1985 WL 670005 (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.
March 4, 1985.

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

Brief Amicus Curiae of Assembly of the State of California Prior to Consideration of Jurisdiction

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*i QUESTION PRESENTED

Whether the justiciability of partisan gerrymandering should be approved without plenary consideration by this Court when (1) no court, including the one below, has expressly considered the constitutional implications and substantial difficulties inherent in judicial review of such claims and (2) summary acceptance of justiciability would approve standardless inquiries into the internal processes of state legislators.

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*1 INTEREST OF AMICUS

Amicus curiae is the duly constituted Assembly of the State of California and submits this brief pursuant to Supreme Court Rule 36.1.

The ruling of the Indiana district court, if sustained, would cast doubt upon reapportionment plans in every state in the Union. California, whose Constitution calls for reapportionment but once each decade, has for the first half of this decade had a series of legislative, judicial and election battles over its Assembly, Senate and Congressional districts. Although litigation over the Congressional plan continues, see *Badham v. Eu,* No. 85-1226, *petition for writ of certiorari pending, amicus* had thought that all challenges to the legislative plans had been resolved. If the decision below is affirmed, California can expect further divisive litigation over reapportionment.

***2** Repeated attacks on the validity of districting plans inevitably distract legislators from the pressing needs of California government and generate great uncertainty at all levels of state government. In addition, the decision below appears to open the way for widespread inquiry-by discovery, deposition and trial testimony-into the intent of individual legislators.

SUMMARY OF THE ARGUMENT

The district court failed to address in any way a far-reaching and fundamental threshold question: whether claims of partisan gerrymandering are justiciable. The court misconstrued the separate opinions in *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653 (1983), failed to consider the additional opinions in *Karcher v. Daggett,* 466 U.S. 910, 104 S.Ct. 1691 (1984), and ignored prior decisions of this Court to the effect that partisan gerrymandering is not justiciable. *Jiminez v. Hidalgo County Water District No. 2,* 424 U.S. 950 (1976); *WMCA, Inc. v. Lorenzo,* 382 U.S. 4 (1965).

An order affirming the decision below or even dismissing the appeal for want of a substantial federal question would be a decision on the merits by this Court. *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975). Such a decision would be viewed as changing *sub silentio* a long line of cases holding that partisan gerrymandering is not justiciable. At best it would throw the lower courts and state legislatures into confusion.

This Court should vacate and remand for full consideration of justiciability in light of pre-existing precedent. *See Upham v. Seamon,* 456 U.S. 37, 44 (1982) (*per curiam*). On a new appeal this Court would then have the benefit of the district court's full analysis on the justiciability issue. *See Taylor v. McKeithen,* 407 U.S. 191, 194 (1972). Additionally, the district court, on remand, may dispose of the case on non-constitutional grounds. *Escambia County, Florida, et al. v. Henry T. McMillan,* 466 U.S. 48, 104 S.Ct. 1577 (1984).

If this Court does not vacate and remand, it should note probable jurisdiction and give the case plenary consideration. Plenary consideration is essential to permit informed review of ***3** the difficulties involved in establishing standards for judicial review of political gerrymandering claims. No reapportionment plan is politically neutral. *Gaffney v. Cummings,* 412 U.S. 735, 752-53 (1973). Identifying members of a "salient" political class is virtually impossible. *Whitcomb v. Chavis,* 403 U.S. 124, 149 (1971). The proposed standards for measuring adverse political impact are laden with hidden policy judgments and generally unworkable. And any effort to determine discriminatory intent in political cases would

inject federal courts into the internal affairs of state legislatures and precipitate otherwise prohibited inquiries into the subjective intent of individual legislators. *See United States v. O'Brien,* 391 U.S. 367, 383-85 (1968).

ARGUMENT

The district court in a divided opinion invalidated Indiana's legislative districting plans as unconstitutional political gerrymanders. It did so without ever considering whether political gerrymandering is a justiciable question.

