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Supreme Court of the United States.

Susan J. DAVIS, et al., Appellants,
v.
Irwin C. BANDEMER, et al., Appellees.

No. 84-1244.
October Term, 1984.
May 9, 1985.

Appeal From the United States District Court For The Southern District Of Indiana

Brief Amicus Curiae of Assembly of the State of California in Support of Appellants

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*1 INTEREST OF AMICUS

The California Assembly files this brief for three reasons. First, although its own reapportionment for this decade is the product of a bipartisan compromise and will not be affected by the law of partisan gerrymandering, the Assembly knows that such claims can only bring disruptive litigation which distracts legislators from their duties and undermines the legitimacy of elected representatives. Second, any claim of partisan gerrymandering naturally results in disputes about the intent of legislators and, as the case at bar has shown, leads federal courts to preside over intrusive inquiries into motives and actions of legislators, inquiries that would be unthinkable in any other context. Finally, elevating partisan interests to constitutional status may undermine the ***2** states' ability to protect and promote the interests of racial and ethnic minorities. [1]

SUMMARY OF ARGUMENT

The Court need not decide here whether partisan gerrymandering may ever be justiciable. It need only decide whether such a claim may be maintained on behalf of one of the two dominant parties in American political life. This Court has consistently refused to entertain claims of partisan gerrymandering. *WMCA, Inc. v. Lomenzo,* 238 F.Supp. 916 (S.D.N.Y.), *aff'd,* 382 U.S. 4 (1965) *(per curiam); Jiminez v. Hidalgo County Water Improvement District No. 2,* 68 F.R.D. 668 (S.D. Tex. 1975), *aff'd mem.,* 424 U.S. 950 (1976). *See also Gaffney v. Cummings,* 412 U.S. 735, 752-54 (1973). And it has never suggested that major political parties are "discrete and insular" minorities, *United States v. Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938), and entitled to special protection.

Partisan gerrymandering claims rest on political assumptions that are not only alien to this Court's jurisprudence, but also inconsistent with the nature of our representative democracy.

Creating a constitutional claim of partisan gerrymandering would inevitably set the interests of political parties against the equitable, statutory and constitutional rights of racial minorities. *See, e.g., United Jewish Organizations v. Carey,* 430 U.S. 144 (1977).

Finally, the perceived harm of partisan gerrymandering can be avoided by strict application of well-established mechanisms, including judicial review of racial exclusion and one person one vote claims, direct initiative and referendum in many states, state ***3** constitutional and statutory reapportionment rules, and the Voting Rights Act. Moreover, a

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modest expansion of traditional doctrines, such as a *per se* ban on multi-member districts, could serve the same goals with far less intrusion into the heart of state representative government.

ARGUMENT

I

JUDICIAL PROTECTION OF MAJOR POLITICAL PARTIES IN THE DISTRICTING PROCESS IS NOT SUPPORTED BY THIS COURT'S JURISPRUDENCE

At the outset it is important to note what is *not* at issue here. This is not a racial gerrymandering case. [2] And it does not necessarily present the issue whether "partisan gerrymandering" in the abstract is or is not justiciable. It presents the limited issue of whether one of the two overwhelmingly dominant political parties in Indiana and the nation can present a cognizable claim of partisan gerrymandering. For reasons that go to the heart of representative democracy we believe that partisan gerrymandering is never justiciable, but the Court need not reach so large an issue. It is enough to say that the party that comprises almost half the Indiana Senate and controls the United States House of Representatives has not been so excluded from the political process as to require intervention by this Court. Just as it would be enough to say that the party that controls the Indiana Senate and comprises close to half of the United States House of Representatives is not so excluded.

***4** That the appellees have brought their claims this far, we believe, arises from a confusion regarding the nature and extent of judicial review dictated by this Court's voting rights and reapportionment cases. But careful reading of the Court's decisions reveals a clear pattern and deep roots in representative democracy and the Reconstruction Amendments. And if one fact emerges it is that this Court's refusal to entertain partisan gerrymandering claims has been indisputably correct.

The Court's cases may be viewed as falling into either two or three categories.

First are those cases which condemn state action which excludes individuals from political participation. Among these "exclusion" cases are those striking down literacy tests, [3] poll taxes, [4] and durational residency requirements. [5] In the White Primary Cases the Court found that blacks were effectively deprived of the franchise by their exclusion from all-white primaries which determined the election outcome. *See Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright,* 321 U.S. 649 (1944); and *Nixon v. Herndon,* 273 U.S. 536 (1927). Also falling within the "exclusion" cases is *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), striking down a plan that excluded black voters. At stake in each of these cases was the individual's right to vote. The plaintiffs claimed no right to a particular outcome from the process. Their objection was to exclusion from political participation. [6]

***5** In the second line of cases, spawned by *Baker v. Carr,* 369 U.S. 186 (1962), the Court struck down reapportionment plans which operated with clear and absolute mathematical certainty to make one person's vote worth less than another's. [7] Once again the *individual's* fundamental right to vote was at stake. [8]

Then, in *Fortson v. Dorsey,* 379 U.S. 433 (1965), this Court stated in *dicta*:

It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political

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elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.

