, yes you would, in fact. In  
6 fact, I don't think - see how you could. In - in this  
7 case, for example, it's impossible for the appellants'  
8 counsel to even say whether their clients were Santorum  
9 Democrats or Gore Democrats. Both won Pennsylvania in  
10 2000.

11 QUESTION: But again, under Justice Powell's  
12 standard, they wouldn't have to do that.

13 MR. KRILL: No.

14 QUESTION: They would just have to say, this is  
15 totally irrational unless you can come up with an  
16 explanation.

17 MR. KRILL: That - that's correct. Now, voters -  
18 they would have to believe -

19 QUESTION: Of course, it doesn't - it doesn't  
20 make much sense to find something justiciable that you  
21 can't possibly devise a remedy for, does it? I mean, to  
22 separate the question of - of whether there's a violation  
23 from the question of remedy, as though, you know, we'll -  
24 we'll - we'll cross that bridge when we get to it, doesn't  
25 seem to me very realistic.

1           MR. KRILL: Oh, if, in fact, I agree, Justice  
2 Scalia. If the court ignores the remedial phase that  
3 would necessarily follow -

4           QUESTION: But, of course, the remedy would be  
5 that redraw district using some neutral criteria.

6           MR. KRILL: There are no -

7           QUESTION: That's certainly not an impossible  
8 standard.

9           MR. KRILL: It is, Your Honor. There are no  
10 neutral criteria. Name a criterion and I'll show you why  
11 it represents a political choice.

12           QUESTION: Historical boundaries, contiguity,  
13 compactness, maintaining incumbents of both parties.  
14 There are lots of neutral criteria available, and any one  
15 of them might justify an other - what seemed on its face  
16 to be a very wild district.

17           MR. KRILL: Respectfully, Justice Stevens,  
18 patterns of development over the last two generations, if  
19 you - if you put them on a - on a map, they look like  
20 splatters of paint on a canvas. They're not pretty.

21           QUESTION: Not as much as some -

22           MR. KRILL: But -

23           QUESTION: Not as much as the one in Karcher or  
24 the one in this case do.

25           MR. KRILL: Well, I would point out that -



1           QUESTION: Of course, I guess if there are five  
2 different criteria: compactness, past practice, or  
3 whatever, it's very much a political call which of the  
4 five criteria you decide to - to use.

5           QUESTION: That's a - that's true, and the only  
6 judicial call is you've got to use at least one.

7           MR. KRILL: Well, but - but by saying that - by  
8 designating them as neutral criteria, the judiciary itself  
9 makes a choice and takes that choice away from the state  
10 legislatures.

11           Voters are not automatons in a matrix controlled  
12 by supercomputers. Voters continue to matter, and they  
13 continue to prove it in election after election. In fact,  
14 they proved it in Pennsylvania in 2002 under this plan.  
15 The 17th congressional district, which the experts  
16 predicted would go Republican did not. Voters and good  
17 candidates and good issues and good party organization  
18 continue to make the difference, just as they did in -

19           QUESTION: How about the rest of their  
20 predictions? They got the others right, didn't they?

21           MR. KRILL: Not quite right.

22           QUESTION: Nobody has to bat a thousand, do they?

23           MR. KRILL: Well, but we - if - if the plan had  
24 been enjoined, we'd never know how right or wrong they  
25 were. And - and -

1 QUESTION: But we do - we do now know, which does  
2 tell us something at least about their predictive  
3 criterion -

4 MR. KRILL: Well -

5 QUESTION: - and - and it is that it - it gets it  
6 wrong in one time out of 19, was that it?

7 MR. KRILL: Yes.

8 QUESTION: One instance out of 19?

9 MR. KRILL: Yeah.

10 QUESTION: That's not bad.

11 MR. KRILL: And in - in - in the 6th district, it  
12 was very close. It was a razor-edge race. But voters  
13 continue to pull the candidates towards themselves. It's  
14 - voters are not disenfranchised. For example, in our 4th  
15 district in western Pennsylvania, the incumbent  
16 Congresswoman is - is a fairly conservative Republican -

17 QUESTION: Thank you, Mr. Krill.

18 Ms. DeLone -

19 MR. KRILL: Thank you.

20 QUESTION: We'll hear from you. Mr. DeLone.

21 ORAL ARGUMENT OF J. BART DeLONE

22 ON BEHALF OF RESPONDENTS CORTES AND ACCURTI

23 MR. DeLONE: That's all right, Mr. Chief Justice.

24 Mr. Chief Justice, and may it please the Court:

25 The Court should hold that political

1 gerrymandering, if it is justiciable at all, violates the  
2 Constitution if and only if the disadvantaged group has  
3 been shut out of a political process as a whole. This is  
4 the standard applied by the Court's unconstitutional vote  
5 dilution cases, and it is consistent with our system of  
6 electing Members of Congress from individual districts.