The district court's failure to address justiciability is inexplicable in the face of a large body of law-including decisions of this Court-holding political gerrymandering nonjusticiable. That authority would support summary reversal of the district court's decision. However, *amicus* suggests that the case first be vacated and remanded to the district court for its views on the justiciability question and for potential disposition on non-constitutional grounds.

I

THIS COURT SHOULD VACATE THE JUDGMENT BELOW AND REMAND FOR FURTHER CONSIDERATION

Either summary affirmance or dismissal of this appeal could be read to resolve *sub silentio* one of the major justiciability controversies of our time.[1] This would be in sharp contrast to this ***4** Court's careful and extended treatment of justiciability in *Baker v. Carr,* 369 U.S. 186 (1962). That case not only was argued twice but also had the benefit of a thorough and thoughtful discussion of justiciability by the three-judge court below, a discussion which this Court mentioned and analyzed repeatedly. *See Baker v. Carr,* 179 F.Supp. 824, 826-28 (M.D. Tenn. 1959) (*per curiam*) (three-judge court), *rev'd,* 369 U.S. 186 (1962).

It is precisely the absence of any such elucidation from the three-judge court in this case which prompts *amicus* to suggest that the best disposition this Court could make of the appeal is to vacate the judgment and remand the matter to the district court for reconsideration.

The district court did not discuss justiciability, although the district court majority in reaching its decision did rely on Justice Stevens' concurring opinion in *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653 (1983). That concurrence and Justice Powell's separate dissenting opinion argue for judicial review of political gerrymandering. 103 S.Ct. at 2667-78, 2687-90. The dissenting opinion of Justice White mentions "racial or political groups" in a general discussion of persons protected by the Fourteenth Amendment. Justice Stevens interpreted this to mean that Justice White "seems to agree that New Jersey's plan would violate the Equal Protection Clause if it 'invidiously discriminated against a racial or political group.'" *Karcher v. Daggett, supra,* 103 S.Ct. at 2669. Some observers understood the combination of opinions, including the fact that the Chief Justice and Justice Rehnquist joined in Justice White's dissent, to mean that there were five votes in favor of justiciability.

Support for this conclusion disappeared, however, with the issuance of opinions from this Court on application for a stay from subsequent orders by the three-judge court in *Karcher v. Daggett*. Justice Brennan, dissenting, asserted that this Court has ***5** "never concluded . . . that the existence or noncompact or gerrymandered districts is by itself a constitutional violation." *Karcher v. Daggett,* 466 U.S. 910, 104 S.Ct. 1691, 1696-97 (1984). Justices White and Marshall joined in Justice Brennan's unequivocal statement. This dissent suggests that Justice White is not among those who

consider political gerrymandering justiciable. And it casts doubt on the claim that the Chief Justice and Justice Rehnquist favor justiciability. [2]

Of course the members of this Court know what they meant to say. The foregoing simply demonstrates that the issue is far more complex than the district court thought.

Moreover, the district court completely ignored two previous decisions of this Court summarily affirming three-judge district court rulings that partisan gerrymandering is not justiciable. *Jiminez v. Hidalgo County Water Improve. Dist. No. 2,* 68 F.R.D. 668 (S.D. Tex. 1975), *aff'd mem.,* 424 U.S. 950 (1976); *WMCA, Inc. v. Lomenzo,* 238 F.Supp. 916 (S.D.N.Y.), *aff'd,* 382 U.S. 4 (1965) (*per curiam*). [3] Acknowledging the binding effect of this Court's summary decisions, *Hicks v. Miranda, supra,* 422 U.S. at 344, lower courts have consistently and correctly relied on *WMCA* and *Jiminez* for the principle that political gerrymandering is either not justiciable or otherwise not ***6** a cognizable constitutional claim. [4] In fact, though the reasoning varies, no lower court has previously sustained a claim of political gerrymandering. [5]

The district court utterly failed to address this body of law. Therefore, vacation and remand for further consideration is very much in order.