379 U.S. at 439.

This *dicta* suggested to some that the Court might recognize a third kind of constitutional vote claim, one not based on exclusion of individuals from the electoral process or mathematical dilution of an individual's vote, but rather on a group interest in a particular electoral outcome. To further support their argument, these advocates point to the Court's willingness to intervene in racial cases. But while these may constitute a third line of cases, they do not support review of partisan claims. And the racial cases ***6** may properly be seen as a continuation of the line of exclusion cases described above.

In *Whitcomb v. Chavis,* 403 U.S. 124 (1971), the Court established standards for resolving racial gerrymandering claims. The Court rejected the argument that "vote cancellation" had occurred simply because the number of black legislators was not proportional to the number of black voters and because black votes were wasted in predominantly white districts. The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.

403 U.S. at 153.

Because blacks were permitted to participate fully in the selection of candidates and voting and because there was no evidence that the black community did not receive effective representation of its unique interests, there was no constitutional violation. In short, the Court equated cancellation of voting strength with denial of access to the political process.

In the later cases of *White v. Regester,* 412 U.S. 755 (1973), and *Rogers v. Lodge,* 458 U.S. 613 (1982), the Court applied the *Whitcomb* standards to affirm findings of vote cancellation. In *White,* the Court affirmed a district court decision that cancellation had been achieved through the use of multi-member districts in two Texas counties. There the use of a multi-member district in one county "effectively excluded [the black community] from participation in the Democratic primary selection process" (412 U.S. at 767) and the use of a multi-member district in another county "excluded Mexican-Americans from effective participation in political life". *Id.* at 769. To support its conclusion that these two groups had been excluded from the political process, the district court pointed to the state's history of discrimination against these groups (specifically including discrimination as to voting rights), the almost total absence of members of these groups in the Legislature since Reconstruction, the use of raceoriented campaign tactics and representatives' systematic disregard for the groups' interests. *Id.* at 766-67. In *Rogers,* the proof was quite similar to that in *White*. There was a history of racial ***7** discrimination in the county (specifically including discrimination in voting rights); there was bloc voting on racial lines; no blacks had ever been elected; and elected officials had been unresponsive and insensitive to the needs of the black community. 458 U.S. at 623. The court held that the county's at-large election scheme effected a total exclusion of blacks from the political process.

These cases may reasonably be viewed as modern exclusion cases or as a new line of cases,[9] for it is not always clear whether the constitutional condemnation in these cases is tied to the fundamental nature of the right to vote or to protection of a suspect class. This ambiguity is most evident in the separate opinions in *City of Mobile, Alabama v. Bolden,* 446 U.S. 55 (1980).

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The *Bolden* plurality and Justices Brennan and White all seemed to undertake the traditional analysis governing race discrimination cases. The plurality held that the requisite discriminatory intent was not proved and the dissenters found it present. *Compare* 448 U.S. at 65, 72-74 (plurality) with 446 U.S. at 94 (Brennan, J.) and 446 U.S. at 103 (White, J.). Justice Marshall, also dissenting, likewise found that the evidence established intent to discriminate. 446 U.S. at 137-39. But Justice Marshall further suggested that no showing of intent was necessary because under *Gomillion* and its progeny he would characterize these as fundamental interest cases. 446 U.S. at 104, 118-19. Thus he allowed for the theoretical possibility of cognizable claims by "electoral minorities" as well as protected racial groups. 446 U.S. at 111-12 and n.7. Justice Stevens also read the *Gomillion* line of cases as deriving their power from the effect on the right to vote rather than on the suspect class. 446 U.S. at 86.

***8** But whereas Justice Stevens' approach was used by the district court to legitimize a partisan gerrymander complaint by a major political party, neither Justice Marshall's analysis nor that of the rest of the Court supports this result. [10] This is so because racial and ethnic minorities are so clearly different from partisan groups. The combination of challenged voting mechanisms and embedded patterns of racism can result in the exclusion of racial minorities from political participation and demonstrate intentional discrimination as well. To the extent racial gerrymandering cases are fundamental right cases, it is because, as in the first line of cases discussed above, the individuals in the group are excluded from political participation altogether. On the other hand, to the extent the problem is viewed as class-based discrimination, the cases are manageable only because racial and ethnic groups are fixed and easily identified and patterns of discrimination over lengthy periods of time make evaluations of discriminatory impact feasible. [11]

***9** It is not just that racial and ethnic minorities have been victims of the worst social, political and physical violence this nation has ever inflicted on its fellow citizens, but that the Fourteenth and Fifteenth Amendments so strongly prohibit distinctions on racial grounds. These factors coalesce to prompt judicial review and to allow for manageable standards to guide that review.