7           In a district system such as ours, there are no  
8 statewide elections for a slate of candidates. Rather,  
9 individual congressional elections are defined by the  
10 unique characteristics of each race. That is why  
11 statewide election results offer no meaningful standard  
12 for judging congressional outcomes. It is also why a  
13 proportionality, the idea that some statewide level of  
14 support should entitle a political party to capture some  
15 specified number of seats, is incompatible with the very  
16 idea of districting, and it is why the Court has  
17 repeatedly -

18           QUESTION: But Mr. DeLone, I - I think our rules  
19 say we frown on people simply reading their arguments.

20           MR. DeLONE: Yes, Your Honor, I'm sorry. And the  
21 point, Your Honor, is that Mr. Smith and appellants' plan  
22 will lead the Court to proportionality if - if the Court  
23 does not consistently apply the - the vote dilution  
24 standard that has - has applied in the past. And that  
25 standard is that you have to be shut out of the political

1 process -

2 QUESTION: Well, the - the - tell - answer - I'll  
3 ask you a question and then you will get away from your  
4 prepared argument.

5 MR. DeLONE: Thank you.

6 QUESTION: But the - the - the - in - in my own  
7 view, not - not the Court's - in - in my own view in the  
8 positive discrimination race cases, I believed -

9 MR. DeLONE: The - the Whitcomb v. Chavis -

10 QUESTION: The positive discrimination cases, the  
11 cases that say you cannot draw a racial district, racial,  
12 minority district -

13 MR. DeLONE: The Shaw Line - the Shaw Line cases?

14 QUESTION: Yes, correct.

15 MR. DeLONE: Yes, Your Honor.

16 QUESTION: I said you could, I thought that the  
17 legislature could do that, primarily because if they could  
18 do it in political party cases, why couldn't they do it  
19 in race cases where it's meant to help the minority?  
20 Well, I lost that. So believing what I thought, doesn't  
21 the reverse hold true? If this Court has found manageable  
22 standards to use to control positive discrimination in  
23 favor of racial minorities for drawing boundaries, then my  
24 goodness, why can't it find standards to prevent the  
25 Republicans from doing the same thing to the Democrats or

1 the Democrats from doing the same thing to the  
2 Republicans?

3 MR. DeLONE: Because, Your Honor, in the Shaw  
4 line of cases, what they were doing is they were trying to  
5 isolate race from all other factors, including politics.

6 QUESTION: And in here, we're trying to - to  
7 isolate being a Democrat or being a Republican -

8 MR. DeLONE: Yes, Your -

9 QUESTION: - from all other factors, because  
10 after all, as Justice Stevens pointed out, they've been  
11 able to come up with no explanation other than we did it  
12 because they're Democrats.

13 MR. DeLONE: Well, Your Honor -

14 QUESTION: That's what the word predominate means  
15 -

16 MR. DeLONE: Right.

17 QUESTION: - and you'd insist on that showing -

18 MR. DeLONE: But, but Your -

19 QUESTION: - just as you do insist on the  
20 predominant showing in the race case.

21 MR. DeLONE: But, Your Honor, assuming that to be  
22 correct, there's nothing wrong with them saying, we did it  
23 just because they're Democrats.

24 QUESTION: Ah, yes, there is, because what's  
25 wrong with it is if you carry it to an extreme with

1 computers, you prevent the majority of voters from  
2 securing the majority of seats. And that simple principle  
3 that the majority should govern is the basic principle of  
4 democracy. So if you find that in the Constitution, it's  
5 just as wrong.

6 MR. DeLONE: Well, I think you have to - you have  
7 to look at what majority you're talking about, Your Honor.  
8 If - in a districting system, you're talking about the  
9 majority in a particular district at a particular time.

10 QUESTION: Correct. What we would do is look at  
11 the state and we would look to see if in the - we could  
12 even give a margin of error. The party that got 53  
13 percent of the votes ended up with 45 percent of the  
14 seats, okay? Objective, contrary to majority rule, and  
15 produced simply by intentional gerrymandering for no other  
16 purpose.

