1985 WL 670014 (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.
April 26, 1985.

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

Brief of Appellants

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*i QUESTIONS PRESENTED

1. Whether the court below in addressing a claim of partisan political gerrymandering erred in not following the decisions of this Court, and the decisions of the U.S. Court of Appeals for the Seventh Circuit that have relied on the decisions of this Court, that such a claim raises issues that are inherently political and not justiciable.

2. Whether the court below erred in holding that a major political party which had enough "safe" seats and was found to have enough "competitive" seats to control both the Indiana House of Representatives and the Indiana Senate, is a "political group" entitled to the same constitutional protection as a racial minority group.

3. Whether the court below erred in holding the 1981 Indiana reapportionment acts violated the Equal Protection Clause solely because of "political gerrymandering", even though these acts were found to have followed (i) the principal neutral criterion of "one man- one vote" and then (ii) the criterion of no minority vote dilution preserving Black voting strength so that the number of Black-majority districts is proportional to Black population, thus protecting the voting rights of Blacks as Blacks as required by the U.S. Constitution and the Voting Rights Act, and then in fact followed the neutral criteria of preserving the cores of previous districts, avoiding incumbent contests and preserving multi-member districts for both Republicans and Democrats unless all the House members from such a district, of either party or race, requested that their district become single member districts.

4. Whether the court below erred in placing the burden of proof on the State of Indiana to prove that the Indiana reapportionment acts are constitutional under the Equal Protection Clause, even though the district population ***ii** deviation was only approximately 1% and the Indiana General Assembly followed neutral criteria previously required by this Court or recognized as proper and appropriate under state law by this Court, and where the alternate plans of the

appellees Bandemer, *et al*. were not even presented until 1982, and except for "one man-one vote" did not even purport to follow any of these same neutral criteria and, as to the House plan, except in certain metropolitan areas, used the same electoral district lines which were severely criticized by the court below.

5. Whether the court below, in finding the Indiana reapportionment acts to violate the Equal Protection Clause solely because of "political gerrymandering", erred in making no determination of the credibility of statistical evidence and engaging instead in a totally discretionary invasion of the political process with no clear enunciation of standards regarding issues such as the definition of a political group, the form of representation (other than proportional) required, how a racial minority and a political group can both be given equal priority in representation in urban areas, the priority to be assigned to "community of interest", the extent to which partisan political comments of legislative leaders in any redistricting would again invalidate a reapportionment plan, and the extent to which any reapportionment plan must also assign priority to "ethnic" minorities and "economic" minorities.

*iii THE PARTIES

Appellants in this proceeding are *Susan J. Davis, John Livengood,* and *Thomas S. Milligan,* as members of the Indiana State Election Board, *Laurie Potter Christie,* as Executive Director of the Indiana State Election Board, and *Edwin J. Simcox,* Secretary of State of the State of Indiana. Appellees from Cause No. IP 82-56-C are *Irwin C. Bandemer, Obi Badili, Ra-Nelle Pearson, George Womack Jr., Edward O'Rea, John Higbee,* and *David Scott Richards*.

Appellees who were originally plaintiffs in the consolidated case, Cause No. IP 82-164-C, are *Indiana N.A.A.C.P. State Conference of Branches, Indianapolis Branch N.A.A.C.P., Fort Wayne Branch N.A.A.C.P., East Chicago Branch N.A.A.C.P. Thomas Bunnell, Edward Richardson, James E. Clark, Bervin E. Caesar, Elizabeth Dobynes, Dr. Benjamin Grant, John Stott,* and *Eunice Roper Allen*.

Appellees by virtue of their status as defendants in the consolidated case (who are not appellants) are *Robert D. Orr,* Governor of the State of Indiana, *J. Roberts Dailey,* Speaker of the Indiana House of Representatives, *Robert D. Garton,* President Pro Tem of the Indiana State Senate, *Richard Mangus,* Chairman of the Standing Committee on Elections and Apportionment in the Indiana House of Representatives, and *Charles Bosma,* Chairman of the Standing Committee of Legislative Apportionment and Elections in the Indiana State Senate.

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Cases

***1** This appeal is from the judgment and decision of the United States District Court for the Southern District of Indiana, sitting as a three-judge court, entered on December 13, 1984, which (1) declared unconstitutional under the Equal Protection Clause of the Fourteenth ***2** Amendment the 1981 Indiana House of Representatives and Senate reapportionment acts and the 1982 amendments thereto; (2) enjoined the Indiana state officers responsible for implementing the election laws and holding elections thereunder from holding elections pursuant to the 1981 House and Senate reapportionment acts and 1982 amendments thereto; and (3) ordered the Indiana General Assembly to enact legislation in 1985 to redistrict the State and reapportion the legislative seats in the General Assembly.

OPINIONS BELOW

The opinion of the three-judge court below is not reported, but the majority opinion and order and the related concurring and dissenting opinion by Judge Pell are set out in Appendix A to Appellants' Jurisdictional Statement, beginning at A-1.[1] The court's opinion and order denying Appellants' Motion to Modify or Amend, together with a dissenting opinion by Judge Pell, are set out in Appendix C to the Jurisdictional Statement, beginning at A-63.

JURISDICTION

This action was initially brought by appellees Bandemer, Badili, Pearson, Womack, O'Rea, Higbee and Richards challenging the 1981 Indiana House and Senate reapportionment acts under the Fourteenth Amendment to the Constitution of the United States, under 42 U.S.C. §1983, and under the Constitution of the State of Indiana.[2] ***3** Jurisdiction in the court below was based on 28 U.S.C. §§1331, 1343(a), 2201 and 2284 for the federal constitutional and statutory claims and on pendent jurisdiction for the state constitutional claims. A three-judge panel was appointed pursuant to 28 U.S.C. §2284.

After trial, the three-judge court entered its opinion and order, including injunctive relief, on December 13, 1984. Appellants filed a timely Motion to Modify or Amend (A-57) on December 18, 1984, requesting that the court alter or amend its opinion and order. This motion was denied on December 27, 1984 (A-63). A notice of appeal (A-67) was filed in the United States District Court for the Southern District of Indiana on January 11, 1985, its timeliness being governed by 28 U.S.C. §2101(b). Probable jurisdiction of this appeal was noted on March 25, 1985.

Jurisdiction of this appeal is conferred on the Court by 28 U.S.C. §1253 since the order appealed from involved the granting of an injunction after hearing by a three-judge court. Cases sustaining the jurisdiction of this Court on appeal are *Whitcomb v. Chavis,* 403 U.S. 124 (1971), and *Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187, 194-95 (1972).

STATUTES INVOLVED

Section 1 of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The 1981 Indiana House of Representatives and Senate reapportionment acts as amended by the 1982 amendments ***4** thereto appear at Ind. Code §§2-1-1.5 and 2-1-2.2 and are set out in Appendix E to the Jurisdictional Statement, beginning at A-69.

STATEMENT OF THE CASE

Following the 1980 census conducted by the United States Census Bureau, the Indiana General Assembly [3] began the process of reapportioning the State based on compilations it received from that agency.

