1985 WL 670038 (U.S.) (Appellate Brief)
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.
August 31, 1985.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

Reply Brief of Appellants

* William M. Evans, Alan W. Becker, Bose McKinney & Evans, 1100 First Indiana Bldg., 11 North Pennsylvania St., Indianapolis, IN 46204, (317) 637-5353, Counsel for Appellants

Linley E. Pearson, Attorney General of Indiana, Michael T. Schaefer, Deputy Attorney General, State House, Room 219, Indianapolis, Indiana 46204, of Counsel

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***1** In suggesting that this case requires application of simple, "bright line" standards and characterizing themselves as powerless victims of the political process, Appellees Bandemer, *et al.* (the "Democrats") ignore many of this Court's prior opinions and ignore their party's own failure to capture competitive seats in Indiana. This Court cannot, however, ignore the legal quagmire and factual ***2** weaknesses surrounding the Democrats' claims and should not accept the invitation to affirm the lower court's ruling by a process of judicial legislation.

I.

THIS COURT HAS PREVIOUSLY REJECTED PARTISAN GERRYMANDERING CLAIMS AS NONJUSTICIABLE

The Democrats' attempt to distinguish this case from the Court's prior rejection of claims of partisan gerrymandering incorrectly characterizes the facts and the questions presented in those prior cases. [1] In *WMCA, Inc. v. Lomenzo,* 238 F.Supp. 916 (S.D.N.Y. 1965), *aff'd,* 382 U.S. 4 (1965), for example, this Court affirmed the lower court's holding that New York's reapportionment statutes satisfied the Fourteenth Amendment, thereby rejecting questions presented with respect to (i) whether political gerrymandering can violate the Fourteenth Amendment and (ii) whether New York's statute violated the Fourteenth Amendment when it established districts which were not convenient and compact, which departed substantially from geographic and political subdivision boundaries, and which were deliberately designed to and adopted in a manner as to systematically minimize the voting power of certain persons. *See* 34 U.S.L.W. 3017 (1965). Significantly, the Democrats also ignore Justice Harlan's observation that the Court by its decision affirmed the nonjusticiability of partisan gerrymandering. 382 U.S. at 4.

Similarly, in *Wells v. Rockefeller,* 311 F.Supp. 48 (S.D.N.Y. 1970), *aff'd,* 398 U.S. 901 (1970), this Court ***3** affirmed the rejection of a partisan gerrymandering claim and rejected questions presented whether partisan gerrymandering was

a justiciable issue in the federal courts and whether districts which were "grotesquely shaped" and noncontiguous and which did not achieve compactness or avoid splitting political subdivisions violated the Fourteenth Amendment. *See* 38 U.S.L.W. 3446 (1970). *See also Archer v. Smith,* 409 U.S. 808, *aff'g in part Graves v. Barnes,* 343 F.Supp. 704 (W.D. Tex. 1972) (rejecting the question whether standards for redistricting should be revised to prohibit partisan gerrymandering). In sum, despite whatever language in prior opinions might be construed to recognize partisan gerrymandering as justiciable, and contrary to the assertions of the Democrats in their brief, in cases where the issue was actually raised this Court has rejected justiciability for claims of partisan gerrymandering. [2]

Moreover, appellees and amici still fail satisfactorily to address a major impediment to justiciability: the lack of any manageable standard for identifying the "protected group." The Democratic Party and the Republican Party may for some purposes constitute an identifiable class, but not for purposes of assessing discrimination in a reapportionment plan, especially one designed to operate over a full decade of changing demographics, party policies and party affiliation. The problem is compounded here since the claimed discrimination is not even asserted to be solely against members of the Democratic Party. Instead, the Republican National Committee as amicus would have the class defined by "party affiliation *or electoral tendencies",* Brief Amicus Curiae of the Republican National ***4** Committee, at 10 (emphasis added), or by "voting patterns", *id.,* at 11 n.8. Common Cause identifies the class as "likely Democratic voters" Amicus Curiae Brief of Common Cause, at 12.