For purposes of the instant case, we need not choose between the constitutional analyses. It is enough to say that the racial cases, driven by the suspect class component of the Fourteenth Amendment, informed by the power of the Fifteenth Amendment, and regulated by manageable standards, are in a class by themselves. It is enough to recognize the obvious: that none of these cases would even have arisen had the class been Republicans or Democrats. *WMCA, Inc. v. Lomenzo,* 238 F.Supp. 916 (S.D.N.Y.), *aff'd,* 382 U.S. 4 (1965) *(per curiam); Jiminez v. Hidalgo County Water Improvement Dist. No. 2,* 68 F.R.D. 668 (S.D. Tex. 1975), *aff'd, mem.,* 424 U.S. 950 (1976).

*10 II

JUDICIAL PROTECTION OF PARTISAN INTERESTS RUNS COUNTER TO OUR REPRESENTATIVE FORM OF GOVERNMENT

We have briefed before [12] and others have fully briefed the extent to which entry into the partisan gerrymandering field would suffer from such a lack of manageable standards as to make the entire subject nonjusticiable. But it is not just the absence of judicially manageable standards which should prompt the Court to stand aside. Intervention would skew the political process in ways which cannot be fully anticipated, but which would severely damage representative democracy as we know it and for little constitutional or social gain.

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A. Court Intervention to Control and Oversee Partisan Gerrymandering Would Be Inconsistent With the Structure of this Democracy.

It would be a mistake to view the district court opinion and the approach suggested by proponents of judicial review as somehow objective or neutral. In this area there is no neutrality. Every districting system is premised upon a theory of representation and a set of political values. Alfred De Grazia, in his treatise on the history of representation in the United States, described this phenomenon:

Representation under any system is biased. It favors or extracts some characteristics of the population over other characteristics. . . . Consequently, when one notices a new movement away from a traditional mode of representation into a new mode of representation, he need not think for a moment that the new direction is towards "science," "neutrality," or "abstract justice against personal justice." For it must have its moral premises, no matter how well-concealed they may be.

***11** De Grazia, *Public and Republic: Political Representation in America* (1951) at 184-85. [13]

Our system of representative government, established in the Constitution and developed in the succeeding two centuries, is deeply rooted in principles of majority rule, individualism and direct democracy. The approach to partisan gerrymandering that has made its way to this Court is also grounded in political values. When the political assumptions underlying the current complaints are compared with the values embedded in our political tradition, however, fundamental inconsistencies quickly become apparent.

1. A "Built-In Bias Toward the Majority" Is Characteristic of Our System

The district court's expedition into the political workings and motives of the Indiana Legislature was prompted by its conclusion that the apportionment plan had "a built-in bias favoring the majority party." App. Jur. St. at A-13. The district court assumed that this bias was improper or was, at least, a critical signal of impropriety. *Id.* But a bias toward the majority is characteristic of our system. The "first principle" of a republic is "that the *lexmajoris partis* is the fundamental law of every society of individuals of equal rights." *Democracy, by Thomas Jefferson,* Letter to Baron von Humboldt, 1817, p. 53, quoted in De Grazia, *supra,* at 107.

For the most part, our representative structure presumes that within an essentially majoritarian system coalitions and compromise will permit the assertion and recognition of minority interests. Consequently no special mechanisms are created to assure ***12** minority participation in the process of legislative enactment. [14] Instead, laws that transgress rights enshrined in the Constitution are invalidated *after* enactment. This system of non-interference breaks down only when a particular minority "is barred from the pluralist's bazaar, and thus keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable." Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) at 152.

Largely through the efforts of Alexander Hamilton, James Madison and John Jay, the Constitution, as adopted, was in some respects anti-majoritarian. *See* Federalist No. 10. But this did not reflect a preference for empowering political minorities. To the contrary it reflected hostility toward interest groups generally and a desire to neutralize, divide and control them. *Id. See also* Pitkin, *The Concept of Representation* (1967) (hereinafter "Pitkin") at 190-95. Within the limited suffrage of the time, Madison endorsed "the fundamental principle of free government"-majority rule. Federalist No. 58. And to the extent an anti-majoritarian sentiment prevailed in 1787, it has been overtaken in the intervening centuries by the steady advance of direct democracy. [15]

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Thus, universal suffrage and an 18-year-old voting age have become the norm. Const. Amends. XV, XIX, XXIII, XXIV, ***13** XXVI.[16] Caucus nominations have been replaced by direct primaries. And the initiative and referendum have been adopted in many states, permitting the majority to exercise its will directly. All of these advances favor the majority.