On January 13, 1981, House Bill 1475 was introduced in the Indiana House as being relevant to reapportionment. Similarly, Senate Bill 80 was introduced on February 24, 1981. These bills were characterized as "vehicle bills" and were devoid of significant content as filed. Such vehicle bills are used by the legislative leadership of both parties, the Democratic leader in the State Senate, Senator O'Bannon, introducing, for example, nine such vehicle bills in 1981. (Exhibit Y) The reapportionment bills were passed in that form and were referred to the other house where amendments were made. The sole purpose for this particular legislative process is to refer both bills to a conference committee. (A-7)

The reapportionment bills were thus referred to a conference committee for action. The Senate Democratic leadership told the Senate Republican leadership that no Democrat would vote for any reapportionment plan prepared by the Republicans. (Garton Deposition, JA-11; ***5** Bosma Deposition p. 196) To advance the legislative process all conferees appointed were Republicans-State Senators Charles E. Bosma and James Abraham and State Representatives Richard W. Mangus and Norman L. Gerig. All were members of their legislative body's respective elections and apportionment committees. Certain Democratic advisors were appointed, but they had no committee vote. (A-7)

To aid in the process of legislative map making, the Republican State Committee, a political organization, contracted with a Detroit, Michigan computer firm, Market Opinion Research, Inc. ("MOR"). The Republican State Committee paid Two Hundred Fifty Thousand Dollars ($250,000.00) for MOR's services and the computer equipment was housed in State Committee headquarters. There was limited access to the equipment and its output. Generally speaking, minority party members had no direct access to the information provided to MOR or to the output from the computers. (A-8) During reapportionment, however, at the request of minority legislators changes were made in the reapportionment

bills to accommodate Democrats and to avoid putting Democratic incumbent Senators into the same district. (Bosma Deposition pp. 194-95; Mangus Deposition pp. 54, 57-59)

Meanwhile, the minority party members did have census compilations provided by the United States Census Bureau from which they began drawing their own map, albeit by less sophisticated means than their Republican counterparts. The reapportionment maps and the district lines could not be determined until the computer information was available, and computer tapes were not even available until some time in the middle or latter part of April, 1981. (Mangus Deposition pp. 20, 47)

The majority party, through its conference committee, revealed the product of the MOR-aided map drawing during the last week of the regular 1981 session. After floor debate, certain changes were made in the reapportionment ***6** bills to accommodate the wishes of members of the minority party. (Bosma Deposition pp. 194-95; Garton Deposition p. 38) The conference committee report was introduced for vote in both houses of the General Assembly on April 30, the final day of the 1981 Regular Session. The Senate adopted the report (Roll Call 673) along party lines, 33 to 15. The House similarly adopted the report (Roll Call 844) along party lines, 59 to 40. The Indiana Journal reports comments by Senator Townsend for April 30, 1981, that the Democrats had forty hours to review the districting of more than 4,000 precincts. The Governor signed the bill into law on May 5, 1981. (A-9) The procedures followed in the passage of these Acts were in accordance with all rules and legislative procedures of the General Assembly and were substantially the same as those procedures followed in 1965 and 1971. In each of those years the conference committee members were all members of the majority party, which in 1965 was the Democratic Party, and in each case the bills were passed at the very end of the Session. (Exhibits N, O, P)

The General Assembly followed certain neutral criteria in adopting the Indiana reapportionment acts in 1981 (“House Plan” or “Senate Plan” or “acts”). The principal criterion was “one man, one vote”, resulting in a population deviation of approximately one percent. (A-10) Next, the General Assembly tried not to dilute Black voting strength. (A-17) By the use of a “no retrogression” rule, Black representation was made proportionate to Black population in Indiana and the number of Black majority districts existing before reapportionment was preserved, in spite of the fact that there was a tremendous drop in population in the Black majority districts in the urban areas since the prior reapportionment. [4] (A-17, A-21)

***7** Subject to these priority guidelines, the General Assembly then followed the neutral criterion of “least changed plan” by not placing two or more incumbents in the same district, by preserving the cores of existing districts, and by continuing existing multi-member districts in the House except where all of the Representatives from any such multi-member district, of either party or race, requested a change to single member districts. (A-18; November Transcript pp. 140-41, JA-30) Multi-member House districts have been used in Indiana during this century (A-19) and are used in urban areas with heavy Black population and also in other areas with predominantly white population, although a higher percentage of Blacks than Whites reside in multi-member districts. (A-18) They are used whether the members are Democrats, Republicans or both Democrats and Republicans in the same multi-member district. Representation is not proportional between the political parties in the multi-member districts in Marion and Allen Counties in that 86% of the House seats in Marion and Allen Counties are now held by Republicans, but 46.6% of the population, the court below held, are identifiable as Democratic voters. (A-19, A-20)

After passage of the Acts on April 30, 1981, the matter was settled until 1982 when certain revisions were made. During the 1982 Session the Plaintiffs presented the “Crawford Plan” for the House and the “Carson Plan” for the State Senate.

The Crawford Plan changed existing multi-member districts to single member districts and adopted as its own the sixty single-member districts contained in the current House Plan. (Mangus Deposition Exhibit 5) It changed the districts in Marion, Allen and Lake Counties to maximize the Black vote in those three counties. [5] (Exhibits 202, 207, ***8** 212, QQ, RR) The impact on Black voting strength of the Crawford Plan is only known, however, in fifteen of the forty districts it created (listed in Exhibit 215, p.6).

The impact on Black voting strength in any of the forty-five Senate districts in the Carson Plan not listed in Plaintiffs' Exhibit 215, p. 7, is also not known. The Carson Plan also would have maximized Black voting strength in Marion, Lake and Allen Counties by creating the maximum number of Black-majority districts. [6] (Exhibits 204, 209, 214)

In Indiana, there is a heavy concentration of Democratic voters, including Blacks, in the urban counties, but only a minority of Democratic voters scattered throughout the rest of the districts. (Exhibit 216, JA-62) In the 1980 election, before reapportionment, thirty-five Republicans and fifteen Democrats were elected to the Indiana Senate, and sixty-three Republicans and thirty-seven Democrats were elected to the Indiana House. (Exhibits II, JJ) In the 1982 election, following reapportionment, there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House. (Exhibit JJ, p. 1)

In the Indiana House in 1982, all 100 seats were up for election. Fifty-seven Republican candidates were elected to serve in the Indiana House; forty-three Democrats were elected to the House. In the Indiana Senate, twenty-five seats were up for election. Thirteen Democrats and twelve Republicans were elected to Senate seats.

Based on the 1982 election (called “most significant” by the court below), in the Senate there would have been thirteen “safe” Democratic seats and eighteen seats in the “competitive” range of 45%-55%, totaling thirty-one of the fifty Senate seats. (A-120) The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate.

***9** In the House, based on the 1982 election there were twenty-eight “safe” Democratic seats and thirty-nine “competitive” seats in the 45%-55% range which gave the minority party an opportunity to win a total of sixty-seven of the 100 House seats if they had won all “safe” and “competitive” seats. (A-12; A-121)

In January, 1982, prior to the 1982 elections, this lawsuit was filed by certain Indiana Democratic Party members. In summary, the plaintiffs alleged that the Acts were intended to, and do, discriminate against Indiana Democrats. They claimed that such “political discrimination” is a violation of Fourteenth Amendment guarantees of equal protection as well as Indiana constitutional prohibitions against treating electors unequally and unnecessary division of counties in Senate districting (since repealed). A two-day trial was held (in October and November, 1983) during which evidence was taken, and all deposition testimony was admitted as well (October Transcript p. 27; November Transcript p. 114).