The Democrats themselves attempt to skirt the issue by relying on the conclusions of the court below, Brief of Appellees at 28, and by defining the protected class in a bootstrap fashion according to historical voting statistics that formed part of a computer data base, *id.* at 29. These of course are not people identifiable by group affiliation or any defined set of beliefs. Rather these are nameless statistics accumulated from past elections in which the characteristics of particular candidates undoubtedly made a difference that is simply ignored. That such past election results formed part of a computer data base used in developing the reapportionment plan certainly does not serve to establish an identifiable group and a manageable standard for purposes of constitutional analysis of partisan gerrymandering. Without such a manageable standard, however, this Court cannot uphold the ruling of the court below without embarking on a massive judicial regulation of the state, local and national political life of this country. [3]

II.

THE INDIANA REAPPORTIONMENT ACTS ARE CONSTITUTIONAL

Regardless of the outcome of elections in any particular year, the test of Indiana's reapportionment plan is whether it meets the constitutional guidelines prescribed by prior opinions of this Court. *Whitcomb v. Chavis,* 403 U.S. 124 (1971). Faced in 1981 and 1982 with the choice of adopting ***5** the Reapportionment Acts or the partisan plans offered by the Democrats, the Indiana legislature chose what it considered the fairer alternative. [4]

A. The Democrats Are not "Fenced Out" of the Political Process

The claim of "impermissible handicap" raised by the Democrats (Brief of Appellees, at 30) resulting from "bias" in the Reapportionment Acts does not withstand rigorous analysis. Rather, the "exclusion" of which the Democrats complain "seems a mere euphemism for political defeat at the polls." *Whitcomb v. Chavis,* 403 U.S. 124, 153 (1971).

1. "Competitive" Seats Under the Reapportionment Acts Allow the Democrats to Gain Control

In Indiana "competitive" seats regularly change parties. In 1982, six House incumbents, namely Reps. Collins, Craig, Johnson, Long, Pruett, and Winger, even with the strength of name recognition, were defeated, as shown in Exhibits W and X. In simple terms, considering the number of marginal seats in the House of Representatives, there is no reason to believe that what happened in 1982 will not happen again, because these seats are, by definition, "marginal seats".

***6** Appellants have argued that the existence and number of "competitive" seats in the 45%-55% range adopted by the court below allows the Democrats to gain control of the Indiana General Assembly (Brief of Appellants at 21-23; *see also* A-121 and JA-39 (House), JA-50 (Senate)). The court below apparently agreed, holding that such seats are winnable by the better candidate more "sensitive to the interests of the voters and the issues of the day" (A-11). The Democrats make no direct response, arguing only that their control is impossible based on the state-wide vote in "anonymous" races, which they variously calculate at 51.0% Republican, 50.8% Republican, 44.3% Republican, 44.6% Republican, 56.1% Republican, 57.4% Republican (Brief of Appellees, at 3), 50.9% Republican, 51.2% Republican, and 48.8% Republican (*id.,* at 13).

Although the court below gave no credence to such evidence of the Democrats, which it called "statistics" (A-11), the Democrats still place great emphasis on their statistics and refer to them regularly in their brief, particularly the statewide result in the so-called "anonymous" races. If these statewide averages indicate anything, however, they indicate that the Democrats could have gained control of the Indiana General Assembly in 1982 with more attractive candidates more able to attract the attention of a majority of Indiana voters and offering a more acceptable legislative program, recognized, as stated above, in the lower court opinion itself as an important factor (A-11).

While a simple comparison between votes and seats won on a statewide basis ignores this element of voter preference, a district-by-district examination graphically illustrates its importance in the context of Indiana's Reapportionment Acts. The table in the appendix to this brief makes this comparison based on exhibits prepared by the Democrats. The table shows that for the thirty-nine House districts held to be "competitive" by the court below, in twenty-six districts there was a difference of three percent or more between the Democrat vote in the ***7** "anonymous" 1982 State Auditor's race attributable to that particular district and the actual Democrat percentage of the legislative vote in that district. Thus, voters expressed a preference significantly different from that in the "anonymous" race in fully two-thirds of the competitive districts.