Winner-take-all single-member geographical districts also usually produce a strong majoritarian bias.[17] Yet such districts are required by law for congressional and many state legislative elections nonetheless. *See* 2 U.S.C. § 2c; Cal. Const. Art. 21; Joint App. at JA-71. Such districts create closer ties between representative and constituent. Additionally a strong majority encourages stability and enhances the legislature's decision-making capabilities.[18]

In geographical districts it is impossible to give all groups representation. Some minorities will inevitably be submerged.[19] In that sense, the traditional election system is structurally incapable of providing each elector an "equally meaningful vote." "The Constitutional Imperative of Proportional Representation," ***14** supra. at 164.[20] But this "majoritarian bias" is not something to be condemned; it is an inevitable feature of our system.

2. The Individual, Not the Political Party, Is the Relevant Actor in Our Election System

Even a brief review of the decision below demonstrates the district court's emphasis on the interests of political groups, specifically the Democratic and Republican parties. *See, e.g.,* App. Jur. St. at A-6, A-17 (interests of the majority and minority party in controlling the General Assembly); *id* at A-11 (assumption that local elections are determined by the ratio of the party vote in national and statewide elections); *id.* at A-11, A-25 (party of the candidates); *id.* at A-25 (concern with group's political access). This fixation on the political party for defining protected voting activity is not only contrary to this Court's prior decisions, it is also contrary to basic assumptions underlying the American system of representation.[21]

For over two centuries prominent themes of American politics have been the individual as political actor and the direct relationship between the people and their representatives. The Constitutional mandate of direct election for the House of Representatives under a system of apportionment by population was, from the outset, understood even by Madison, who was no advocate of populism, "to refer to the *personal rights* of the people, with ***15** which it has a natural and universal connection." Federalist No. 54 (emphasis added).[22]

Jefferson's definition of a republic highlights individual direct action:
Were I to assign to this term a precise and definite idea, I would say purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority.

Democracy by Thomas Jefferson, Letter to J. Taylor, 1816, pp. 61-62, *quoted* in De Grazia, supra, at 105.

From Paris in 1787, Jefferson congratulated Madison on the substitution in the Constitution of voting by persons instead of by states. *The Portable Thomas Jefferson* (ed. Merrill D. Peterson), Letter to J. Madison, 1787, p. 429.

Fundamentally individualist concepts of the social compact and natural rights guided the political theory of the direct democrats and are embodied in the Declaration of Independence, the Preamble to the Constitution and the Bill of Rights. Jefferson was truculently insistent on that individualism. In 1784 he wrote to Francis Hopkinson.

I am not a Federalist, because I never submitted the whole system of my opinions to the creed of any party of men whatever in religion, in philosophy, in politics, or in anything else where I was capable of thinking for myself. Such an addiction is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all.

The Portable Thomas Jefferson, supra, Letter to F. Hopkinson, 1789, p. 435.

***16** Our voting system is premised upon the concept of the individual as the relevant political actor.[23] Yet the district court completely lost sight of the individual and his or her direct relation to government. The court placed the party in between.

3. As a General Rule Election Results Cannot Be Predetermined and Candidates Are Not Fungible

The district court assumed that even in the absence of bloc voting, election results can be predetermined simply by how the lines are drawn. App. Jur. St. at A-13, A-24. The court thus implicitly assumed that, as a rule, voters have made their decisions prior to the selection of candidates, prior to campaigns and without regard to the issues presented and conditions existing at the time of the election. The court treated candidates as though they were fungible within the limits of their party affiliation. *See, e.g.,* App. Jur. St. at A-11, A-25 (candidate's party); A-11 (assumption that local elections determined by national and statewide partisan trends). *See also* Motion to Affirm at 5 (comparison of district election results to "anonymous" statewide candidates). Our political system and constitutional jurisprudence are to the contrary.

Except in the face of a long history of strict racial bloc voting, *Rogers v. Lodge,* 458 U.S. 613, 623 (1982), the courts have never been willing to accept the idea that election results are predetermined.[24] In *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976), for ***17** example, the Court tacitly rejected the argument that it should uphold limits on political expenditures because expenditures have such power to influence the vote.

Additionally, predetermination implies that the campaign organization, the characteristics of the candidates, their expenditures and the issues debated before the voters make little or no difference. Except in uncontested elections these assumptions go too far.[25] The very facts that Indiana is a swing state and that there are surprise upsets belie the claim of systematic predetermination. Moreover, this assumption discounts the range of policies and positions among candidates from a single party. One Republican or Democratic candidate is not the same as another, certainly not in California: ". . . political parties are weak in California. There is no strong party discipline that determines how members of the Legislature will vote on any issue. Party positions are rarely taken on bills, and legislators vote more in accordance with the views of their constituents and their own consciences than with the views of party leaders." Quinn and Salzman, *California Public Administration: Text and Readings on Decision-making in State Government* (1978) at 19.