While the remedy of vacating and remanding is usually employed to permit the lower court to consider a new and intervening ruling, it is by no means limited to that situation. It is not uncommonly used to permit a lower court to consider older precedent that it has failed to address. *See, e.g., Upham v. Seamon,* 456 U.S. 37, 44 (1982) (*per curiam*) (finding three-judge court had misinterpreted long-standing reapportionment ruling but vacating and remanding for relief in light of lower court's greater familiarity with upcoming state election requirements); *Bailey v. Patterson,* 369 U.S. 31, 34 (1962) (*per curiam*) (vacating and remanding to abstaining three-judge court for reconsideration in light of long extant precedents). This Court also commonly vacates and remands in order to receive the benefit of a lower court analysis not yet made. *See, e.g., Taylor v.* ***7** *McKeithen,* 407 U.S. 191, 194 (1972) (*per curiam*) (reapportionment issue not considered below); *G.D. Searle & Co. v. Cohn,* 455 U.S. 404, 413-14 (1982) (constitutional claim not considered by lower courts). *See also Oklahoma Natural Gas Co. v. Russell,* 261 U.S. 290, 293 (1923) ("Generally it is not desirable that we should pass upon such matters until they have been dealt with below.")

Vacating and remanding here would not only allow the district court to address the justiciability question but would also permit the Court to resolve the case and invalidate the plan under Section 2 of the Voting Rights Act and thus avoid the constitutional questions altogether. [6] *Escambia County, Florida, et al., v. Henry T. McMillan,* 466 U.S. 48, 104 S.Ct. 1577 (1984) (*per curiam*).

There are special reasons in reapportionment cases to seek the wisdom of lower courts. The geography and demographics of the various states differ dramatically in ways significant to claims of political gerrymandering. [7] District court perspectives in their home states may be especially useful to this Court in deciding whether judicially manageable standards exist for assessing partisan gerrymandering claims. *See Storer v. Brown,* 415 U.S. 724, 742 (1973), remanding ballot access case for consideration "in the context of California politics."

***8 II**

JUDICIAL REVIEW OF POLITICAL GERRYMANDERING CLAIMS IS UNMANAGEABLE AND SHOULD NOT BE APPROVED SUMMARILY

It is not enough simply to assert that if racial gerrymandering is justiciable, political gerrymandering must be as well. Political gerrymandering claims raise extraordinarily difficult problems in defining the protected group, measuring adverse effect and proving discriminatory intent, problems that are not present-or at least are manageable-in racial gerrymandering cases. [8]

Reapportionment is inherently political. *Gaffney v. Cummings, supra,* 412 U.S. at 752-53. Every decision about the placement of district boundaries will almost certainly affect some political interests adversely.
The key concept to grasp is that there are no neutral lines for legislative districts. Whether the lines are drawn by a ninth-grade civics class, a board of ph.D's, or a computer, every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place.

Dixon, Robert G., Jr., "Fair Criteria and Procedures for Establishing Legislative Districts", in Grofman, et al. (ed.), *Representation and Redistricting Issues* at 7-8.

Even political scientists committed to altering the reapportionment process are forced to recognize the severe problems in establishing measures of political gerrymandering. Professor Backstrom's review of the political science complexities is enough to give any court pause:
***9** What this chapter illustrates is the vast complexity in practice of trying to implement a fair districting plan, accommodating all possible representation goals. In any event, the desire of some reformers to try to sterilize the redistricting process from all partisan input and measures is a hopeless, if not misguided, effort. Just because the drafter of a redistricting plan is unconscious of partisan criteria does not mean that the resulting plan will be fair. There is simply no way of drawing a redistricting plan without effects, both representational and partisan political. Give a chimp in a zoo a crayon and a map, and the resulting plan will have differential effects on people.

Backstrom, Charles H., "Problems of Implementing Redistricting", in Grofman, et al., *supra* at 45-46.

Professor Robert Dixon, originally a strong advocate of developing "standards," came to question his earlier approach. Instead, he proposed establishing nonpartisan reapportionment commissions as perhaps the only way to achieve the political reform that he and his colleagues supported. [9] *See* Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts" in Grofman, et al., *supra*.