2. If Democrat House Candidates Had Not Run Behind Their Own Ticket, They Would Have Won Control in 1982

The Democrats also seek the attention of this Court by asserting that even if the Democrats win a majority of the state-wide vote for "anonymous" races in two consecutive elections they can never under any circumstances gain control of the Indiana General Assembly (Brief of Appellees, at. i, 3-4, 11, 14, 27, 28, 30, 31, 32, 36, 38, and 46).

The court below made no such finding, limiting its analysis to the seat-vote relationship resulting from the 1982 elections to the Indiana House of Representatives (A-11). The court found that the Republicans made "an effort" to maintain control (A-17), but made no finding that they would remain in control if the Democrats running for state office in fact ever won in two successive elections. Indeed, the court expressly rejected statistics to predict future election outcomes after 1982 (A-13).

Since the Democrats lost in 1984 and have never won a majority of the state-wide vote in two successive elections even under their calculations, either before or after reapportionment (JA-37), this pivotal argument of the Democrats is based on conjecture rather than fact and could not have been the basis for the decision of the court below. Moreover, the argument is clearly incorrect. Statistics prepared by the Democrats themselves show that they could have controlled the House of Representatives in 1982 if their losing candidates had not run behind their own ticket.

***8** House district results for 1982 show that losing Democrat candidates able to do as well as the statewide average for their district in the so-called "anonymous" races would have won eight more races. Six of these races were in the "competitive" districts 36, 9 (Budack), 32, 10 (Ayres), 56 and 33. *See* the table in the appendix, *infra*. In addition, district 71 elected a Republican but was 61.8% Democrat (A-121), and district 62, won by a Republican, in fact was a Democrat majority seat based on the Supreme Court Clerk race (50.3% Democrat, as shown in JA-43) and the Auditor and Supreme Court Clerk race combined (50.1% Democrat, as shown in JA-46). Combined with the 43 seats they actually won, the Democrats would have gained absolute control with 51 votes if they had been able in 1982 to do as well in the races they lost as the very statewide averages they rely on.

B. The Reliance of the Court Below on the 1982 House Seat-Vote Relationship is Wholly Misplaced

Despite the repeated denials of Amici and the Appellees that they are not seeking proportional representation, their analyses and even their language approach just such a request. The Republican National Committee argues, for example, that if the seat-vote ratio is disproportionate "something is surely amiss" (Brief Amicus Curiae of the Republican National Committee in Support of Appellees, at 23), and the Democrats openly argue that "the population of Marion County entitled it [the Indiana Republican Party] to precisely fourteen representatives and seven senators..." (Brief of Appellees, at 38).

This Court has, of course, rejected any suggestion that the Constitution requires proportional representation. *Mobile v. Bolden,* 446 U.S. 55, 79 (1980). In addition, this Court has held that the ability of a group to win a particular election or elections at all is not relevant to a constitutional inquiry. *Whitcomb v. Chavis,* 403 U.S. 124, 154-55 (1971). Even to the extent that seat-vote ratios might have some ***9** relevance under some circumstances they do not support the lower court's finding of unconstitutionality. [5]

The Democrats have cited *Gaffney v. Cummings,* 412 U.S. 735 (1973) as an example of a reapportionment plan designed "to provide representation reflecting voting strength" (Brief of Appellees, at 32). In the 1972 election at issue in *Gaffney,* the Republicans received 52.88% of the votes in all the House races and 61.59% of the House seats, and 54.18% of the votes in all the Senate races and 63.88% of the Senate seats. (Brief for Appellees Theodore R. Cummings, *et al.,* at 36, *Gaffney v. Cummings,* 412 U.S. 735 (1973); Reply Brief for Appellant, at Chart I, *id.*) The plan which resulted in these seat-vote differentials was approved by the Court following the 1972 election, *id.* at 740, and was found to have allocated political power between the parties in accordance with their voting strength "within quite tolerable limits", *id.* at 754. These Connecticut differentials, however, average more than the seat-vote differential in the Indiana House which was relied upon by the court below as "most significant" (A-11).