17 MR. DeLONE: But, Your Honor, if you're doing  
18 that, you're - you're - you're going into proportionality.  
19 You're saying, if you're entitled to a - to a sum state.

20 QUESTION: No, no proportionality. Forget the  
21 proportionality. I agree with you a perfectly random  
22 system will produce 100 Republican delegation, so I agree  
23 with you about that. I'm only sticking to the majority  
24 rule.

25 QUESTION: Do - do people always vote for a

1 particular candidate because he's a Republican or - or -  
2 or she's a Democrat?

3 MR. DeLONE: Absolutely not, Your Honor, and that  
4 -

5 QUESTION: Of course not. So you can't tell from  
6 the Republican votes how many of those are Republican  
7 votes and how many of them are, you know, Smith votes or -

8 MR. DeLONE: Exactly right, Your Honor, and  
9 that's why the idea of comparing any sort of statewide  
10 vote with the districting votes that you actually have is  
11 inconsistent with -

12 QUESTION: Even if that's true, is it not obvious  
13 from the configuration of some of the districts, that  
14 those who drafted the districts thought they could predict  
15 what they were going to do?

16 MR. DeLONE: Again, Your Honor, assuming that  
17 that's correct, there's nothing wrong with it.

18 QUESTION: Oh, okay.

19 MR. DeLONE: And as far as the - the - what level  
20 you come to in a - in a majority/minority consignment,  
21 Justice Breyer, I think the way that the Bandemer  
22 plurality did it, again, applying what this Court has  
23 consistently applied in vote - in the vote dilution cases,  
24 by which I mean the Whitcomb v. Chavis line of cases, is  
25 to say, all right, let's look at this and see if it's like

1 a diagnostic test, like a threshold. Have we got a  
2 problem here where, over time, and I'm not sure how much  
3 time, but over a significant amount of time, it looks like  
4 the majority overall is being consigned in some way.

5 But, once you do that, you must look elsewhere,  
6 which is what Rogers says, Whitcomb says, all of the - the  
7 vote dilution cases say. You can't ever look at electoral  
8 results alone. That's never sufficient. What you must  
9 look to is whether or not there's been something else that  
10 has caused a self-perpetuating breakdown in the democratic  
11 process, because as soon as you - and -

12 QUESTION: Do you agree with your colleague that  
13 there is no need for any neutral justification when you're  
14 drawing districts? That it can be done solely for the  
15 purpose - granted it be an attempt that might not succeed,  
16 nobody knows for sure how people are going to vote, but is  
17 it permissible for a legislative body not even to consult  
18 - I mean, the majority of a legislative body not even to  
19 consult another party, not even to take anything into  
20 consideration except trying to get the maximum results at  
21 the - the election?

22 MR. DeLONE: Yes, Your Honor. That's  
23 permissible, and we think that was the whole point of what  
24 we call the racial gerrymandering line of cases, that is,  
25 the Shaw Line of cases, where they were saying, okay, we



1 have a special category here that relates to race, and  
2 what we're trying to do is define the difference between  
3 race, which is inherently suspect, and which requires  
4 special scrutiny, and politics, which the Court repeatedly  
5 said -

6 QUESTION: But if you take that position, then  
7 you must be taking the position, I guess you are, that the  
8 - the holding in Bandemer that this was a just -  
9 justiciable issue is just erroneous?

10 MR. DeLONE: Your Honor, we think that -

11 QUESTION: That's your basic position?

12 MR. DeLONE: We certainly think that the Court  
13 should take this opportunity to find that - that - that  
14 political gerrymandering is non-justiciable. We think  
15 that would be the simplest and the cleanest way to frankly  
16 get out of the political thicket.

17 But - but even if you don't do that, what - what  
18 the Bandemer plurality was doing was simply applying what  
19 this Court has - has always applied with respect to vote  
20 dilution. And we think it would be kind of strange if the  
21 - excuse me, Your Honor.

22 QUESTION: May I ask you this? Do you think the  
23 complaint states a cause of action under Justice Powell's  
24 opinion in Bandemer?

25 MR. DeLONE: I heard you ask that before, Your

1 Honor.

2 QUESTION: That's why I thought I'd ask you. You  
3 had fair warning of the question.

4 (Laughter.)