4. The Presumption in Our System Is That Representatives Act for Their Entire Constituency, Not Just for Those Who Voted for Them

The district court's statewide analysis of voting results ignores the significance of the district constituency. And the district court's emphasis on the candidate's party affiliation implies that the only important thing a representative does is to vote on ***18** partisan issues. In fact, however, many of the representative's activities and responsibilities relate to non-partisan concerns of individual constituents or to the interests of the constituency as a geographical or economic unit.[26] Thus, the representative provides constituent services to everyone in the district, is expected to bring governmental contracts,

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industry and other economic benefits into the district and is expected to represent the district's general welfare. [27] When Abraham Lincoln ran for reelection to the Illinois Assembly in 1836, his platform promised:

If elected, I shall consider the whole people of Sangamon my constituents, as well those that oppose as those that support me.
Quoted in De Grazia, *supra*. at 127.

B. Review of Alleged Partisan Gerrymanders Will Draw the Courts Deeply Into Internal Legislative Processes in the Several States

If courts undertake review of partisan gerrymandering, they will inevitably become enmeshed in reviewing and judging the internal workings and subjective motivations of the state legislative bodies ***19** that, in the first instance, are responsible for legislative districting. Const. Art. I, § 4. [28] This fact, standing alone, sets this case apart from all previous cases to which the Court has extended review [29] and mandates judicial restraint in order to preserve legislative independence and promote principles of comity.

As Professor Deutsch put it:
[Partisan gerrymandering review would] require the Court to canvass the actual workings of the floor leadership in the legislative branches, [and] the mechanisms of party control . . . . Even assuming that the evidence was available and would be forthcoming, is it likely that our society could accept, as a steady diet, the spectacle of the judiciary solemnly ruling on the accuracy of a political boss's testimony concerning the sources of his power over voters and the degree of control that he exercised over elected officials?

Deutsch, "Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science," 20 Stan. L. Rev. 169, 247 (1968).

In the past this Court has shown great sensitivity to these concerns. [30] In some "extraordinary instances" public officials may ***20** be called to the stand to testify concerning the purpose of an official action, but "even then such testimony frequently will be barred by privilege." *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 268 (1977). Even if such individual testimony were allowed, its validity to prove the intent of the legislative body is doubtful. *See Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); *United States v. O'Brien, supra,* 391 U.S. at 385-86. And courts have been understandably reluctant to accept the other alternative-review of the parliamentary maneuverings that led to legislative enactment. [31]

The reluctance to subject legislators to judicial review of acts connected to their legislative duties has deep roots in the parliamentary struggles of the sixteenth and seventeenth centuries. *Tenney v. Brandhove,* 341 U.S. 367, 372 (1951). Protection from the intrusion of litigation was thought so important by the framers of our Constitution that they incorporated the common law privilege of legislators in the Speech and Debate Clause, Art. I, § 6. [32] All but seven states have similar protections in their ***21** constitutions. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 406 (1979) (Marshall, J., dissenting).

To be sure, the federal Speech and Debate Clause does not directly protect state legislators from federal process. *Lake Country Estates, Inc. v. Tahoe Planning Agency, supra,* 440 U.S. at 404. Nor is there a comparable evidentiary privilege for

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state legislators in federal criminal proceedings. *United States v. Gillock,* 445 U.S. 360 (1980). But, as Justice Frankfurter said in *Tenney v. Brandhove, supra,* in the course of explaining why state legislators are absolutely immune from suit for damages under 42 U.S.C. § 1983:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial . . . . The holding of this Court in Fletcher v. Peck . . . that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Tenney v. Brandhove, supra, 341 U.S. at 377. [33]

***22 C. Judicial Recognition of Partisan Interests Will Endanger Protection of Racial Minorities**

Recognition of partisan gerrymandering claims will certainly lead to increased challenges to reapportionment plans. As these cases arise, the potential for serious conflict between racial and partisan interests increases dramatically.

The immediate risk is that partisan and racial interests will be pitted against one another with the courts as referees. *Cf. United Jewish Organizations v. Carey,* 430 U.S. 144 (1977) (Hasidic Jews' complaint against New York apportionment plan designed to enhance representation of nonwhites).

Even districts drawn to implement the Voting Rights Act may be challenged when such implementation alters the partisan balance. Whenever members of a racial group are predominantly aligned with the majority party, line-drawing that advantages the racial minority will also advantage the majority party. Even were this Court to rule that partisan effects are permissible so long as the purpose is to enhance representation for racial minorities, the intractable problem of discerning whether the legislature's motives were racial or partisan will remain. The problem is well illustrated here by the lower court's attempt to decide whether blacks were disadvantaged because they were blacks or because they were Democrats.

Any decision extending constitutional protection to partisan interest will almost inevitably lead to conflict in the legislative forum as well. It is indisputable that no matter where district boundaries are placed, some political interests will be adversely affected. Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts," in *Representation and Redistricting Issues, supra,* at 7-8; Backstrom, "Problems of Implementing Redistricting," in *Representation and Redistricting Issues, supra,* at 45-46. Currently, legislatures can take affirmative steps to enhance the representation of racial and ethnic minorities without thereby making the resulting apportionment plan vulnerable to court challenges by other political interests. If partisan claims are given constitutional recognition, then future legislatures will have to assess the likelihood of a partisan attack each time they draw a ***23** line that advantages a racial minority. And when the conflict is between the interests of a racial minority blessed with few or no representatives in the decisions-making body and the interests of one of the two major political parties, minority interests may not always prevail.