Not only is this 1982 Indiana seat-vote differential within constitutional limits, but any differential at all on a district basis can be explained by factors other than partisan political gerrymandering. For example, in the three most populous counties, Marion, Lake and Allen, the total vote was much greater in 1982 where the Republicans won than where the Democrats won. The total vote for all candidates in House districts that elected Republicans and where at least a majority of the voters resided in one of these three ***10** counties [6] was 1,025,533. Twenty Republicans won in these districts. Thus, the total vote per winning candidate (1,025,553 divided by 20) was 51,276.65. In these same three counties the comparable average total vote per Democratic winning candidate [7] (10 in number) was only 32,301.90. [8]

Since it took the Republicans many more votes per winning candidate than it took the Democrats in these three counties, it would appear that the Democrats made more effective use of their votes in winning their seats, and that the Republicans "wasted" more votes to win their seats. This can be demonstrated by a simple example. If a candidate of party A in a

two-party race wins by 51% when the total vote was 50,000 (25,500 votes) and a candidate of party B wins by 51% in another district where the total vote was only 30,000 (15,300 votes), party B wins one-half of the seats with less than one-half of the total votes in these two districts.

Thus, the "signal" seen by the court below in the overall seat-vote relationship in the 1982 election was misleading, and the lower court's reliance on it was misplaced. Seatvote relationships are simply a poor indication in Indiana of partisan gerrymandering, and the court below ignored all the factors affecting legislative vote totals, including the personality of the candidates and the heavy Democrat districts which necessarily resulted from complying with the constitutional requirement that black voting strength be preserved, when the court leaped to its conclusion that there was unconstitutional gerrymandering because it saw a "signal" (A-11) in the seat-vote relationship.

***11 III.**

BLACK VOTERS, AS DEMOCRATS, PRESENT NO CONSTITUTIONAL CLAIMS

The Indiana NAACP State Conference of Branches (the "NAACP") filed no cross appeal from the judgment of the court below and therefore must accept the court's finding that blacks are not harmed by the Reapportionment Acts as blacks but only as Democrats (A-20-21). *Langnes v. Green,* 282 U.S. 531 (1930); *Federal Trade Commission v. Pacific States Paper Trade Association,* 273 U.S. 52 (1926). Yet in its Brief the NAACP only repeats its argument, rejected by the court below, that the Reapportionment Acts unconstitutionally "fragment" black voting strength (Brief of NAACP, at 8, 9, 26) with particular reference to Marion County, which has a twenty percent black population and has three of fifteen, or twenty percent, black majority House legislative seats.

Black concentration of voters sufficient to permit black majority districts exists only in Marion and Lake Counties, and in these counties black majority districts exist in approximate proportion to black population (Exhibit 215, p. 2; A-127; Exhibit JJ pp. 22, 23). This is in sharp contrast to the two "fragmentation" cases cited in the NAACP Brief. In *Busbee v. Smith,* 549 F.Supp. 494 (D.D.C. 1982), the black voters in Atlanta, Georgia, where racial polarization in voting was increasing, *id.* at 499, were denied a black majority Fifth Congressional district because "[t]he legislators knew a cohesive black community existed in south Fulton and Dekalb Counties, that it would take a 65% black population to allow a black electoral majority and that the Fifth District embodied in the final conference report divided the black community and prevented a black majority," *id.* at 515. The court stated it was not necessary that Georgia "maximize minority voting strength in the Atlanta area", but that it was not allowed to implement "a scheme designed to minimize black voting strength to the extent possible," *id,* at 518. In ***12** *Major v. Treen,* 574 F.Supp. 325 (E.D.La. 1983), the Louisiana legislature unlawfully diluted black voting strength in New Orleans by discarding a congressional redistricting plan which created a black majority district, *id.* at 332, because of the threat of a gubenatorial veto and substituting instead a plan which separated black voters to produce all white majority districts. This dilution of minority voting strength invalidated the act because it was employed in a racially polarized environment. The court stated:

> The importance of polarized voting cannot be under-estimated, for if it does not exist, the minority voter "has little reason to complain ..." *United Jewish Organizations v. Carey,* 430 U.S. 144, 166 n.24, 97 S.Ct. 996, 1010 n.24, 51 L. Ed. 2d 229 (1977).

Id. at 351.

The NAACP argument that districts with less than a black majority remaining after black majority districts have been created in rough proportion to black voting strength are "fractured" unless black voting strength is maximized there

as well, was rejected in *Gingles v. Edmisten,* 590 F.Supp. 345 (E.D.N.C. 1984), *prob. juris. noted sub nom. Thornburg v. Gingles,* 53 U.S.L.W. 3776 (Apr. 19, 1985).[9] As reported in the supplemental opinion of the court, the black plaintiffs contended that the North Carolina plan "fractures substantial black population concentrations which, although insufficient in numbers and contiguity to constitute another voting majority, might nonetheless exercise considerable voting power as a substantial voting minority in one at least of appropriately ***13** constructed single-member districts". The plaintiffs also claimed that the plan contained districts "so irregularly shaped that voters assertedly will not be able to learn in which district they live so to be able to use their votes effectively". 590 F.Supp. at 379. The plaintiffs presented a plan which would have created a district with a 44.7% black population in a "packed" district compared to 28.2% of the population in the district with the largest black concentration outside the two black majority districts under the state's plan approved by the court. *Id.* at 380. The court held, however, that no "fracturing" or "packing" in violation of Section 2 of the Voting Rights Act had occurred, reasoning that the application of this concept to districts with less than black majorities lacks any rational basis, only "raw intuition". *Id.* at 381.

Therefore, *Gingles* holds that there is no fracturing of a black concentration of voters where the blacks are less than a majority even where there has been racial bloc voting. Not only is there no evidence or finding of any racial bloc voting in Indiana, there is no evidence or finding that blacks residing in multimember districts in which they were a minority and represented by white Republican legislators fared any worse than white Democrats residing in the same district.[10]

For these reasons the blacks as Democrats present no constitutional claims. Quite simply, blacks are fully and fairly represented in Indiana.

***14 IV.**

DEMOCRATS ARE NOT A "SUSPECT CLASS" UNCONSTITUTIONALLY DEPRIVED OF THEIR VOTES

In an unfortunate muddling of the issues in this case, the Democrats claim they are deprived of their fundamental right to vote, (Brief of Appellees, at 19 n.19) and liken this case to ballot access cases and cases in which membership in a political party results in loss of a job or other rights and privileges. Such a characterization is misleading and trivializes the needs of true "insular" minorities for constitutional protection.

The right to vote is indeed a fundamental right. State action infringing that right is therefore subject to strict scrutiny. The fundamental "right to vote," however, is merely the numerical, or quantitative, right to vote. This right to vote is guaranteed to racial groups under the Fifteenth Amendment, and to all groups under the Fourteenth Amendment. Unlike the quantitative right to vote, however, the qualitative right to vote, or a right against vote dilution, is provided under the Fourteenth Amendment only if a suspect class, particularly a racial or ethnic group, is affected.

In 1973 this Court for the first time upheld a vote dilution claim in *White v. Regester,* 412 U.S. 755 (1973), *aff'g in part Graves v. Barnes,* 343 F. Supp. 704 (W.D. Tex. 1972). It said it would entertain claims that electoral systems "are being used invidiously to cancel out or minimize the voting strength of racial groups." *Id.* at 765. It therefore affirmed a finding that multimember districts in Dallas County, Texas discriminated against blacks.[11] Obedient to *White,* ***15** the lower courts opened their doors to claims of racial vote dilution, particularly the southern courts in the Fifth Circuit. *E.g., Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973). They remained closed, however, to such claims by political groups. For example, in *Jimenez 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), the court held that only racial groups could attack gerrymandering. *Id.* at 673-74.