5 QUESTION: Don't tell me you didn't read the  
6 opinion.

7 MR. DeLONE: No, no. Yes, Your Honor, I - I - I  
8 think it would, because Justice Powell thought in terms of  
9 neutral districting criteria and thought there was some  
10 objective reality out there. And frankly, we don't think  
11 there is one, and if you start down the road of electoral  
12 results, we submit that -

13 QUESTION: No, no. He doesn't start down the  
14 road of electoral results. He - he focuses on intent,  
15 that it's an intent to use nothing except a non-neutral  
16 criterion in drafting the regulations. And you're  
17 suggesting that's permissible. That would not require  
18 counting votes after the election.

19 MR. DeLONE: With respect to intent, Your Honor,  
20 we - we think it - it's - you certainly can assume that  
21 there was political intent in a - in a political  
22 gerrymander -

23 QUESTION: And nothing else.

24 MR. DeLONE: It - it certainly could be nothing  
25 else, Your Honor.

1 QUESTION: So is this a - an intent of a bare  
2 majority or all of them? What - what - what if -

3 MR. DeLONE: Well, I think you can presume that  
4 as - as Justice Ginsburg pointed out, 42 of 98 in the  
5 Democratic caucus voted for the plan. I think you can  
6 presume that they were in some way -

7 QUESTION: You can only - that's a matter of  
8 defense. You can't presume that based on the allegations  
9 at the complaint.

10 MR. DeLONE: No, I - I was trying to address  
11 Justice Scalia's question about -

12 QUESTION: I'm trying to get to how you - how you  
13 determine intent.

14 MR. DeLONE: Well, I - I -

15 QUESTION: Or whether it's based on the majority  
16 or -

17 MR. DeLONE: I - I think you can presume that  
18 whatever the voting, there was some political motivation,  
19 and I think you can presume that the political motivation  
20 might be different for different groups, different  
21 parties. And - and frankly, we - we don't - we don't have  
22 a problem with the intent -

23 QUESTION: Belling the cat. I mean, it's  
24 wonderful to use intent. How do you find intent? That's  
25 - legislative intent is very hard to determine.

1           MR. DeLONE: And - and - and I think the intent  
2 would be - would different. But it's - you can even  
3 assume that it's political -

4           QUESTION: Well, how did you find it in the - in  
5 the first racial gerrymandering case? Didn't you find it  
6 partly by looking at the shape of that district in North  
7 Carolina?

8           MR. DeLONE: Yes, Your Honor.

9           QUESTION: Didn't that shift the burden?

10          MR. DeLONE: Yes, Your Honor, you did. But in  
11 the - in the racial gerrymandering cases, you were looking  
12 for something that was race-neutral.

13          QUESTION: You were also looking for predominant  
14 motive, not what the exclusive motive is, which is the  
15 test that Justice Stevens is - is proposing.

16          MR. DeLONE: That - that's correct, Your Honor.

17          QUESTION: The - the exclusive motive just is  
18 easier to respond to, because all you got to do is come up  
19 with one neutral justification and you use the neutral  
20 justifications that the Court identified itself in the  
21 racial gerrymandering cases, such as contiguity and  
22 compactness and so forth.

23          MR. DeLONE: But again, Your Honor, your - your -  
24 the premise of your question is that there's something  
25 wrong with political motivation.

1                   QUESTION: Correct. That's exactly right. No,  
2 no, the premise of the - what the question is that there's  
3 a duty to govern impartially, and that if you have no duty  
4 except partisan advantage, the case is just like saying,  
5 we're going to pay the majority legislatures a higher  
6 salary than the minority legislatures.

7                   MR. DeLONE: Well, Your Honor, I - I think that  
8 when you're - when you're dealing with a - a political  
9 question like districting, you're - you're - I think no  
10 political party worth its salt is going to be - not think  
11 it's - it's doing what's in the public interest to give  
12 itself as much advantage as possible.

13                   QUESTION: It can do that as long as it has some  
14 other basis for doing it, and that's history what we did  
15 over years and years and years, states have followed an  
16 attempt to get compact districts, your neighbors are in  
17 the same voting area as you are and so forth, not these  
18 fancy designs that are really a recent product of  
19 politics.

