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We are changing the format here because my colleagues, the litigators over here, decided they couldn’t sit down and actually talk to anybody, so for parallelism I’m standing up as well. The topic as Bill said is congressional redistricting in general, which is really one of the great problems of our democracy that people are starting to focus on. You could do all you want to change the finance system and to fix the election machinery, which Marnie is going to talk about in the next panel, but at the end of the day you could still have what most people would perceive as a profoundly undemocratic electoral system if the districts are drawn in such a way as to produce a pre-ordained outcome.

The reason for that is our American tradition of using single-member, winner-take-all districts, which means that even in a fifty-fifty jurisdiction, if you are clever enough about how you draw the districts, you can make almost every one of the winners be from one of the two parties. If you have any doubt about the effectiveness of that, all you have to do is look at the congressional delegation here from the State of Florida, which I believe is still 18-7 Republican. This is a state which many would assess as a fifty-fifty state, although that is in the eye of the beholder I guess.

There are a lot of good and bad effects of having a winner take-all system, which I’m not going to get into. I will let the theorists in the room talk about it if they want to maybe in the Q & A Session. One of the things that it clearly does is to promote a two-party system. You don’t end up with lots of splinter parties if you have a winner-take-all system, and that could have a lot of effects on the way the legislature functions. I’m going to take that as a given and talk a little about how the courts have responded to the abuses that can occur when you have that kind of system and you let the legislatures, the politicians them-

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selves, draw the lines, which is what we do in this country in most places.

And to start with a little bit of history, until the 1960s there essentially was no judicial regulation of how the legislatures went about doing this. It was viewed as a political matter that the courts couldn’t get into. Then the whole “voting rights revolution,” as it has been called, began with the “one-person, one-vote” cases Baker v. Carr and Reynolds v. Sims, which first attempted to isolate one particular abuse, which was huge disparities in population which of course can be used to magnify the power of some places and some people and minimize the power of other people.

That doctrine has continued to evolve to the point now where if you are drawing congressional districts you have to draw them to perfect mathematical equality, by which I mean even if there is a couple of dozen votes difference between the largest and the smallest congressional districts, unless you can come up with a convincing reason why you did it that way it could be held unconstitutional. Indeed, the Pennsylvania map that we challenged just a couple of years ago, in a case that went ultimately to the Supreme Court, was initially held invalid under the “one-person, one-vote” doctrine because districts that are about 600,000 in size differed by 19 persons under the Census data that we were using to measure the size of districts. You can see how strictly that is enforced.

With one-person, one-vote in place as a rule, the courts then turned to dealing with minority vote dilution, first under the Constitution and then under the Voting Rights Act. Eventually we got to the point where there was a pretty well established understanding that where you can create a compact minority-controlled district you should try to do that, at least up to a point. By the time we got to the 1990s, the Supreme Court at least was of the perception that maybe those efforts had gone a little too far and it came out with a couple of rulings which in many ways were limitations on the creation of minority districts in the country. One was Mr. De Grandy’s Supreme Court case Johnson v. De Grandy, in which the Court said “you don’t have to keep creating minority districts up past the level of proportionality,” so that if you have a twenty-five percent black state, and a quarter of your districts are African-American-majority-controlled, then generally speaking that would be enough.

The other case was Shaw v. Reno, in which the Court said “if your efforts to create a minority district go too far in terms of creating ugly districts or districts that otherwise show too much focus on race, then they would hold those unconstitutional under the Equal Protection Clause.” So that is where things stood by the time we got to this round
of redistricting that began after the 2000 Census. Looking at those established doctrines and how they worked out in this round of redistricting, I'd say they worked pretty well in the sense that there have been very, very few maps held invalid under the Voting Rights Act, under Shaw v. Reno, under the “one-person, one-vote” rule with the exception of the Pennsylvania problem which got fixed in about a week after we won that great victory.