Similarly, in *Mirrione v. Anderson,* 717 F.2d 743 (2d Cir. 1983), the plaintiff argued that a reapportionment intended to improve black and Hispanic voting power diluted his voting strength and that of other residents of the Rosedale community in New York City. The trial court dismissed his complaint, and the appellate court affirmed, noting that "members of a community have no claim to be left together in one district at least absent a showing of discrimination on grounds of race or color." *Id.* at 745 (quoting *United Jewish Organizations of Williamsburgh, Inc. v. Wilson,* 510 F.2d 512, 521 (2d Cir. 1975), *aff'd on other grounds sub nom. United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144 (1977)).

The Fourteenth Amendment "intent" requirement has proved particularly troublesome in the vote dilution area. This question was largely resolved by the Court in *Rogers v. Lodge,* 458 U.S. 613, 624-26 (1982), where it held that the history of discrimination against a racial group, its depressed socio-economic ??, and unresponsive and discriminatory actions of government officials are all relevant to proving that an electoral system has a discriminatory purpose.

Indeed, in setting up its list of racially tailored factors, *Rogers* stated the constitutional constraints on multimember districting in strictly racial terms:
[T]his Court has repeatedly held that multimember districts are not unconstitutional *per se*. The Court has recognized, however, that multimember districts ***16** violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial ... discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population.

458 U.S. at 637, (emphasis and ellipsis in original, citations omitted). Justice Steven read this passage as holding that only racial groups could object to vote dilution. He dissented in part because he disagreed that the racial character of the minority should be of critical importance. *Id.* at 651-53 (Stevens, J., dissenting).

There is every reason to deny judicial review to the vote dilution claims of these Democrats. They simply are not a suspect class.

> [They] have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 28 (1973) (residents of less wealthy school districts not a suspect class).

The Democrats cannot make the type of showing that the racial cases require. The required proof is stringent. The question turns not merely on the number of representatives a majority is able to elect; it involves many other factors, which together tend to show that *the minority has been intentionally fenced out from effective participation in the political process*. The Democrats would have to demonstrate that in Indiana they have even less access to the process than did blacks in Mobile, Alabama. *Cf. Mobile v. Bolden,* 446 U.S. 55 (1980) (reversing a finding that an atlarge voting system unconstitutionally diluted black voting strength). Such a showing would be impossible.

***17** This pattern of exclusion must be far more stark and pervasive than the Democrats could possibly show. [12] Democrats have never been subject to societal discrimination in the way that blacks have. Almost by definition, Democrats are able to work through the political process. They belong to a political party of enormous wealth and

influence. There is no impediment to Democrats registering to vote, fielding agreeable candidates, or serving on grand juries. Democrats' roads are paved. They have ample opportunity to make known their views and to attempt to form coalitions or to win others over to their cause. In short, Democrats lack any quality that would call for extraordinary judicial intervention in the majoritarian system. *See United States v. Carolene Products Co.,* 304 U.S. 144, 152-43 n.4 (1938).

The factors to be considered clearly aim at protecting only the genuinely oppressed minority, not a minority party complaining because in a representative democracy the majority party tends to win elections. One of the two key parties in the two-party system *per se* can never show the degree of fencing out necessary to show a constitutional violation. The spectacle of Democrats seeking to cloak themselves in protections tailored to victims of racist oppression would be amusing, if it did not threaten to impinge on the constitutional protections already afforded racial and ethnic minorities by this Court.