There is no way for courts to enter this arena without making "initial policy determination[s] of a kind clearly for nonjudicial discretion." *Baker v. Carr, supra,* 369 U.S. at 217. There is also no way for courts to identify manageable standards to guide judicial review.
A. Identifying the Members of a Protectable Political Group Is Impossible

Gerrymander cases are not one person, one vote cases. *Whitcomb v. Chavis, supra,* 403 U.S. at 142; *Nevett v. Sides,* 571 F.2d 209, 215 (5th Cir. 1978), *cert. denied,* 446 U.S. 951 (1980). One ***10** person, one vote cases focus on the quantitative weight of an individual's vote [10] and the voting interest protected is an individual right, not a group right. *Reynolds v. Sims,* 377 U.S. 533, 561, 580-81 (1964); *Mirrione v. Anderson,* 717 F.2d 743, 745 (2d Cir. 1983), *cert. denied,* _____ U.S. _____, 104 S.Ct. 1308 (1984).

Gerrymander claims, by contrast, focus on a group's power to assert political influence. [11] And, while "state sponsored segregation based on race, religion, or ancestry is peculiarly vulnerable to constitutional attack . . . [t]he integration of Democrats and Republicans, or of Liberals and Conservatives, has no such privileged status under the Federal Constitution." *WMCA, Inc. v. Lomenzo,* 238 F.Supp. 916, 926 (S.D.N.Y.), *aff'd,* 382 U.S. 4 (1965) *(per curiam). See also Whitcomb v. Chavis, supra,* 403 U.S. at 149.

There are unique historical reasons for the specially protected status of ?? and ethnic groups whose ability to participate in the political process has been impeded. *See United States v.* ***11** *Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938); *White v. Regester,* 412 U.S. 755, 766-68 (1973). Additionally, while racial and ethnic groups entitled to protection in the reapportionment process can be easily defined, the same is not true of political groups.

Affiliation with a political party is by definition changeable. *See Kusper v. Pontikes,* 414 U.S. 51 (1973). "The only time voter registration figures are static is during the 30-day closure periods between primary and general elections." *Wymbs v. Republican State Exec. Committee of Florida,* 719 F.2d 1072, 1086, (11th Cir. 1983), *cert. denied,* _____ U.S. _____, 104 S.Ct. 1600 (1984).

Nor is it possible to define political groups by their voting activity. Individuals vote for individuals in this country and are notorious for disregarding party affiliation in order to do so. It is a commonly known and judicially noticeable fact that party loyalty in election activity varies tremendously from election to election in any given year and in different election years.

The difficulties in identifying "a politically salient class", *Karcher v. Daggett, supra,* 103 S.Ct. at 2672 (Stevens, J., concurring), become apparent when one examines the lower court's decision in this case. The district court purports to intervene to protect "those who align themselves with the Democratic Party." App.Jur.St. at A-26. However, in order to assess adverse impact, it relies on whether a vote was cast for a Republican or Democratic candidate, regardless of the voter's party affiliation. *Id.* at A-11 to A-12. The group entitled to protection under this approach would be without identifiable members except on election day in a particular month of a particular year. It certainly has no continuing identity to which this or any other court might extend constitutional protection. *See Whitcomb v. Chavis, supra,* 403 U.S. at 156-57; *Mobile v. Bolden, supra,* 446 U.S. at 78 n.26; *Jiminez v. Hidalgo Co. Water Improve. Dist. No. 2, supra,* 68 F.R.D. at 673-74.

***12 B. There Are No Manageable Standards for Measuring Adverse Political Impact**

The district court purported to measure the Indiana reapportionment plans against a series of standards such as competitiveness, compactness or unusual shapes, deviations from political boundaries, and preservation of communities of interest. *See, e.g.,* App.Jur.St. at A-14, A-27. Additionally, although it disclaimed use of a proportionality standard, the court imposed exactly that. [12]

The court's failure to consider the usefulness of these criteria and whether they embody hidden policy judgments is reflected in its willingness to proceed on "suspicion of [a] kind of built-in bias" (App.Jur.St. at A-13) and to conclude that "a disparity speaks for itself." *Id.* at A-20. Before this Court acts on the merits, some systematic identification and evaluation of the criteria to be used to support findings of a political gerrymander is essential.