Essentially, there was a general understanding of how these things fit together and most of the maps have stayed in place. What you have though is this enormous additional problem of partisan gerrymandering, which the courts have not addressed as effectively and therefore have not reined in in a very productive way. Now there are two things that people mean when they talk about partisan gerrymandering. One is what we focus on our litigation for the Democrats around the country, which is bias: taking a fifty-fifty state and trying to produce an 18-7 congressional delegation. The other is non-competitiveness, as seen in maps like, for example, California’s, which is reasonably fair I think most people would say between the parties, but has essentially no competitive districts in it. Basically no congressional election in California comes out with less than sixty percent of the vote for the winner. You always know who is going to win in every district.

So those two problems are both caught up in what people talk about in terms of partisan gerrymandering because there can be a bipartisan gerrymandering or a biased gerrymander. It used to be people thought you couldn’t do both non-competitive districts and biased maps at the same time. I think there is still some obvious tension between those two, but at the same time the technology has evolved, and the understanding of how to do this has evolved, to the point where there are maps that are quite biased and at the same time not very competitive in their districts.

Now what have the courts been doing about partisan gerrymandering? Since the Davis v. Bandemer decision in 1986, the Supreme Court has been officially of the view that a claim of partisan gerrymandering is a justiciable claim—that you can sue under the Fourteenth Amendment to throw out a map that goes too far in terms of favoring one party’s voters over the other’s. But that proved to be kind of a worthless victory because the standard that evolved out of it was so insuperable that nobody has ever won a partisan gerrymandering case under Davis v. Bandemer. Essentially, the courts interpreted Davis v. Bandemer as requiring the plaintiffs to prove not only that the map was very biased but also that they have effectively been shut out of the political process altogether: that they were unable even to run candidates or make
speeches or campaign, things that would be independently unconstitutional and don’t occur anyway. So the whole promise of some kind of constitutional limit on partisan gerrymandering coming out of *Davis v. Bandemer* was hollow.

A few years later, we were faced in the beginning of this decade with a series of state maps that had been drawn in places like Michigan, Pennsylvania, and Florida. These are three primary examples of maps that were gerrymandered in the sense that the states are at least fifty percent Democratic but the delegations going to be produced by the maps were at least two-thirds Republican. And so we spent a lot of time trying to figure out how to get this doctrine to work more effectively. Eventually, we did get the issue back to the Supreme Court in the Pennsylvania case (predictably we lost in the districts courts as everybody else had since the *Bandemer* decision). We said to the Supreme Court “let’s either get rid of this thing or let’s make it work, put some real limits. There is a crisis out there.” And the Supreme Court took the case of *Vieth v. Jubelirer*.

Ultimately, the Supreme Court produced what I would have to call a pretty inscrutable decision. We have a number of opinions there. Basically, though, the Court broke down 4-1-4. There were four who joined with Justice Scalia in saying that this whole area ought to be completely out of the courts, that the courts really have no way to figure out what a “fair map” is and therefore they shouldn’t be in the business of invalidating maps on the grounds that they are unfair. They don’t have a standard to apply that has any meaning so it is non-justiciable. Then there were the four—Stevens, Ginsberg, Breyer, Souter—who tend to be viewed as more progressive, who all made various attempts to articulate a standard which they thought would be a meaningful justiciable limitation on partisanship in drawing districts lines. Then there was Justice Kennedy who wrote a concurrence in the judgment ruling against us, ruling against the Democratic plaintiffs in the case, in which he said he wasn’t yet willing to say that the issue should be non-justiciable, because he still was not giving up on the hope that we could articulate a standard for assessing what a fair or unfair map is. He didn’t know what it was yet, and so we lost and, as Justice Scalia pointed out, essentially the fifth vote by which we lost in the Supreme Court was a Justice who said I don’t know what the law is, but whatever it is you haven’t met it yet. So it was kind of a frustrating decision although obviously it could have been worse if he had gone with Scalia and made the issue non-justiciable altogether.

Where do we go from there? Well, we were simultaneously litigating this little problem down in Texas, where the federal district court
had drawn the map in 2001 because the legislature had deadlocked and failed to draw a map. But then along comes 2003, and the Republicans have taken over the legislature and decided it was time for them to draw a new map. This is where we went through the whole deal with the Democrats absenting themselves first to Oklahoma and then to Albuquerque, trying to slow down this process. We went through three special sessions of the Legislature in Texas until they were finally able to pass a new map, which we then immediately challenged a year ago. That was upheld, but at the time Bandemer was still the law, so we went up to the Supreme Court from the Texas decision upholding that map and said “take this case. This one is worse than Pennsylvania.” We thought maybe we could get Justice Kennedy’s vote.