*18 CONCLUSION

In the present case the Democrats and the NAACP as Democrats seek to invoke the very "right" of group representation which was rejected in *Whitcomb v. Chavis* and to accomplish this by the creation of arbitrary "bright line" tests where no manageable standards exist. This Court should not, however, abandon its prior holdings at the Appellees' call for judicial legislation. The Indiana Reapportionment Acts allow the Democrats to compete fairly for legislative seats and to win control of the Indiana legislature. As such they are constitutional. For the reasons discussed herein and in Appellants' prior brief, this Court should reverse the order of the court below and vacate the injunction.

Respectfully submitted,

William M. Evans

Alan W. Becker

BOSE MCKINNEY & EVANS

1100 First Indiana Building

11 North Pennsylvania Street

Indianapolis, Indiana 46204

(317) 637-5353

Of Counsel:

Linley E. Pearson,

Attorney General of Indiana

Michael T. Schafer,

Deputy Attorney General

Office of the Attorney General

State House, Room 219

Indianapolis, Indiana 46204

APPENDIX

HOUSE OF REPRESENTATIVES "COMPETITIVE" SEATS

Winning Candidate	District	% Democrat based on 1982 State Auditor's Race (A-121)	% Democrat based on 1982 election results (JA-39)	
Kiely (R)	36	54.6%	41.3% *	**
Schuck (D)	30	54.0%	52.9%	
Underwood (D)	55	53.8%	56.2%	
Cook (D)	17	53.6%	65.8% *	
Bowser (D)	9	53.6%	58.4% *	
Budak (R)	9	53.6%	43.0% *	**
Price (D)	5	53.2%	53.2%	
Marshall (D)	69	53.2%	56.2% *	
Tincher (D)	46	51.1%	53.1%	
Goble (D)	67	51.0%	100.0% *	
Espich (R)	32	50.4%	38.6% *	**
Schultz (D)	61	50.2%	57.3% *	
Wilson (D)	10	50.2%	52.6%	
Ayres (R)	10	50.2%	44.2% *	**
Hibner (R)	56	50.1%	41.0% *	**
Hoover (R)	33	50.1%	46.8% *	**
Dean (R)	62	49.9%	44.8% *	
Coleman (R)	54	49.6%	40.8% *	

Becker (R)	75	49.3%	41.5% *
Avery (D)	75	49.3%	59.6% *
Duckwall (R)	31	49.3%	48.2%
Turner (D)	31	49.3%	51.7%
Thomas (R)	44	49.1%	39.6% *
Moberly (R)	57	48.7%	.0% *
Taylor (R)	8	48.1%	47.9%
McIntyre (R)	65	47.7%	40.5% *
Klinker (D)	27	47.7%	52.4% *
Fifield (R)	15	47.6%	42.2% *
Reppa (R)	15	47.6%	40.5% *
Stephan (R)	21	47.1%	49.3%
Jontz (D)	25	46.4%	61.1% *
Bales (R)	60	46.3%	43.1% *
Mangus (R)	6	45.9%	46.5%
Becker (R)	24	45.6%	46.0%
Engle (R)	20	45.2%	41.9% *
Pond (R)	20	45.2%	40.3% *
Worden (R)	20	45.2%	44.1%
Hayes (D)	59	45.2%	51.8% *
Regnier (R)	29	45.1%	44.4%
Totals	**26**		**6**

Footnotes

* *Counsel of Record*

1 As the Democrats correctly point out, summary affirmances reject the specific questions presented in the jurisdictional statement, *Mandel v. Bradley,* 432 U.S. 173, 176 (1977), and dismissal of an appeal for want of a substantial federal question

represents a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 476 n.20 (1979).

2 The Democrats' suggestion that the justiciability of their partisan gerrymandering claim was resolved in Baker v. Carr, 369 U.S. 186 (1962) (Brief of Appellees, at 24-26) is rather disingenuous. As the court below held, the "one man, one vote" issue addressed in *Baker* is not present here (A-10). *Cf.* Amicus Curiae Brief of Common Cause at 5 ("Nothing, here, corresponds to the principle of 'one person, one vote.'").