There is no good reason to create this conflict. No one can seriously argue that the evils of the two types of gerrymandering are the same. Racial gerrymandering reflects entrenched racism. The effect of partisan gerrymandering, on the other hand, is transitory. Even a "successful" partisan gerrymander will have a declining impact over the course of a decade as district demography changes. Party labels mean different things at different times. In this country one can change his politics, but not his race.

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*24 CONCLUSION

This Court has a number of powerful and manageable tools to deal with redistricting abuses. The Voting Rights Act and the Fourteenth and Fifteenth Amendment race cases control the worst form of gerrymandering. One person, one vote standards limit partisan discretion.

In addition, state constitutions often establish further restrictions, and the popular initiative and referendum provide direct democratic review of the process.

The most important check on partisan gerrymandering, however, is the ebb and flow of political power between the two major parties at the local, state and federal levels. At some times and in some places the balance of power between the two major parties is even; usually it is not. But it is for the people to shift the balance, not the courts.

The decision of the district court should be reversed.

Dated: May 8, 1985.
Respectfully submitted,

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Footnotes

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1 The California Assembly has intervened, for much the same reasons, in a partisan gerrymandering case involving the California Congressional apportionment. *See, Badham v. Eu,* 721 F.2d 1170 (9th Cir. 1983) and *Badham v. Eu,* 53 U.S.L.W. 3687 (No. 84-1226)(certiorari to the Ninth Circuit on an unreported related holding denied on March 25, 1985).

2 The district court ruled that a racially discriminatory intent had not been proved and therefore rejected the racial gerrymandering claim. App. Jur. St. at A-20. The NAACP plaintiffs also raised a Voting Rights Act claim. The district court's factual findings on racial impact would appear to justify invalidation of the plan or portions of it under § 2 of the Act, which by its terms does not require discriminatory intent. 42 U.S.C. 1973(b). *See* App. Jur. St. at A-18 to 20, A-30. However, it appears that no Rule 12.4 cross-appeal was filed on either of these claims.

3 *Louisiana v. United States,* 380 U.S. 145 (1965).

4 *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966).

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5 *Dunn v. Blumstein,* 405 U.S. 330 (1972).

6 A slightly different form of exclusion was addressed in the ballot access cases. *See, e.g., Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564 (1983); *American Party of Texas v. White,* 415 U.S. 767 (1974); *Storer v. Brown,* 415 U.S. 724 (1974); *Williams v. Rhodes,* 393 U.S. 23 (1968). There individuals were permitted to vote, but state laws restricted the ability of candidates to obtain a place on the ballot. When such laws were struck down, as in *Williams* and *Anderson,* it was because of burdens placed upon the "voters' freedom of choice and freedom of association." *Anderson v. Celebrezze, supra,* 103 S.Ct. at 1579. In these cases it was the candidate or the party that was completely excluded from the ballot, rather than the voter excluded from the ballot box, but the result was the same: a voter could not even cast a ballot for the candidate of his or her choice.

7 *See, e.g., Reynolds v. Sims,* 377 U.S. 533, 568 (1964); *Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964).

8 Thus, although the Congressional cases have been based on Article 1, § 2 as well as the Fourteenth Amendment, the analysis has been the same except that state legislative plans are not held to the same strict numerical standards required in Congressional cases. *White v. Regester,* 412 U.S. 755, 763 (1973). *Compare Brown v. Thomson,* 462 U.S. 835, 103 S.Ct. 2690 (1983) and *Mahan v. Howell,* 410 U.S. 315, 329 (1973), *with Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653 (1983).

9 "*Regester* is a kind of present-day version of the 'white primary' cases. Multimember districts, it would seem, violate the Equal Protection Clause, not because they overrepresent or underrepresent pure and simple, but because they do that in a context where all stages of the electoral process have been effectively closed to identifiable classes of citizens, making the political establishment 'insufficiently responsive' to [minority] interests." G. Casper, "Apportionment and the Right to Vote: Standards of Judicial Scrutiny", 1973 *Supreme Court Review* at 28.

10 Additionally, whereas Justice Marshall's approach would strengthen protections against racial gerrymandering, Justice Stevens' approach, by equating racial and partisan gerrymandering claims, is likely to reduce vigilance against race discrimination. For the inevitable presence of political considerations in the apportionment process leads Justice Stevens to conclude that the process "must tolerate some attempts to advantage or disadvantage particular segments of the voting populace." *Mobile v. Bolden, supra,* 466 U.S. at 91 (Stevens, J., concurring).

11 The "heightened judicial solicitude" in race cases is prompted by the fact that

prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .

United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

It is questionable whether any political party in this country could be described as discrete and insular. The two major parties surely cannot, and least of all in the election and apportionment context. This is apparent from the innumerable definitions of the protected class that could be developed in partisan cases. Here, the district court effectively defined the protected class as those who voted for Democratic candidates in the 1982 election. App. Jur. St. at A-12 to 13, A-24. The alleged discriminatory effect was thus used in bootstrap fashion to identify the protected class. By so doing, the court completely ignored the non-voting population-registered voters who for whatever reason (including silent dissent) abstained from casting a ballot, and the thousands of people who though ineligible to vote are counted in the apportionment of representatives and the formation of districts. Moreover, even judged on its own terms, the group identified by the district court-those who aligned themselves with the Democratic Party-is ever-changing. If this is the standard, then it "would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman v. Dougall,* 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting); *Whitcomb v. Chavis, supra,* 403 U.S. at 156-57. *See generally* Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) at 151-53.

12 Brief Amicus Curiae of Assembly of the State of California Prior to Consideration of Jurisdiction at 8-18.

13 Proponents of judicial control over partisan gerrymandering will often deny that their approach would lead to a new mode of representation. They may deny, as did the court below, that theirs is a call for proportional representation and state that all they seek is an "effective" or "meaningful" vote. App. Jur. St. at A-24 to A-25. Significantly, however, the political scientists who support this so-called reform movement concede that what is proposed is proportional representation or a variation thereon. *See, e.g.,* Lijphart, "Comparative Perspectives" in Grofman, et al. (ed.) *Representation and Redistricting Issues* (1982) at 155; Pennock, *Democratic Political Theory* (1979) at 358.

14 Such mechanisms, including, for example, proportional representation, would be likely to undermine majority rule and arguably "nullify" democracy. Adler, "A Disputation on the Future of Democracy," *The Great Ideas Today: 1978* (Encyclopedia Britannica) at 19. "To be in favor of universal suffrage (which makes the ruling class coextensive with the

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population), while at the same time wishing somehow to undercut the rule of the majority, is as self-contradictory as being for and against democracy at the same time." *Id. See also id.* at 61.

15 Although the Republic was established in the Eighteenth Century, the advent of democracy in the sense of majority rule really began in the Nineteenth with "the gradual amendment of republican constitutions by extensions of the suffrage and by correction of various forms of oligarchical injustice." Adler, "A Disputation on the Future of Democracy," *supra,* at 9.

16 To the extent that women, minorities, the poor and younger people tend to vote with one party or another, each of these provisions creates a "built-in bias."

17 *See* "The Constitutional Imperative of Proportional Representation," 94 Yale L.J. 163, 164 n.4, 172; Grofman, "For Single Member Districts Random Is Not Equal," in *Representation and Redistricting Issues, supra,* at 55; De Grazia, *supra,* at 187.

18 Proportional representation eliminates the bias, but at a cost. It encourages divisiveness and fosters antagonism. *See* De Grazia, *supra,* at 203; Pitkin at 64. It tends to make the legislature a forum for debate rather than for decision-making. Pitkin, *supra,* at 63. It has been charged that proportional representation "makes everyone potent; then it makes everyone impotent; and finally, it makes one man omnipotent." De Grazia, *supra,* at 201.

19 *Wendler v. Stone,* 350 F.Supp. 838, 840 (S.D. Fla. 1972); "The Constitutional Imperative of Proportional Representation." *supra,* at 172-73. *See also* Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts," in *Representation and Redistricting Issues, supra,* at 7-8, 16.

20 The Note's author, like many other commentators, suggests that an equally meaningful vote can be achieved only through proportional representation. *Id.* at 164, n.3. *See also* note 13, *supra*. But then one is proposing a restructuring of our entire system. *See* Baker, "Threading the Political Thicket," in *Representation and Redistricting Issues, supra,* at 31.

21 As the plurality opinion in *Mobile v. Bolden* points out:

It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.

Mobile v. Bolden, supra, 446 U.S. at 78.

22 The term proportional representation, though used at the time of the Constitutional Convention, referred only to representation by population rather than by states. De Grazia, *supra,* at 108. *See The Portable Thomas Jefferson (ed. Merrill D. Peterson),* Letter to J. Madison, 1787, p. 429; Federalist No. 39.

23 David R. Mayhew, in his book *Congress: The Electoral Connection* (1974) discusses the role of parties in elections. He emphasizes that congressional candidates cannot rely on party affiliation to get elected. "[A] congressman can-indeed must-build a power base that is substantially independent of party." *Id.* at 26. And he concludes that "no theoretical treatment of the United States Congress that posits parties as analytic units will go very far." *Id.* at 27.