There were two things that were unusually bad about the Texas map. First, it was done in the middle of the decade and so it raised the specter of having maps redrawn every two years in an effort to tinker with the political consequences. Second, it was a map that had been defended at trial by the State of Texas as not reflecting racial animus, but instead having been driven entirely by the goal of maximizing partisan advantage. That was openly admitted by the State of Texas, on the theory that Davis v. Bandemer would protect them. So we went up to the Court and said “it’s mid-decade and it’s a 100% partisan map.” And the Supreme Court remanded back to the trial court and said “we are not going to take it yet. We want you to think about it some more now that we have ruled in this Pennsylvania case,” the case where the Court divided 4-1-4 with the middle vote being Justice Kennedy saying “I don’t know what the law is.” We are now back in the district court and we had the task of briefing the reasons why the Vieth case from Pennsylvania, that sort of Delphic oracle of a case, was nevertheless a justification for throwing out the Texas map. And essentially where we are going here, and I think if the Court ever does put any kind of limitation on partisan gerrymandering, it would be something like this: we are trying to isolate out from the Kennedy opinion in Vieth, and from the dissenting opinions, the principle that if some feature of a map or an entire map can only be explained as being purely partisan in nature, that level of discrimination is too serious, i.e., purely partisan goals do not justify passing any legislation. You have to come up with some other state interest that is being promoted or pursued by virtue of having passed the map.

In Texas, we have those findings that the only reason the State of Texas passed the new map in 2003 was to gain more seats for the Republicans. Essentially, what that would do if that rule were adopted, and I have no idea whether it would be adopted when we go back up to
the Supreme Court in a few months, is get you a limitation on mid-decade redistricting. If the rule is that your maps are okay as long as you can articulate some state interest, some reason why you passed it other than partisan advantage, then almost any map passed at the beginning of the decade will pass that test because at the beginning of the decade you are pursuing any number of legitimate state interests, such as equalizing population, getting the right number of congressional districts that your state is now allocated, lots of things like that. So there are always other state interests that are being promoted. But at the mid-decade point, at least where, as here, you have a perfectly lawful map in place, one can really say that the only reason this new map was passed was for partisan reasons. There simply was no other state interest. It was simply done to change the electoral outcome in the state.

Obviously, we are going for a fairly narrow win that would address the mid-decade issue which I think a lot of people find very, very troubling—the idea that we are going to start going to a festival of doing this virtually throughout each decade, every two years adjusting the maps. If we win, it would not be much of a constitutional limitation on partisan gerrymandering per se. I think the Court in Vieth made it pretty clear that they were not buying what we were trying to sell. They do not believe there ought to be serious limitations on bias in the sense of looking at a map and saying “Look, this is a fifty-fifty state judging by these other elections, but there is virtually no chance that the Democratic Party would get fifty percent of the seats with fifty percent of the votes. The map is so biased that is not-going to happen.” There are a lot of reasons why the Court is skeptical about that approach. They really do feel that they are getting into the political thicket by going that far with us. Dan Lowenstein and others have written many articles arguing that our theory does not make any sense, but we nevertheless had some hope there. The bottom line is whether we win in Texas or lose in Texas, there really isn’t going to be meaningful limitation on partisan gerrymandering at the beginning of the decade.