A majority of the three-judge court agreed that the acts were unconstitutional under the Fourteenth Amendment as a partisan political gerrymander. The court below found the unusual shapes of certain specified House Districts, which however generally observed township lines, indicated a lack of consistent application of community-of-interest principles. [7]

The court below entered an opinion and order December 13, 1984, enjoining Indiana officials from holding elections pursuant to the Acts at any time subsequent to November 6, 1984 and giving the 1985 Session of the Indiana General Assembly, presumably either the regular session or a special session if necessary, the opportunity to enact legislation

to comply with the court's order. (A-33) The court retained jurisdiction to take such further action as it ***10** deemed necessary if the General Assembly did not act.

Judge Wilbur Pell of the United States Court of Appeals for the Seventh Circuit, a member of the three-judge panel, concurred in part and dissented in part. He concurred that there was no finding of constitutional or statutory violations insofar as the NAACP plaintiffs were concerned, but dissented from the majority's decision that the Indiana General Assembly had violated the Equal Protection clause of the Fourteenth Amendment by diluting the voting strength of the Plaintiffs as Democrats.

On December 18, 1984, State officials asked the court below to clarify its order in certain specific respects, including what priority to assign to its new constitutional prohibition against partisan political gerrymandering, which conflicts in certain important aspects with the neutral criterion used by the Indiana General Assembly of preserving Black voting strength. (A-57) The court denied this request for clarification by order entered December 27, 1984, Judge Pell concurring in part and dissenting in part. (A-63).

SUMMARY OF ARGUMENT

The court below erred in considering a claim of partisan political gerrymandering justiciable at all and in holding on the record before it that the Indiana reapportionment acts violated the Equal Protection Clause solely on the basis of partisan political gerrymandering. This Court has previously refused to consider such claims justiciable, and consideration of such claims would require determination of issues for which there can be no manageable judicial standards. The court below acknowledged that the Indiana reapportionment acts followed the principal neutral criterion of "one man-one vote" and then the criterion of no minority vote dilution preserving Black voting strength so that the number of Black-majority districts is proportional to Black population in compliance with the U.S. Constitution and the Voting Rights Act as amended in ***11** 1982, and then followed the neutral criterion of "least changed plan" by preserving the cores of previous districts and avoiding incumbent contests and by preserving multi-member House districts for both Republicans and Democrats unless all the House members from such districts, of either party or race, requested that their district become single member districts.

The court below also erred in holding that a major political party is constitutionally disadvantaged under the Equal Protection Clause when Appellees Bandemer's *et al.* own evidence indicated there were enough "safe" seats and "competitive" seats for the Democrats to win sixty-seven seats in the one hundred seat Indiana House of Representatives and thirty-one seats in the fifty seat Indiana Senate in 1982. The court below based its decision primarily on the fact that in 1982 the Democrats won forty-three seats while the statewide vote for all Democrat House candidates totalled 51.9% of the votes cast. Although it recognized that the Indiana General Assembly followed the guideline of not diluting the Black vote by use of its "no retrogression" rule (A-10, A-17), and by the fact that Black representation is proportional to Black population in Indiana (A-17), and that the Indiana General Assembly protected the voting rights of Blacks as Blacks as required by the Federal Constitution and the Voting Rights Act (A-21), and that there are heavy concentrations of Democrats in urban areas (A-12) that are Black (A-18), it failed to recognize that to reduce the heavy concentration of Democrat voters in urban electoral districts in Marion, Lake and Allen Counties would necessarily include in these districts Republicans (largely White), which would inevitably reduce the percentage of Black citizens in existing Democrat Black-majority districts and would necessarily cause Black vote dilution, whether single member districts or multi-member districts were used.

Although the court below found that township lines generally were followed in redistricting (A-10, A-29) ***12** (which themselves often have irregular shapes because of natural boundaries) it severely criticized the "bizarre" shapes of certain

specific House districts (A-14-A-17, A-28-A-29), while acknowledging at the same time that community of interest is often not possible (A-14, A-30). The court also failed to consider that many of these House electoral districts were designed by the House Democrats themselves (Mangus Deposition pp. 54, 57-9), were held by Democrats following the 1982 election (Exhibit JJ, p. 22), and were used in the House alternative plan presented by the Appellees Bandemer, *et al*. themselves.

The court below erred in placing the burden of proof on the State of Indiana to prove that the reapportionment acts are constitutional under the Equal Protection Clause (A-30), even though this Court has always held that the burden of proof never shifts to the defendant to prove the absence of racial discrimination in non-congressional racial voting discrimination cases. The court below therefore put a heavier burden of proof on plaintiffs in racial voting discrimination cases than on political parties seeking judicial relief under the new partisan political gerrymandering claim it has created.

The court below also erred in including the Senate reapportionment act in the sweep of its order, where there are no findings that any specific Senate district in any way violates any of the neutral criteria established by the Court; where there are no multi-member districts in the Senate; where no incumbents of the party claiming to be disadvantaged were placed in the same district with any other incumbent; and where the 1982 election resulted in proportional representation based on the statewide vote (A-214).

*13 ARGUMENT

I.

THE DECISION BELOW IS BASED ON A NONJUSTICIABLE ISSUE IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

In striking down Indiana's reapportionment acts solely on the basis of partisan political gerrymandering, the court below went far beyond appropriate judicial boundaries. Plunging heedlessly into the "political thicket," the court enmeshed itself in issues involving political policy devoid of judicially discoverable and manageable standards.

Prior decisions of this Court have consistently, albeit often quietly, rejected partisan political gerrymandering as a justiciable issue. In *WMCA, Inc. v. Lomenzo,* 382 U.S. 4, *aff'g* 238 F.Supp. 916 (S.D.N.Y. 1965) this Court affirmed in a *per curiam* opinion the holding of a three-judge court that allegations of gerrymandering "for partisan political advantage," 238 F.Supp. at 925, did not raise questions under the Federal Constitution. Justice Harlan, in a concurring opinion, observed that by its affirmance the Court affirmed the "eminently correct principle" that partisan gerrymandering is not subject to federal constitutional attack under the Fourteenth Amendment. 382 U.S. at 4.

The Court has reaffirmed that principle in many subsequent cases. *See Badgley v. Hare,* 385 U.S. 114 (1966) (dismissing an appeal of a state court decision for want of a substantial federal question); *Wells v. Rockefeller,* 398 U.S. 901, *aff'g* 311 F.Supp. 48 (S.D.N.Y. 1970); *Archer v. Smith,* 409 U.S. 808, *aff'g Graves v. Barnes,* 343 F.Supp. 704 (W.D. Tex. 1972); *Kelly v. Bumpers,* 413 U.S. 901 (1973), *aff'g* 340 F.Supp. 568 (E.D. Ark. 1972); *Wiser v. Hughes,* 459 U.S. 962 (1982) (dismissing appeals alleging political gerrymandering for want of a substantial federal question).

***14** Lower courts, relying on these cases, have similarly concluded that political gerrymandering is not a justiciable issue. In *Cousins v. Chicago City Council,* 466 F.2d 830 (7th Cir. 1972), for example, the Seventh Circuit Court of Appeals held that a claim by a political group that it was disfavored by the drawing of ward district lives "remains among the nonjusticiable political questions," relying on *WMCA v. Lomenzo,* 382 U.S. 4 (1965). *See also, e.g., Russo v. Vacin,* 528 F.2d 27 (7th Cir. 1976); *Sincock v. Gately,* 262 F.Supp. 739, 828-33 (D. Del. 1967); *Meeks v. Avery,* 251 F.Supp. 245,

250-51 (D. Kan. 1966); *Bush v. Martin,* 251 F.Supp. 484, 513 (S.D. Tex. 1966); *Sims v. Baggett,* 247 F.Supp. 96, 104-05 (M.D. Ala. 1965).