3 The involvement of the federal courts in what the public perceives as determinations requiring "political" judgments could also impair the public's confidence in the impartiality of the federal judiciary. *See, e.g.,* LaFollette, GOP Takes Remap Ruling to U.S. Supreme Court, Indianapolis News, February 1, 1985, at 25, col. 2 (making note of the political backgrounds of the members of the lower court). *See also* Mobile v. Bolden, 446 U.S. 55, 93 n. 15 (1980) (Stevens, J., concurring).

4 The alternative plans were certainly no better and arguably much worse than the Reapportionment Acts. Indeed, it ill becomes the Democrats to raise an issue of partisan gerrymandering when the Crawford Plan they espouse would have put 16 House incumbents in Marion, Lake and Allen counties in single member districts with another incumbent, 13 of whom would have been Republicans (Exhibit II). Similarly, in the Senate, the Democrats' Carson Plan would have put 14 incumbents in the same district with another incumbent, 12 of whom would have been Republicans (Exhibit SS). Such treatment of incumbents is wholly unnecessary. In marked contrast to the Democrats' plans, the Reapportionment Acts place no incumbents in the same district in the Senate, and only two incumbents in the same district in all of Marion, Lake and Allen counties. Additionally, the Democrats' plans themselves created unusual district shapes. *See* Exhibits 202, 204, 207, 209, 212, 214, QQ and RR.

5 Actually, the 1982 Senate results show just the opposite. Using the lower court's figures, in 1982 the Democrats received approximately 53.1 percent of the statewide Senate vote and won thirteen of twenty-five, or 52 percent, of the races. (A-12) Since in a twenty-five seat election each seat represents a four percent gain, the 1982 Senate elections resulted in full proportional representation, as pointed out in Judge Pell's dissent (A-44).

6 Districts 15, 19, 20, 48, 49, 50 and 52. *See* Exhibit X, pp. 53, 54, 58.

7 Districts 11, 12, 13, 14 and 51. *See* Exhibit X, pp. 53, 58.

8 A greater number of votes per winning Republican candidate than per winning Democratic candidate is apparently a nationwide phenomenon. Or??, Genesis of a "Gerrymander", Wall St. J., May 7, 1985, at 3??, ?? 3 (eastern ed.).

9 In former North Carolina House district number 36 blacks constituted 26.5% of the total population and, in reapportionment, this district was divided into eight single member districts. Two of these eight single-member districts had black majority populations. 590 F.Supp. at 378. In other words, black majority districts comprised 25% of the total number of new districts, and blacks comprised 26.5% of the total population. As in Indiana, the black majority districts, where permissible, are roughly proportional to the total black population.

10 The undisputed evidence is that in every bill where the so-called "black position" was defeated, the vote was along party lines and that where the so-called "black position" won the vote was not along party lines (November Transcript pp. 124-25). Republicans, whether from multi-member districts or single member districts, voted for white-Democrat sponsored legislation in approximately the same percentage that they voted for black-Democrat sponsored legislation (*see* Exhibits A-D, S and T).

11 It also affirmed a finding that Bexar County's multi-member district discriminated against Mexican-Americans, but only after carefully noting that "the District Court considered the Mexican-Americans in Bexar County to be an identifiable cl?? for Fourteenth Amendment purposes." 412 U.S. at 767; ??

12 Even under the Stevens-Powell analysis, a political gerrymander is unconstitutional only if it is egregious. Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 2675-76, 2690 (1983). It cannot be the rule that the mere influence of partisan or political considerations in formulating a reapportionment is sufficient to invalidate it. *See* Rogers v. Lodge, 458 U.S. 613, 648-49, (1982) (Stevens, J., dissenting). "[P]olitical considerations, even partisan ones, are inherent in a democratic system." Karcher v. Daggett, 462 U.S. 725, 103 S.Ct. 2653, 2?? (1983) (Powell, J., dissenting).

* - districts in which vote percentages for State Auditor's race and House race varied by 3% or more

** - districts which would have elected a Democrat if the Democratic candidate had run as well as the Democratic candidate for State Auditor

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