Even a brief review of just two of the standards relied upon by the district court-compactness (App.Jur.St. at A-14, A-27) and proportionality (App.Jur.St. at A-11 to A-12, A-19, A-25)-highlights the problems. [13]

***13 1. Compactness is not a neutral or a manageable standard**

The term "compactness" refers to the aesthetics of district shape. Despite its superficial allure, the compactness standard does not survive close scrutiny. [14]

Compactness is not politically neutral. It favors political groups that are geographically more evenly distributed throughout a state. [15]

In states where city or county boundaries are highly irregular, district lines that follow those boundaries will inevitably have "tortuous" shapes. *Gaffney v. Cummings, supra,* 412 U.S. at 752 n.18. *See also Legislature v. Reinecke,* 10 Cal.3d 396, 413 (1973) ("Some cities have exceedingly irregular boundaries with an odd assortment of 'fingers' and 'peninsulas' jutting out ***14** from the basic part of the city."). [16] Moreover, as Professor Dixon has noted,

A district pattern of symmetrical squares, although conceivable, well can operate to submerge a significant element of the electorate. . . . [A] benign gerrymander, in the sense of some asymmetrical districts, may well be required to assure representation of submerged elements within a larger area. Shape requirements focus on form rather than the substance of effective political representation.
Dixon, "Fair Criteria and Procedures for Establishing Legislative Districts", in Grofman, et al., *supra* at 16.

Adoption of a compactness standard would almost certainly lead legislatures to emphasize this criterion to the exclusion of other more substantive and important considerations affecting the quality of the vote-considerations like the interests of minority groups-in an effort to avoid litigation and judicial condemnation. Finally, the compactness standard is no guarantee against gerrymandering. "A committee (of any composition) may comply with all the rules of compactness, contiguity, and such, and still create a masterful gerrymander." Papayanopoulos, Lee, "Compromise Districting", in Grofman, et al., *supra* at 63. Compactness is a misleading and unmanageable standard for judicial assessment of partisan gerrymanders.

2. Proportionality is not a neutral or a manageable standard

This Court "has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation." *Mobile v. Bolden, supra,* 446 U.S. at 79. *See also Whitcomb v. Chavis, supra,* 403 U.S. at 156-57, 160; *White v. Regester, supra,* 412 U.S. at 765-66; *Rogers v. Lodge, supra,* 458 U.S. at 618. Yet commentators, either directly or indirectly, continue to urge this as a constitutional standard. *See, e.g.,* ***15** Lijphart, Arend, "Comparative Perspectives", in Grofman, et al., *supra,* at 155 (quoting Dixon); Pennock, J., *Democratic Political Theory* (1979) at 358. And the court below applied what amounts to a proportionality standard. *See* n. 12, *supra*.

Proportionality requirements are utterly inconsistent with an electoral system like ours in which legislators represent districts and run in individual winner-take-all political races. *See* Dixon, Robert G., Jr., 1971, "The Court, The People and 'One Man, One Vote"', in Polsby, Nelson, W. (ed.), *Reapportionment in the 1970s* at 13; *see also* Baker, Gordon E., "Threading the Political thicket", in Grofman, et al., *supra* at 31. *See generally* Note, "The Constitutional Imperative of Proportional Representation," 94 Yale L.J. 163 (1984). As this Court said in *Whitcomb v. Chavis:*
[T]ypical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. *Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated*; arguably they have been denied equal protection of the laws since they have no legislative voices of their own. This is true of both single-member and multi-member districts. *But we have not*

yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.

Whitcomb v. Chavis, supra, 403 U.S. at 153 (emphasis added).

See also 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.").

The district court assumed that disproportionate election results are a signal of partisan gerrymandering. But in winner-take-all district elections, disproportionate results are the norm rather than the exception regardless of who draws the lines. *See* Dixon, ***16** "The Court, The People, and 'One Man, One Vote"', in Polsby, *supra*. at 13.

Moreover, as is clear from this case, a proportionality standard cannot reliably be applied until after an election has been held. Even then, a substantial element of speculation as to what will occur in the next election will always remain. As the court said in *Kilgarlin v. Martin, supra,* 252 F.Supp. at 433: "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."