This judicial refusal to be drawn into the issue of state political influences affecting legislative districting reflects the insoluble problems inherent in such an analysis. At a minimum, to establish a constitutional violation a court would be forced to define a protectible political class, assess the impact of district lines on that class, and inquire into the wisdom of legislative motivations and judgments. These areas of inquiry are devoid of manageable standards.

A. A Protectible Political Class Cannot Be Judicially Defined

The starting point for any protection of a political group, definition of a "politically salient class," *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 2672 (1983) (Stevens, J. concurring), requires answers to numerous questions touching on the nature of political power. Some of these were expressed in the plurality opinion in *Mobile v. Bolden,* 446 U.S. 55, 78 n. 26 (1980):

> It is difficult to perceive how the implications of the dissenting opinion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of ***15** a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group"? Can there be more than one "political group" among white voters (e.g., Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself.

Courts have avoided such unanswerable questions until now by recognizing only gerrymandering claims based upon racial considerations. Racial discrimination, of course, involves a long history of disadvantage to specific and discernable groups and is the subject of specific constitutional concern. *E.g., Whitcomb v. Chavis,* 403 U.S. 124, 180 (1972) (Douglas, J., concurring in part and dissenting in part); *United Jewish Organizations v. Carey,* 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring); *Mobile v. Bolden,* 446 U.S. 55, 66 (1980). No such factors are present to guide choices generally between competing political groups.

Moreover, the problem is compounded when the "groups" in question are political parties. Political parties are, after all, simply an aggregation of smaller political and special interest groups. Auerbach, *The Reapportionment Cases: One Person, One Vote-One Vote, ***16** One Value,* 1964 Sup. Ct. Rev.1, 52. Thus, inclusion of a particular political party within the definition of a "political group" requires not only that the *Mobile v. Bolden*-type questions be answered for the party as a whole, but also that the potential "political groups" comprising the party be examined to see whether they qualify for protection. Such an analysis would inevitably involve "relationships of great delicacy that are essentially political in nature." *O'Brien v. Brown,* 409 U.S. 1, 4 (1972) (per curiam). It is an analysis better left to politicians than committed to the federal judiciary. [8]

Attempts to define protectible political classes also suffer from the elusive nature of their constituencies. This Court has previously recognized that votes are cast by individual citizens, rather than economic or political interests, *Reynolds v. Sims,* 377 U.S. 533, 562 (1964), and that such voters can change their political affiliations from election to election, *Kusper v. Pontikes,* 414 U.S. 51 (1973). Any reapportionment plan which is politically "fair" when adopted may, therefore, soon become "unfair." Changing alliances, changing views and an increasingly mobile voting populace make definition of a political group and the fixing of its geographic location an impossible task. *See generally* Auerbach, *Commentary,* Reapportionment in the 1970's 74, 87 (N.Polsby ed. 1971).

B. Adverse Political Impact Cannot Be Judicially Assessed

Related to the problem of defining a protectible political group is the lack of a standard for determining whether such a group has been disadvantaged. The court below purported to measure Indiana's reapportionment acts against such standards as proportional representation ***17** (even though it recognized that proportional representation is not required, A-25), compactness and "community of interest" (although it also recognized "community of interest" is not required, A-30). The court then avoided the difficult threshhold issues of measurement by asserting that the disparity in proportional representation "speaks for itself" (A-20) and that the shapes of many districts "are often contorted." (A-16) In short, the court below used a wholly subjective analysis, without standards which could guide the Indiana legislature, or any legislature, in creating an acceptable plan. This standardless approach merely reflects the lack of manageable standards available.

1. Proportionality Is Not An Effective Measure

This Court has unequivocably determined that there is no Constitutional right to proportional representation. *Mobile v. Bolden,* 446 U.S. 55, 76, 86 (1980). In any "winner take all" system certain supporters of losing candidates are arguably denied representation, but this does not deny them equal protection of the laws, even when the same candidate wins year after year. *Whitcomb v. Chavis,* 403 U.S. 124, 153 (1971). One commentator has identified several theoretical and practical "major flaws" with the use of proportionality measures for unconstitutionality. Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota,* 62 Minn. L. Rev. 1121, 1128 (1978). Proportionality simply cannot be guaranteed in the American system of elections, which traditionally has provided clear governing majorities and governmental stability.

Moreover, the use of a proportionality measure requires that a court match legislators either with certain types of voters or with a particular political group. In view of the range and diversity of political views among voters, even within political parties, merely labelling legislators as ***18** "Democrat" or "Republican" is too simplistic. Such a scheme also ignores independent voters. Clearly, such matching quickly becomes complex and, further, it involves the heart of political questions reserved to voters. The only alternative to such a complex matching, however, is recognition of a right of representation for the political groups themselves, a step this Court has flatly rejected:

> 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 claims to representation. And the Court's decisions hold squarely that they do not.

Mobile v. Bolden, 446 U.S. 55, 78-79 (1980) (footnote omitted).

2. District Geometry Is Not An Effective Measure

Although the shapes of legislative districts, described in terms of such attributes as compactness, contiguity and community of interests, are frequently suggested as an appropriate measure of adverse political impact and were relied upon by the court below (A-14, A-27), the "tidiness" of district boundaries is an artificial measure which has been rejected by this Court.

A preference for compact and contiguous districts is really nothing but a policy decision in favor of political groups whose support is evenly distributed about a state. Those groups which are concentrated in one area, such as a city, will be disadvantaged by "stacking" if a compact district encompasses them. Groups whose "community of interest" follows some feature such as a river or an interstate highway might be "fractured" by districts meeting an ideal of compactness. Modern transportation and communication capabilities have decreased the importance of simple geometric district shapes. *Reynolds v. Sims,* 377 U.S. 533, 580 (1964).

***19** Recognizing that other considerations are more important than geography, this Court held in *Gaffney v. Cummings,* 412 U.S. 735 (1973) that a state legislature did not violate the Fourteenth Amendment by drawing noncompact legislative districts based on partisan considerations. Simply stated, "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Id.* at 752 n. 18.

In sum, the very nature of a "political group" resists measurement of adverse impact on it by any judicially discoverable or manageable standards and involves policy questions at the heart of the political process. Accordingly, assessment of such impact as a step toward finding partisan political gerrymandering can only bury a court in the midst of an unresolvable political question.

C. Partisan Legislative Intent is Clearly a Political Question

Reapportionment is an inherently political process. *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 2671 (1983) (Stevens, J., concurring). One commentator has suggested that there is nothing more political than how legislative boundaries are drawn. Polsby, *Introduction,* Reapportionment in the 1970's 1 (N.Polsby ed. 1971).

Nevertheless, only purposeful discrimination can violate the Fourteenth Amendment, *Mobile v. Bolden,* 446 U.S. 55, 67 (1980). Thus, a finding of unconstitutional political gerrymandering necessarily requires an inquiry into the partisan motives of a legislature. In addition to the difficulty of determining how much partisanship is too much, one court has suggested that "judicial intrusion so near the heart of the political process would be a desperate remedy worse than the disease." *Jimenez v. Hidalgo County Water Improvement District No.2,* 68 F.R.D. 668, 674 (S.D. Tex. 1975), *aff'd,* 424 U.S. 950 (1976).