24 *See Wells v. Rockefeller,* 311 F.Supp. 48, 51 (S.D.N.Y.) *aff'd mem.,* 398 U.S. 901 (1970) ("Recent election figures . . . are only indicative of the voters' reaction to a particular candidate."); *Kilgarlin v. Martin,* 252 F.Supp. 404, 433 (S.D. Tex. 1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill,* 386 U.S. 120 (1967) (*per curiam*) ("The only demonstrable way available to fathom the political inclinations of a certain area at any given time is at the ballot box on a given election day.").

25 Hence, Mayhew notes that "vote variation over which congressmen have reason to think they can exercise some control (i.e. the primary vote and the local component of the November vote) is substantial. . . . [I]n general elections . . . district vote fluctuations beyond or in opposition to national trends can be quite striking." *Congress: The Electoral Connection, supra,* at 34. *See also id.* at 39 (election outcomes are influenced by "money, the ability to make persuasive endorsements, organizational skills, and so on").

26 The proportionalists reject this concept and find geographical constituencies an impediment to fair representation. *See* De Grazia, *supra*. at 195; "The Constitutional Imperative of Proportional Representation," *supra,* at 165 (proportional representation requires large multi-member districts).

By contrast, this Court has closely scrutinized multi-member districts. Indeed, the time may have come to hold that multi-member districts are unconstitutional *per se. See Whitcomb v. Chavis,* 403 U.S. 124, 145-47 (1971), in which the Court considered new mathematical evidence that multi-member districts may violate one person one vote requirements, but found that "[t]he real-life impact of multi-member districts on individuals has not been sufficiently demonstrated, at least on this record, to depart from prior cases." *Id.* at 146. *And see* Banzhaf, "Multimember Electoral Districts-Do They Violate the 'One Man, One Vote' Principle," 75 Yale L.J. 1309 (1966).

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27 *See* Jewell, “The Consequences of Single and Multimember Districting” in *Representation and Redistricting Issues. supra,* at 132-34.

28 That is precisely what happened here. The court took testimony from individual legislators. App. Jur. St. at A-8 to A-9. It reviewed and condemned the parliamentary procedures by which the reapportionment bill was introduced, the legislative committee appointments, and the adequacy of legislative hearings, review and deliberation. *Id.* at A-7 to A-9. The court did all of this with little reference to what, if any, “normal” procedures are employed by the Indiana legislature. *See* Joint App. at JA-22. Of course, had the court taken this further step to justify its condemnation, the intrusion into internal legislative processes would have been that much worse.

29 In race cases discriminatory intent must be proved, but this requirement rarely, if ever, requires inquiry into the minds of state legislators or the parliamentary processes of state legislatures. *See, e.g.,* circumstantial evidence of intent discussed throughout *Rogers v. Lodge, supra*.

30 *See, e.g., Garcia v. United States,* 469 U.S. 70, 105 S.Ct. 479, 483 (1984); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 267-68 (1977); *United States v. O'Brien,* 391 U.S. 367, 383-85 (1968); *Fletcher v. Peck,* 6 Cranch 87, 130-31, 3 L.Ed. 162 (1809).

31 If an Act of Congress is properly signed, enrolled, and deposited as the Constitution requires, the federal courts refuse to make an evidentiary inquiry into the actual facts of its passage, no matter what the seeming strength of the evidence that the Act was not properly passed-for example, that the text as passed differed from the text as enrolled, *Marshall Field & Co. v. Clark,* 143 U.S. 649, 670-73 (1892), or that a quorum was not actually present, *Lyons v. Woods,* 153 U.S. 649, 662-63 (1894); *United States v. Ballin, Joseph & Co.,* 144 U.S. 1, 3-4 (1892). “Judicial action based upon such a suggestion is forbidden by the respect due to a co-ordinate branch of the government.” *Marshall Field & Co. v. Clark, supra,* 143 U.S. at 673. In California and other states, courts similarly refuse to look behind an enrolled bill to judge the parliamentary process by which it was adopted. *See, e.g., County of Yolo v. Colgan,* 132 Cal. 265, 274-75, 64 P. 403, 407 (1901).

32 If the sort of discovery that occurred in this case were sought against members of Congress, the Speech and Debate Clause would without question make them absolutely immune from it, whether the underlying proceeding was criminal or civil. *See, e.g., United States v. Helstoski,* 442 U.S. 477, 489 (1979) (criminal); *United States v. Brewster,* 408 U.S. 501, 525 (1972) (same); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 508-11 (1975) (civil); *Powell v. McCormack,* 395 U.S. 486, 502-03 (1969).

33 *Lake Country Estates, supra,* 440 U.S. at 405, and *United States v. Gillock, supra,* 445 U.S. at 372-73, both reaffirm the continued vitality of *Tenney* in civil suits. And at least two circuits have applied the *Tenney* rule to Section 1983 actions for injunctive relief. *Star Distributors, Ltd. v. Marino,* 613 F.2d 4, 10 (2d Cir. 1980); *Green v. DeCamp,* 612 F.2d 368, 369, 372 (8th Cir. 1980).

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