20                   MR. DeLONE: But, Your Honor, in - in all of  
21 these traditional districting criteria, they're basically  
22 used as tools by the political parties to seek what kind  
23 of political advantage they can. And again, we submit  
24 that that is - is - there's nothing wrong with that. And  
25 the question is whether or not you've been shut out of the

1 process, whether something else is happening that suggests  
2 that the - the process itself is broken. And if you -

3 QUESTION: For example, what would that be?

4 MR. DeLONE: Well, Your Honor, it's - it's  
5 happened in the past. It's - it's - it's happened with  
6 Reynolds and Baker, and it's happened with -

7 QUESTION: But that isn't gerrymandering.

8 MR. DeLONE: No, it isn't, but it's the kind of  
9 breakdown -

10 QUESTION: You're saying there's no  
11 gerrymandering unless there's something else.

12 MR. DeLONE: Yes.

13 QUESTION: Which is to say there's no such thing  
14 as cognizable political gerrymandering, period.

15 MR. DeLONE: I - I think what the Bandemer  
16 plurality was trying to do was to leave the door slightly  
17 ajar for something that, frankly, in our political system  
18 is too resilient to - to allow to happen, but it's  
19 conceivable that it could happen. And frankly, we think  
20 that it's strange to try and change the - the standard,  
21 which is well established in this Court's jurisprudence,  
22 just because the political system doesn't allow it to  
23 occur.

24 And we think that once you go down the road of  
25 electoral results, you go down the road of

1 proportionality. And the - the references that - that  
2 appellants' counsel keep making to majorities are  
3 statewide majorities, and that is proportionality. That  
4 is a political judgement, and we believe that the Court  
5 has properly rejected that and the Court should continue  
6 to apply the unconstitutional vote dilution standard and  
7 that that - if - if they find that it's justiciable at  
8 all, and that the easiest and simplest thing for the Court  
9 to do is to find that political gerrymandering is in fact  
10 unconstitutional - excuse me, non-justiciable as a matter  
11 of law.

12 QUESTION: Thank you, Mr. DeLone.

13 Mr. Smith, you have two minutes remaining.

14 REBUTTAL ARGUMENT OF PAUL M SMITH

15 ON BEHALF OF THE PETITIONERS

16 MR. SMITH: Thank you, Mr. Chief Justice. Let me  
17 start off by saying I do think that our complaint  
18 satisfies the standards of the Powell opinion in - in  
19 Bandemer that it alleges that partisan maximization was  
20 the sole driving force behind this map. And indeed, we  
21 had the opportunity in the district court, because of the  
22 one person, one vote problem, for the state to come in and  
23 try to come up with some justification for their line-  
24 drawing other than partisan maximization, and the district  
25 court found as a fact in that trial that the map

1 jettisoned every criterion that this Court ever identified  
2 in Karcher, other than partisan maximization.

3 QUESTION: I take it the results you're urging on  
4 us would require us to supervise local entities, city  
5 councils, boards of supervisors -

6 MR. SMITH: They -

7 QUESTION: - water districts.

8 MR. SMITH: They - they - they as well can  
9 violate the constitutional rights of the people who live  
10 in those jurisdictions, Your Honor.

11 And let me just address the - the question of  
12 whether it makes sense to wait and see how the elections  
13 come out and see whether there is, in fact, this anti-  
14 majoritarian effect from the line-drawing. One of the  
15 real practical problems with that is that the lines  
16 themselves in a - in an extreme gerrymander like this, can  
17 - can effect the statewide aggregate vote totals  
18 themselves.

19 You saw that right here where, in - with the  
20 history of votes very evenly divided in a - in a balanced  
21 map through the '90s, a court-drawn map. Suddenly with  
22 this gerrymander you had five Republicans running  
23 unopposed, you had a number of the Democratic incumbents  
24 defeated in the primaries because they squared off -

25 QUESTION: I guess if it were the constitutional



1 rule, the party could adjust and try to run strong  
2 candidates, even in overwhelmingly Republican districts.

3 MR. SMITH: Well, I suppose that that is in fact  
4 the case, but you can't assume that the - the vote totals  
5 under a gerrymander are independent of the effects of  
6 that. First of all, if they pair the incumbents, they're  
7 just not there to run anymore, and there's a substantial  
8 distortion caused by the map.

9 There was some discussion by Mr. Krill of  
10 judicial races as the - the test of - of partisan balance  
11 in the map because the - the supposition was that judges,  
12 when they run, don't have any great personal magnetism, I  
13 guess. But he didn't mention the - the race that was  
14 cited in our reply brief, which - this was 2003 - where  
15 Mr. Bayer ran as a Democrat, got 52 percent of the votes  
16 statewide, and carried six out of the 19 districts. That  
17 is an indication of the basic fundamental packing and  
18 cracking that's in the map, and is in fact a form of  
19 severe discrimination, making some voters' votes count  
20 much more forcefully than others.

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Smith  
23 The case is submitted.

24 (Whereupon, at 12:07 p.m., the case in the  
25 above-entitled matter was submitted.)