C. There Are No Manageable Standards for Evaluating Invidious Discriminatory Intent in Partisan Gerrymandering Cases

The constitutional requirement of equipopulous districts is straightforward: a plan either meets the numerical one person, one vote standard or it does not. By contrast, in the context of racial gerrymandering a "discriminatory purpose" must be proved to invalidate a plan and justify judicial intervention. *Rogers v. Lodge, supra,* 458 U.S. at 617, 620; *Mobile v. Bolden, supra,* 446 U.S. at 66-68; *Washington v. Davis,* 426 U.S. 229, 240 (1976); *Wright v. Rockefeller, supra,* 376 U.S. at 58. *See also White v. Regester, supra,* 412 U.S. at 765, and *Whitcomb v. Chavis, supra,* 403 U.S. at 142 (multi-member districts are not unconstitutional *per se* despite their known tendency to dilute the minority vote).

In racial gerrymander cases specific standards have been developed to guide the court's assessment of whether purposeful dilution of the vote on racial lines has been established. *See Rogers v. Lodge, supra,* 458 U.S. at 624-27; *White v. Regester, supra,* 412 U.S. at 765-69; *Whitcomb v. Chavis, supra,* 403 U.S. at 154-55; *Nevett v. Sides, supra,* 571 F.2d at 216-17; *Zimmer v. McKeithen,* 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other ground sub nom. East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976) (*per curiam*). But these standards for ***17** assessing discriminatory purpose are utterly irrelevant in the partisan context. [17]

Any effort to develop a new set of standards for partisan cases will inevitably draw courts into the unmanageable and extremely sensitive realm of inquiring into legislators' subjective states of mind. For example, the lower court in this case apparently relied upon deposition testimony from the Speaker of the House regarding "reasons that were operative in [his] mind" in formulating districts. App.Jur.St. at A-8. *See also id*. at A-9, A-14 (Senator Bosma's view of considerations involved in drafting the plan). Yet this Court has frequently reiterated that statements from individual legislators are not appropriate bases for determining legislative intent. *See, e.g., United States v. O'Brien,* 391 U.S. 367, 383-85 (1968); *Hing v. Crowley,* 113 U.S. 703, 710-11 (1885).

Attempts to review state legislative procedures in enacting a reapportionment plan are also likely to place federal judges in the awkward position of resolving factual disputes about what really happened in the course of legislative considerations. [18] Such fact ***18** finding injects federal courts into the very heart of state government. The absence

of other criteria for assessing discriminatory intent is one more reason why claims of partisan gerrymandering are and should remain non-justiciable.

CONCLUSION

This Court should note probable jurisdiction. The Judgment should then be vacated and the matter remanded for further consideration by the three-judge court. Alternatively, the case should be set for plenary consideration.

Dated: March 1, 1985
Respectfully submitted,

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Footnotes

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1 Lower courts would, of course, be required to consider a summary disposition as binding precedent of this Court. *Tully v. Griffin, Inc.,* 429 U.S. 68, 74 (1976); *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975). "'[V]otes to affirm summarily, and to dismiss for want of substantial federal question . . . are votes on the merits of a case.'" *Hicks v. Miranda, supra,* 422 U.S. at 344, quoting from *Ohio ex rel. Eaton v. Price,* 360 U.S. 246, 247 (1959).

2 That doubt is confirmed, at least as to single member districts, by Justice Rehnquist's dissent, joined by the Chief Justice, in *Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416, 422 (1984) (*mem.*).

3 The Court has indicated in *dicta* that political gerrymandering *may* be justiciable in the context of *multi-member districting systems. See Gaffney v. Cummings,* 412 U.S. 735, 751, 754 (1973); *White v. Regester,* 412 U.S. 755, 765, 769 (1973); *Whitcomb v. Chavis,* 403 U.S. 124, 143-44 (1971); *Burns v. Richardson,* 384 U.S. 73, 88-89 (1966). The holdings in these cases do not, however, support a rule of justiciability. Nor do these cases, even in *dicta,* support the justiciability of partisan gerrymandering claims in plans with single member districts. Although the Indiana apportionment plans include some multi-member districts, the district court did not limit its consideration or statement of the law to multi-member districts.