This Court has traditionally deferred to state legislative judgments regarding state redistricting plans. *Gaffney v.* ***20** *Cummings,* 412 U.S. 735 (1973); *Mahan v. Howell,* 410 U.S. 315 (1973); *Reynolds v. Sims,* 377 U.S. 533 (1964). Indeed, this Court has suggested that "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney v. Cummings,* 412 U.S. 735, 752 (1973). Certainly, it would be difficult to imagine a manageable standard involving the summoning of state legislators into a federal court to testify about their political motivations. [9]

Moreover, an attempt to isolate an "invidious" motive necessarily involves a balancing of group interests by the court in a fashion more properly left to the legislature. [10] A reapportionment plan which is neutral or favorable with respect to one

political group may be unfair to another. *E.g., United Jewish Organizations v. Carey,* 430 U.S. 144 (1977) (Hassidic Jews disadvantaged in favor of Black voters); *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 2675 n. 27 (1983) (Stevens, J., concurring). Such a situation faces the Indiana legislature since the lower court's order may require that Black voters be disadvantaged to increase Democratic strength. (*See* A-59) In contrast to the well-developed standards for discovering invidious racial discrimination, attempts to isolate such legislative intent for political discrimination cases are doomed to failure. As Justice Brennan aptly concluded, "[p]olitical affiliation is ***21** the keystone of the political trade. Race, ideally, is not." *United Jewish Organizations v. Carey,* 430 U.S. 144, 171 n. 1 (1977) (Brennan, J., concurring).

II

EVEN IF A CLAIM OF PARTISAN POLITICAL GERRYMANDERING MIGHT BE JUSTICIABLE UNDER CERTAIN CIRCUMSTANCES, THIS IS NOT THAT CLAIM.

Even if a claim of partisan political gerrymandering were justiciable in some circumstances, the evidence before the court below cannot justify the court's finding that Indiana's reapportionment acts are unconstitutional on that basis. At the very least, unconstitutional political gerrymandering must create a gross disadvantage to the weaker political group. *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 2672 (1983) (Stevens, J., concurring). Rather than suffering a disadvantage, however, the lower court's own findings establish that Indiana Democrats can take control of the General Assembly under the challenged reapportionment acts.

A. "Safe" and "Competitive" Seats Allow the Democrats Control

The court below held that legislative seats in the 45%-55% range are "competitive" because determined by "candidate personality and positions" (A-12) and winnable by the better candidate more "sensitive to the interests of the voters and the issues of the day" (A-11).

Indiana Senate. Based on the 1982 election results, called "most significant" by the court below (A-11), in the Indiana Senate there were 13 "safe" Democrat seats and 18 seats in the "competitive" range of 45%-55%, as shown in a chart prepared by Appellees Bandemer *et al*. (A-120). This chart also shows four "safe" and eleven "competitive" seats up for election in 1984. The 1982 election in fact resulted in proportional representation of the two political parties in the Indiana Senate, as pointed out in the opinion of Judge Pell in the court below (A-44).

***22** *Indiana House*. In the Indiana House, according to a chart prepared by Appellees Bandemer *et al*. but introduced into evidence as Exhibit "HH" (A-121) by the Appellants, the 1982 election resulted in twenty-eight "safe" Democrat seats and thirty-nine "competitive" seats in the 45%-55% range. This gave the Democratic party an opportunity to win a total of sixty-seven of the one hundred House seats if they had won all "safe" and "competitive" seats. [11] Exhibit 32 (JA-39) is also instructive, being based on a ranking of House districts in the 1982 election results, showing the vote margins. Since the ideal House population is 54,901, a 1% increase in the Democrat vote in each House district, or 549 votes, (and the resulting Republican loss) represents a "swing" of 1,098 votes in each district. A 2% Democrat increase in votes statewide, distributed equally in each House district, would result in a "swing" of 2,196 votes in each district. Exhibit 32 indicates that a 2,196 vote swing would have elected Democrat candidate Gondeck, ranked 56th, and the other fifty-five seats with smaller Republican margins, giving the Democrats fifty-six seats in the House. [12] These statistics seem to indicate that if the Democrats are able to increase their statewide vote by two percentage points or more, with an attractive candidate for governor, there are enough competitive seats with small ***23** enough vote margins that the Democrats would sweep into control in the Indiana House. [13]

Exhibit 32 also shows that there are six heavily Republican seats that are unopposed, and six heavily Democrat seats that are also unopposed (Districts 42, 63, 74, 70 and 67), not including seats with Black members (Representatives Mosby, Goodall, Brown, and Harris) where the Indiana General Assembly recognized the need to maintain the substantial Black vote in these districts, which is also heavily Democratic.

B. Lack of Proportional Representation Based on Seat-Vote Ratios Does Not Prove Partisan Political Gerrymandering

The court below relied primarily on the fact that in the 1982 election the Democrats won forty-three seats in the House while the statewide vote for all Democrat House candidates was 51.9%, and calls this a "built in bias" (A-13) and "at the very least, a signal that Democrats may have been unfairly disadvantaged by the redistricting" (A-11-A-12). [14] In fact, a lack of proportional representation between seats and votes in the House, on the record in this case, proves nothing of the sort.

Significantly, the 51.9% figure includes voting results in districts where the candidates are unopposed. This figure is reduced to 49.6% if unopposed districts are removed (JA- ***24** 38). [15] In District 51, a Black-majority district, there was only token Republican opposition and a huge Democrat margin (JA-39). With the removal of the vote totals for District 51, which required a large Democrat margin to maintain Black voting strength (vote totals shown on page 58 of Exhibit X), there are then 713,027 Republican legislative voters and 599,490 Democrat legislative voters, the Democrat vote being 45.67% of the total. This is a more meaningful percentage because it is based on 1982 House districts in which there were party contests and in which the Indiana General Assembly did not maintain overwhelmingly Democrat majorities to maintain a Black-majority district. Thus, the "signal" of unfairness relied upon by the court below was a false one.

But regardless of what is a meaningful seat-vote percentage, in comparing statewide races and legislative races the court below apparently ignored the comments of Justice Stevens in his concurring opinion in *Karcher v. Daggett,* 462 U.S. 725 (1983), wherein he stated that some "vote dilution" will inevitably result from "residential patterns" where one party is heavily concentrated in the urban areas. 103 S. Ct. at 2675 n. 27. The source cited by Justice Stevens, Backstrom, Robins & Eller, *supra* at 1127, expands on this point:

Aside from those analysts who emphasize physical appearance as a means of identifying gerrymandering, others purport to measure gerrymandering by focusing on the partisan outcome of the legislative election following a redistricting. Analysts using this approach compare the percentage of a party's legislative vote statewide with a ***25** percentage of seats gained. Marked disparities between the two figures are said to indicate the existence of a gerrymander.

This method of identifying gerrymandering, like the first, has major flaws. First, the approach fails to account for the fact that the difference between percentage of vote and number of seats captured may in fact be the result of natural advantages-the inordinate concentration of partisans in one place-rather than any deliberate partisan districting scheme. For example, it is well known that Michigan Democrats are heavily concentrated in Detroit but are in a minority in many other parts of the state.

Thus, in every election, Detroit Democrats will win heavily but their excess votes-those above 50%-do their party no good. Similarly, Democrats in out-state Michigan waste votes in those districts where they are a strong but persistent minority. No tolerable districting plan can effectively use either kind of votes, but typical post-election bias measures would show a gerrymander in favor of Michigan Republicans.