So that it is why a lot of people are starting to think about trying to come up with some new governmental structure to take the job away from the legislators themselves. I think you’re starting to see a real movement getting a toe-hold here and you see that in Governor Schwarzenegger’s proposal out in California, which I think is a reflection of this need to do something better in the area of districting than we have been doing in recent years. How far it will go remains to be seen. It is an extremely difficult job to try to figure out how you would structure such a commission so that it doesn’t either just replicate the problem or indeed make it worse.
One of the main things that is pushing it is this problem of non-competitiveness. I think people really do resent the fact that incumbents are designing all of these maps in such a way that none of them can lose. You have in Congress now only about thirty seats or so that even conceivably turn over from election to election out of the 435. So it is a very problematic situation that we have gotten ourselves into. But if you try to figure out how to set up a non-partisan commission to solve that problem and to solve the problem of partisan bias as well, a lot of people say why not do it the Iowa way. What Iowa does do is rather remarkable. They have these commissions that purport not to pay any attention to party, indeed not to pay any attention who is in office at all. So they draw a map sometimes with two or three incumbents in the same district. It seems to work for them and indeed some of the most competitive congressional races in the country were in Iowa in the last election, because they have that system, but I think it is problematic as a model for the rest of the country for a couple of reasons.

First of all, Iowa is characterized by basically having about a 98% Anglo population. Any other state with large urban areas is going to have the need to draw districts that comply with the Voting Rights Act, which means you’ve already moved from a kind of blind system where we are just going to draw nice little squares to starting to look at who’s living where and trying to make sure there are electoral opportunities for particular groups as they are guaranteed under the Voting Rights Act. Once you start doing that, then you have two choices. You can either just pay no attention to how the rest of the map is and not look at politics at all, which would mean you draw a map that is almost certainly going to favor Republicans unfairly, or you start looking at politics and saying well alright we are going to try to look at the overall political effects of the map. I say that because a Voting Rights district has probably on average eighty percent or ninety percent Democratic voters. So you are isolating a large percentage of the Democratic electorate into those districts. It’s not that I am saying that is a bad thing, but I think what you see in states across the country is that unless you make a deliberate effort to compensate for that in other districts, you end up with maps in which the Democrats get a third of the districts even if they get more than half the votes. So, it’s not going to be that you can construct these systems and tell these commissioners just pretend you don’t know anything about politics or race and just draw districts that follow town lines or something like that. If you do such a system it would end up producing some of the most effective gerrymanders that have ever been drawn.

I want to conclude by mentioning one other issue. I said that the Voting Rights Act and related jurisprudence had worked out rather
smoothly this decade. The next issue that is going to get to the Supreme Court in the area of redistricting is a challenge to the so-called "fifty percent rule," which is the rule under the Voting Rights Act that in order to have the right to draw a new district for African-Americans or Hispanics, you have to be able to draw some hypothetical district that would have more than fifty percent of that protected group in the district.

As the world has moved on since the 60's, and since the passage of the Voting Rights Act, and as racial polarization in voting has been reduced in many places in the country, you are starting to see arguments people are making saying "we should be able to draw districts that are less than fifty percent black." There are many places where you can't draw a minority district at that level, but you could draw a district in which the minority group might be thirty percent or forty percent, in which they have a very predictable ability to control the electoral outcome even at that level.

How would that happen? That happens when that minority group maybe is seventy percent or eighty percent of the Democratic primary and the district as a whole is predictably Democratic. So, the question is do you start broadening the kinds of districts in that minority groups can claim a right to have created? At the same time, when legislators draw those kinds of maps deliberately—as often occurs where the Democrats are in charge because they're trying to create minority districts at the same time as not unduly packing Democratic voters—can those be challenged on the ground that they're splintering minorities too much? We saw that in New Jersey where the Democrats, through the commission process, were able to spread out African-American and Hispanic voters in the Newark area to an additional district, and took over the state legislature as a result and the Republicans then brought Voting Rights Act challenges to that map saying "no, you should have packed the blacks more closely together. Reducing their percentage below fifty percent to thirty-five percent and forty percent violated the Voting Rights Act."

And so that's really the cutting edge issue in Voting Rights Acts jurisprudence, which I think is something the courts are very interested in because they're trying to figure a way to move toward a less segregated world in which these issues of race matter less in the way the districts are being drawn. I think they like the idea that we are moving toward not having identifiably black majority districts next to the very high white majority districts, etc. around the country. What they will end up doing with that jurisprudentially remains to be seen, but there's a major conflict among the circuits about that issue right now so I think that will get to the Court in one form or the other soon. And I'll follow up with these guys later on. Thank you everybody.