4 *See Russo v. Vacin,* 528 F.2d 27, 29 (7th Cir. 1976); *Cousins v. City Council of City of Chicago,* 466 F.2d 830, 844 (7th Cir.), *cert. denied,* 409 U.S. 893 (1972); *Wendler v. Stone,* 350 F.Supp. 838, 840 (S.D. Fla. 1972); *Skolnick v. Mayor and City Council of Chicago,* 319 F.Supp. 1219, 1228 (N.D. Ill. 1970); *Wells v. Rockefeller,* 273 F.Supp. 984, 987, (S.D.N.Y.) *aff'd mem.,* 389 U.S. 421 (1967); *Sincock v. Gately,* 262 F.Supp. 739, 831, 833 (D. Del. 1967); *Bush v. Martin,* 251 F.Supp. 484, 513 (S.D. Tex. 1966).

5 In addition to the cases cited above, *see also In re Pa. Congression. Dist. Reapportionment Cases,* 567 F.Supp. 1507, 1517 (M.D. Pa. 1982); *Dunn v. Oklahoma,* 343 F.Supp. 320, 327-28 (W.D. Okla. 1972); *Grivetti v. Illinois State Electoral Board,*

335 F.Supp. 779, 789, 791 (N.D. Ill. 1971), *aff'd mem.*, 406 U.S. 913 (1972); *Kilgarlin v. Martin,* 252 F.Supp. 404, 433-34 (S.D. Tex. 1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill,* 386 U.S. 120 (1967) (*per curiam*); *Grills v. Branigan,* 255 F.Supp. 155, 156 (S.D. Ind. 1966), *vacated and remanded on other grounds sub nom. Duddleston v. Grills,* 385 U.S. 455 (1967); *Meeks v. Avery,* 251 F.Supp. 245, 250-51 (D. Kan. 1966).

6 The district court apparently assumed that discriminatory intent was a requirement in Section 2 cases. App.Jur.St. at A-20. It is not. *See* 42 U.S.C. §1973(b).

7 For example, in midwestern states with small and largely rural populations, laid out mostly along the meridians of the map, "compactness" and the aesthetic "shape" of districts may be of some use. In highly populated mountainous or coastal states, however, they are not.

8 In addition, the impact of a change in the law would be far-reaching. It would presumably affect not only congressional and legislative apportionment but also every type of districted local elective body-cities, counties and boards-to which the Equal Protection Clause has been held to apply. *See Lockport v. Citizens for Community Action,* 430 U.S. 259, 265 n.11 (1977); *Hadley v. Junior College District of Kansas City,* 397 U.S. 50 (1970); *Avery v. Midland County,* 390 U.S. 474 (1968).

9 In California, two such proposals for reapportionment commissions have been presented for popular vote in the form of Initiative Constitutional Amendments within the last three years. Each time the electorate rejected the proposal. *See* Proposition 14, November, 1982; Proposition 39, November, 1984.

10 In congressional reapportionment, this requirement is imposed by Article I, § 2. *See Wesberry v. Sanders,* 376 U.S. 1, 7-8 (1964). In state legislative reapportionment, it is imposed by the Equal Protection Clause. *See Reynolds v. Sims,* 377 U.S. 533, 568 (1964). However, the underlying principle in either case is that of equipopulous districts. *See id.* at 579. The term one person one vote is, therefore, a somewhat inaccurate shorthand. Equipopulous districts are based upon population figures, not the number of voters or even of those eligible to vote.