There is no evidence or finding that any alternate plan of reapportionment in Indiana, regardless of the mapmaker, with multi-member or only single member districts, would not also reflect this "wasting" of Democratic votes in areas of high Democratic concentration, assuming that Black-majority districts were maintained. [16]

The lower court in *Karcher* on remand also recognized that lack of proportional representation based on statewide ***26** votes and legislative seats won does not prove partisan political gerrymandering. The lower court held an analysis of the results in each of the proposed congressional districts of several statewide elections had no "real relevance". *Daggett v. Kimmelman,* 580 F.Supp. 1259, 1263(1984), *aff'd sub nom Karcher v. Daggett,* 467 U.S. 1222, 104 S. Ct. 2672 (1984). The court stated:

> While it is true the congressional elections are frequently affected by the same issues that influence the outcome of the presidential and senatorial contests, the patent reality is that they are strongly influenced by the more direct relationship of a Representative with the voters in his own district. Thus the fact that a district may have voted in favor of a senatorial or presidential candidate of one party is hardly a strong predicter of the outcome of a congressional race.

Although this Court "has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation," *Mobile v. Bolden,* 446 U.S. 55, 79 (1980), the court below attached great significance to seat-vote ratios which do not in reality prove any cognizable disadvantage to the Democrats. Surely such evidence cannot support a finding that Indiana's reapportionment acts are unconstitutional.

***27** C. The General Assembly Followed Neutral Criteria Previously Required by This Court or Recognized as Proper and Appropriate Under State Law by This Court.

1. One Man-One Vote and No Dilution Of Black Voting Strength

The court below conceded that the reapportionment acts in question followed the Constitutional criterion of "one man, one vote" with a population deviation in the range of only one percent (A-10). This is well within the ten percent limitation below which this Court has suggested no justification is required for state legislative redistricting plans. *Brown v. Thomson,* 462 U.S. 835 (1983). Absent a problem of racial discrimination, satisfaction of the equipopulation standard should end the inquiry on the record in this case. *Karcher v. Daggett,* 462 U.S. 735 (1983).

Once equipopulous districts were created, the Indiana reapportionment acts also followed the neutral criteria of no minority vote dilution and preserving Black voting strength so that the number of Black-majority districts is proportional to Black population. This was done by following the rule of "no retrogression" (A-10, A-17) which resulted in Black-majority districts proportional to Black population (A-17) despite a ten-year population loss in urban areas such as in Senate District 34 in Marion County, a Black-majority district, of 36,064 (A-123); in House District 45 (now 51) in Marion County, a Black-majority district, of 56,226 (A-124); and in House District 5 (now 14) in Lake County, a Black-majority district, of 29,592(A-124; *see also* Exhibit Z, JA-63). [17] The court below accordingly found no violation of the Voting Rights Act (A-21).

***28** The relative size of racial groups before and after redistricting is, of course, an important consideration in determining the constitutionality of any reapportionment act, including Indiana's. *Ketchum v. Byrne,* 740 F.2d 1398, 1407 (7th Cir. 1984). In *Rome v. United States,* 446 U.S. 156, 185 (1980) the Court held that electoral changes which lead to retrogression in the position of racial minorities in the exercise of their electoral rights cannot be permitted. *See also Beer v. United States,* 425 U.S. 130, 141 (1976). [18]

The sensitivity of the Indiana General Assembly to the criterion of "no minority vote dilution", recognized as a constitutional criterion in *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. at 2664 (1983), is illustrated in Marion County, which preserved its fifteen seat delegation to the Indiana House despite a population decrease (A-15). Although House District 45 (now 51) in Marion County had itself lost more population than the ideal district population size of 54,901 (A-127), the Indiana reapportionment acts preserved Black voting strength and representation and also maintained Marion County urban representation, rather than converting this Black-majority three-member district to a two-member district.

The court below seemed to recognize that the Indiana reapportionment acts followed the guideline of preserving Black voting strength, but explained this away by intimating that this was a result of "hindsight and chance" (A-18). In fact, contemporaneous newspapers articles report that this neutral criterion of "no dilution of the minority vote" guided the Indiana General Assembly throughout reapportionment. (Exhibits 241, 244, 253; Mangus Deposition Exhibits 2, 8).

Although the court below also found a "stacking" of Democrats (A-13, A-17, A-19, A-30) concentrated in urban ***29** areas (A-12, A-18), there was no evidence or finding that this was not the natural result of Democrats who were Black and concentrated in urban areas (A-18) being placed in the same district to preserve the Black voting strength that existed before reapportionment. This was the neutral legislative goal adhered to at all times during the reapportionment process (Bosma Deposition, pp. 20-1, 52-3, 69, JA-14; Mangus Deposition, pp. 29-31, JA-20-JA-21; Dailey Deposition, p. 91). There is no evidence or finding that any less "stacking" would not result in the Blacks losing Black voting strength and Black-majority districts in some or all of these urban areas in Indiana.

2. The "Bizarre" Shapes Condemned by the Court Below Were Needed to Meet Neutral Criteria

The decision of the court below discusses in great detail the "bizarre" shapes of certain specific House districts (A-14, A-17, A-28, A-29), but concludes only that this indicates no community of interest (A-29). Several House districts were found to lack compactness, but there is no finding that this lack of compactness resulted in gerrymandering favoring the Republicans. [19] In fact, some of these House districts (District Nos. 25, 42, 43, 66, 70 and 73) were held by Democrats following the 1982 election (Exhibit JJ, p. 22). The district lines for three of these House districts held by Democrats were drawn at least in part by the Democratic Representatives themselves (Mangus Deposition, pp. 54, 57-9).

***30** Moreover, there is no finding that the configuration of any particular House district or districts was not in fact the result of the neutral criteria of "one man-one vote" and of not diluting Black voting strength. House districts generally follow township lines (A-29), which constitutes a legitimate state interest. *Mahan v. Howell,* 410 U.S. 315, 328 (1973), *modified* 411 U.S. 922 (1973). Compactness itself is not, of course, a federal requirement under the Constitution, *Gaffney v. Cummings,* 412 U.S. 735, 754 (1973), and was followed when the "numbers fit" (Mangus Deposition, p. 52).

3. The Least Changed Plan Was Used

The Indiana reapportionment acts then followed the neutral criterion of "least changed plan", recognized as proper by the Court. *LaComb v. Growe,* 541 F.Supp. 145 (D.Minn. 1982), *aff'd sub nom. Orwoll v. LaComb,* 546 U.S. 966 (1962). The acts preserved the cores of prior districts, *Karcher v. Daggett,* 462 U.S. 725, 103 S. Ct. 2653, 2663 (1983), and avoided where feasible contests between incumbents, *Burns v. Richardson,* 384 U.S. 73, 89 n. 16 (1966); *White v. Weiser,* 412 U.S. 783, 797 (1973).

4. Multi-Member Districts Were Maintained

The Indiana reapportionment acts also followed the neutral criterion of least changed plan by preserving multi-member districts in the House unless all of the Representatives from such a district, regardless of party or race, requested that their district become single-member districts (A-18; November Transcript, pp. 140-41, JA-30; Mangus Deposition pp. 20, 29, JA-20; Dailey Deposition p. 23; Campbell Deposition pp. 143-7, 151-2, 167).

The combined use of single-member districts and multi-member districts is quite common in legislatures, occurring in thirteen legislatures in 1981 (Exhibit GG, JA-71). In *Burns v. Richardson,* 384 U.S. 73, 89 n. 16 (1966) the ***31** Court found it relevant that the Hawaiian Legislature was dominated by multi-member districts in both houses before statehood and that this feature did not originate with the particular reapportionment plan then under consideration. Similarly, multi-member districts have been used during this century (A-19), have had a long and continuous history in Indiana (Exhibit EE, JA-64) and were expressly found to be constitutional by this Court in *Whitcomb v. Chavis,* 403 U.S. 124 (1971).

Moreover, multi-member districts exist in both urban areas and rural areas and are represented by legislators that are Democrats, Republicans, or both Democrats and Republicans (A-121). For example, House District 31, a two-member district, is represented by a Republican farmer and a Democratic businessman from Gas City, Indiana (Exhibit JJ, pp. 22, 29 and 42). This negates a claim of purposeful discrimination. *Cosner v. Dalton,* 522 F.Supp. 350, 362 (E.D.Va. 1981).

While the court below relied on the "status" argument that more Blacks than Whites reside in multi-member districts (A-18), that 46.6% of the population in Marion and Allen Counties is identified as Democratic while the Republicans won 86% of the House seats in Marion and Allen Counties, all from multi-member districts, and that "such a disparity speaks for itself" (A-20), this phenomenon does not connote unconstitutionality. In *Whitcomb v. Chavis,* 403 U.S. 124 (1966), quoted approvingly in *Mobile v. Bolden,* 446 U.S. 55, 79-80, the Court considered a charge of political gerrymandering made in oral argument (403 U.S. at 156 n. 35) and held that the fifteen person multi-member district in Marion County, Indiana, was constitutional even though the minority party had won only one race in five from 1960 to 1968, *Id.* at 150. *Whitcomb* thus held it constitutional for the minority party to win exactly the same number of House seats-fifteen-in this ten year period as it would now have if it won only the three seats in Marion County in House District 51 in the next five elections.

***32** D. The Record Does Not Show the Elements Suggested by Justice Stevens' Concurrence in *Karcher v. Daggett*

While the court below relied heavily on the concurrence of Justice Stevens in *Karcher v. Daggett,* 462 U.S. 725 (1983) for the parameters of a political gerrymandering claim (A-21), the court below made no attempt to relate the concept of "political gerrymandering" to the specific facts of this case. The Court held in *Karcher* that the plan rejected by the lower court had greater population variances, *Karcher v. Daggett,* 466 U.S. 910, 104 S.Ct. 1691 (1984) (Justice Stevens concurring in denial of stay), and "was designed to produce contests among certain Republican incumbents", *Daggett v. Kimmelman,* 580 F.Supp. 1259, 1263 (1984) *aff'd sub nom. Karcher v. Daggett,* 467 U.S. 1222, 104 S.Ct. 2672 (1984). No such circumstances exist here. There is no evidence or finding by the court below that the Indiana reapportionment acts were designed to, or resulted in, contests among incumbents of either party which were not unavoidable because of one man, one vote considerations. [20]

The court below also made no finding on the measurement of the baseline strength of a political party in Indiana. The "political group" found disadvantaged by the court below was defined as persons who are "Democrats or at least have Democratic voting tendencies" (A-19). This group was also defined as those voting for unspecified Democratic

candidates in either 1956, 1958, 1964, 1972, 1974 or 1980 (A-11), as those voting for all Democratic candidates for the House of Representatives in 1982, and as those voting for all Democratic candidates for the Indiana State Senate in 1982 (A-12). As Justice Stevens recognized in his concurring opinion in *Karcher,* measurement of ***33** baseline strength is "difficult for a political party". *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 2672 n. 13 (1983). The court below simply avoided this difficulty.

III

THERE IS NO BASIS IN THE RECORD FOR A FINDING OF UNCONSTITUTIONAL DISCRIMINATORY INTENT

The Court has determined that discriminatory purpose is critical to a vote-dilution claim under the Equal Protection clause of the Fourteenth Amendment. *Mobile v. Bolden,* 446 U.S. 55 (1980).[21] Perhaps sensing the difficulty of discovering improper political intent (as opposed to racial intent) in the political process, the court below in an effort to find such intent quoted the partisan comments of two Republican legislative leaders (A-8-A-9) and found largely from these comments that the purpose and intent of the General Assembly was to deprive the minority party of its constitutional right to equal protection. There is no reason to believe, however, that these particular legislative leaders were in any way authorized to speak for the Indiana General Assembly as a whole, or that they were authorized to make these statements in any representative capacity whatever. The Court has held that no member of a legislature, outside the legislature, is empowered to speak with authority for the body. *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). *Accord Strauch v. United States,* 637 F.2d 477 (7th Cir. 1980) (statements by a government official outside the scope of his authority are ***34** not binding); *Department of Energy v. Westland,* 565 F.2d 685, 691 (3d Cir. 1977).

Partisan comments and partisan influences are to be expected during the legislative process. In *Gaffney v. Cummings,* 412 U.S. 735, 753 (1973), the Court stated:

> Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when over-laid on a census map, it requires no special genius to recognize the political consequences of drawing a district along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shapes of districts may well determine the political complexion of the area . . . The reality is that districting inevitably has and is intended to have substantial political consequences.

Moreover, the experience in Indiana demonstrates that political partisan intentions are not always borne out by subsequent events. Before reapportionment in the 1980 election, thirty-five Republicans and fifteen Democrats were elected to the Indiana State Senate, and sixty-three Republicans and thirty-seven Democrats to the Indiana House (Exhibits II and SS). Following reapportionment, in the 1982 election there was an increase of three Democrats in the State Senate and six Democrats in the Indiana House (Exhibit JJ, p. 1).[22]

*35 IV

THE COURT BELOW IMPROPERLY SHIFTED THE BURDEN TO THE STATE OF INDIANA TO JUSTIFY ITS REAPPORTIONMENT ACTS

The court below shifted the burden of proof to the State of Indiana to prove that its reapportionment act was "necessary in order that the 'one person, one vote' constitution tenet be preserved" (A-30), which was said to be based on the concurrence of Justice Stevens in *Karcher v. Daggett,* "in conjunction with" *Mobile v. Bolden* (A-21).

In *Mobile v. Bolden,* however, the Court held the burden of proof *never* shifts to the state to prove the absence of racial discrimination. The plaintiff must always prove his case in racial voting discrimination cases, except in cases arising under Section 5 of the Voting Rights Act of 1965, not applicable here. In *Mobile,* the Court held that a plaintiff in alleging voting discrimination on account of race "must prove that the disputed plan was, conceived or operated, as [a] purposeful devic[e] to further racial . . . discrimination" 446 U.S. at 66, and noted that in *White v. Regester,* 412 U.S. 755 (1973) it held that:
the plaintiffs had been able to "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group(s) in question".

The other case relied upon for shifting the burden of proof, *Karcher v. Daggett,* was not a Fourteenth Amendment challenge to state legislative districting at all but an Article I, Section 2 challenge to Congressional districting with an entirely different standard of proof. *Karcher* holds that as between two standards-equality or something less than equality-only the former reflects the aspirations of Article I, Section 2. 103 S.Ct. at 2659.