11 *Whitcomb v. Chavis, supra,* 403 U.S. at 149-50; *Nevett v. Sides, supra,* 571 F.2d at 216; *Cousins v. City Council of City of Chicago, supra,* 466 F.2d at 851 (Stevens, J., dissenting); *Kilgarlin v. Martin, supra,* 252 F.Supp. at 432-33. *See also Mobile v. Bolden,* 446 U.S. 55, 78 (1980). Racial gerrymandering cases thus present issues of race discrimination which are judged by standards developed in other race discrimination cases that may not have involved voting rights at all. *See Rogers v. Lodge,* 458 U.S. 613, 617 (1982), citing *Washington v. Davis,* 426 U.S. 229, 240 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). In *Gomillion v. Lightfoot,* 364 U.S. 339, 341 (1960), the Court intervened because it was faced with something over and beyond the "familiar abuses of gerrymandering." It was faced with racial discrimination.

12 The majority compared the statewide percentage of votes cast for Democratic and Republican candidates with the percentage of legislative seats won by Democrats and Republicans, and concluded that a disproportionately low number of Democrats were elected. App.Jur.St. at A-11 to A-12. The dissent chose to compare the percentage of legislative seats won by a given party with average figures for votes cast for that party's candidates in elections for statewide offices. *Id.* at A-44 to A-45. Either approach focuses on the proportionality between the number of votes candidates from a given party receive and the number of seats that party wins, despite the district court's disclaimer. *Id.* at A-25.

13 Because the only issue now before the Court is whether this case should receive plenary consideration, we will not attempt to present here a comprehensive analysis of proposed standards.

14 This Court has previously held that compactness is not a constitutional requirement. *Gaffney v. Cummings, supra,* 412 U.S. at 752 n.18; *White v. Weiser,* 412 U.S. 783 (1973); *Wright v. Rockefeller,* 376 U.S. 52 (1964). Although compactness was once required by federal statute, *see* Reapportionment Act of 1901, 31 Stat. 734 (1901) and Act of August 8, 1911, 37 Stat. 14 (1911), this statutory requirement was abandoned decades ago. Act of June 18, 1929, 46 Stat. 26-27 (1929). The California Constitution, although it establishes some reapportionment guidelines beyond equipopulous districts, noticeably omits compactness. Cal. Const. Art. XXI.

15 Thus, if as is often the case, minority groups are highly concentrated in urban areas, application of a compactness standard would amount to a judicial imprimatur on gerrymanders disfavoring minorities and favoring groups that are characterized by more even geographical distribution. Crossing of county/city boundaries and violations of district compactness may be necessary to provide fair minority participation. *See Jordan v. Winter,* No. GC 82-80-WK-O (N.D. Miss., April 16, 1984), *aff'd sub nom. Brooks v. Allain* in *Mississippi Republican Executive Committee v. Brooks,* 469 U.S. 1002, 105 S.Ct. 416 (1984) (sprawling uncompact districts in court-ordered interim plan adopted to assure fair racial representation). In either event, compactness will be directly at odds with efforts to enhance minority representation. *Cf. United Jewish Organization v. Carey,* 430 U.S. 144, 167-68 (1977).

16 Compactness will also conflict with other communities of interest. A coastal community follows a narrow swath of land on a usually irregular coastline. A river's meandering course often unites an agricultural community.

17 For example, neither Republicans nor Democrats nor members of any other political group have suffered anything approaching the sort of systematic economic, employment and educational discrimination that for decades has undermined the ability of racial minorities to participate in the election system. *See White v. Regester, supra,* 412 U.S. at 768-69. Nor can members of political parties point to poll tax laws, onerous voter registration requirements or other such devices designed and adopted specifically to exclude them from the election system. *See Rogers v. Lodge, supra,* 458 U.S. at 624. The three-judge court in this case purports to apply the "well-established standard of proof for invidious discrimination as set forth in *City of Mobile v. Bolden*." App.Jur.St. at A-21. However, the subjective evidence of individual legislators' views on which the three-judge court relied is quite different from the factors discussed in *Mobile v. Bolden* or in this Court's subsequent clarifying decision in *Rogers v. Lodge, supra*.

18 In this case, for example, the court found it significant that Democrats were not involved as voting members on the conference committee that reviewed the plan. App.Jur.St. at A-7. The court apparently disregarded evidence that the Senate Democratic leadership had informed the Republican leadership that no Democrat would vote for a reapportionment plan prepared by the Republicans in any event. *See* Jurisdictional Statement at p. 4.

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