The burden shifted to the state in *Karcher* to justify its Congressional redistricting plan under Article I, Section 2 since an alternate plan had greater population equality. ***36** The court below incorrectly assumed that the burden also shifted to the State of Indiana to justify its acts against a claim of political gerrymandering under the Equal Protection clause of the Fourteenth Amendment, even though the population variances in this state legislative redistricting case were *prima facie* constitutional and needed no justification, and neutral criteria recognized by this Court and even acknowledged by the court below were scrupulously followed.

Further, the House and Senate alternate plans, not offered by Appellees until 1982 after the acts had been considered and passed in 1981 (Exhibits 24, 25), could not possibly allow a presumption against the constitutionality of the Indiana reapportionment acts. They do not even purport to follow all of the same neutral criteria as the acts themselves. The impact on Black voting strength of the House or Crawford Plan is only known in fifteen of the forty districts it created. (Exhibit 215, p. 6.) The impact on Black voting strength in any of the forty-five Senate districts in the Senate or Carson Plan not listed in Exhibit 215, p. 7, is also not known. The House Plan changed multi-member districts to single member districts but used the same single member district lines in rural areas as the House reapportionment act itself (Mangus Deposition Exhibit 5) which were severely criticized by the court below (A-14-A-17, A-28-A-29). This House Plan also created unusual district shapes to maximize Black representation in Marion, Lake and Allen Counties (Exhibits 202, 207, 212, QQ and RR) that were not acceptable to or approved by the court below (A-21). The Senate Plan did not even purport to concern itself with preserving Black voting strength throughout the State of Indiana, and also created unusual shapes in Marion, Lake and Allen Counties to maximize Black representation (Exhibits 204, 209 and 214) that also were not accepted or approved by the court below. (A-21) In sum, the shift of the burden of proof to the State was without justification and was erroneous.

***37 V**

THE SCOPE OF THE REMEDY EXCEEDS THE CONSTITUTIONAL VIOLATION FOUND

The court below made no specific finding of any unconstitutionality in the Senate reapportionment act. Its opinion referred only to the House Plan as Exhibit A (A-14, A-29) and to specific House districts. There is no reference to any specific Senate district or that any such district in any way violates any of the neutral criteria established by this Court. There are no multi-member districts in the Senate. [23] No incumbents of the party claiming to be disadvantaged were placed in the same Senate district, as in *Karcher v. Daggett*. The 1982 election resulted in proportional representation of the two political parties in the Senate (A-44). In short, the court below did not find, and could not have found even under its own theory, any unconstitutional political gerrymandering in the Senate Plan. Nevertheless, the court below's remedy swept broadly over the Senate reapportionment act as well as the House reapportionment act.

As this Court held in *Whitcomb v. Chavis,* 403 U.S. 124, 161 (1971), the remedial powers of an equity court are not unlimited, and a district court errs in "broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." *See also White v. Weiser,* 412 U.S. 783, 796-97 (1973). The State of Indiana obviously cannot correct any deficiencies in the Senate reapportionment act when none are stated to exist. Accordingly, the injunction is overbroad in its coverage of the Senate Plan and should be vacated.

*38 CONCLUSION

The federal courts have long refrained from becoming entangled in standardless questions requiring political policy decisions. Throwing aside that tradition of restraint, the court below struck down Indiana's reapportionment acts on purely political grounds, even though those acts met the "one man, one vote" standard and followed other neutral criteria approved by this Court. As Justice White wisely wrote for the majority in *Gaffney v. Cummings,* 412 U.S. 735, 749-50 (1973), "[t]hat the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." For the reasons discussed herein, the Court should reverse the order of the court below and vacate the injunction.

Respectfully submitted,

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*39 APPENDIX

Indiana House Districts

New House District	Old House District	Single or Multi-member
1	13	(1)
2	12	(1)
3	11	(1)
4	11	(1)
5	9	(1)
6	10	(1)
7	8	(2)
8	9	(1)
9	7	(2)
10	6	(2)
11	1	(2)
12	2	(2)
13	3	(1)
14	5	(2)
15	4	(2)
16	19	(1)
17	18	(1)

18	17	(1)
19	14	(3)
20	15	(3)
21	16	(1)
22	23	(1)
23	22	(1)
24	21	(1)
25	20	(1)
26	30	(1)
27	29	(1)
28	28	(1)
29	27	(1)
30	26	(1)
31	25	(2)
32	24	(1)
33	39	(1)
34	38	(1)
35	37	(1)
36	35	(1)
37	36	(1)
38	34	(1)
39	33	(1)
40	47	(1)
41	32	(1)
42	31	(1)
43	50	(1)
44	48	(1)
45	49	(1)

46		(1)
47	52	(1)
48	42	(3)
49	43	(3)
50	44	(3)
51	45	(3)
52	46	(3)
53	55	(1)
54	41	(1)
55	56	(1)
56	40	(1)
57	54	(1)
58	53	(1)
59	59	(1)
60	60	(1)
61	51	(1)
62	61	(1)
63	63	(1)
64	62	(1)
65	64	(1)
66	65	(1)
67	58	(1)
68	57	(1)
69	66	(1)
70	69	(1)
71	67	(1)
72	68	(1)

73	70	(1)
74	71	(1)
75	72	(2)
76	73	(1)
77		(1)

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Footnotes

* *Counsel of Record*

1 References to the appendix to the Jurisdictional Statement are in the form "A- ." References to the Joint Appendix are in the form "JA- ."

2 A second action, with a different group of plaintiffs (the NAACP plaintiffs) and challenging the reapportionment acts on the basis that the electoral district lines did not give Black citizens, as Blacks, the maximum number of Black-majority districts, was subsequently filed as Civil Action No. IP82-164-C. By order dated May 3, 1982, the two actions were consolidated by the court below. The issues raised in the second action are not a part of this appeal. In addition, one of the state constitutional provisions on which Bandemer *et al.* relied has since been repealed (A-52).

3 The General Assembly is Indiana's bicameral legislature, consisting of a House of Representatives with 100 members and a Senate with 50 members. House members serve a term of two years and Senate members serve a term of four years with one-half of the Senate members elected every two years. The General Assembly is not a full-time legislature. Rather, in odd numbered years it meets for a maximum of 61 session days, and in even numbered years for a maximum of 30 session days. Apportionment of the state into districts represented in the General Assembly is done by legislative act, signed by the Governor into law. The opinion of the court below gives a more detailed description of the General Assembly (A-5, A-6).

4 By following these guidelines, the court below found the Indiana General Assembly protected the voting rights of Blacks as Blacks as required by the U.S. Constitution and §2 of the Voting Rights Act of 1965, as amended in 1982. (A-21).

5 Representative Crawford testified that the purpose of the changes proposed by the Crawford Plan was to maximize Black-majority districts and "to allow blacks to be similarly situated as . . . the majority of other voters in the state and to make a majority decision." (November Transcript pp. 80-81, 118). The changes proposed to attain this purpose were not approved by the court below.

6 This was also not approved by the court below.

7 Compactness was a neutral criterion followed during reapportionment if the "numbers fit". Mangus Deposition, p.52.

8 At least one social scientist has argued that political parties, which are by their nature "encompassing" and inclusive, are fundamentally different from political interest groups, which are exclusive in nature. M. Olson, The Rise and Decline of Nations 50 (1982).

9 Not only has it "repeatedly been pointed out that it is not the business of the federal courts to inquire into the personal motives of legislators," Baker v. Carr, 369 U.S. 186, 337 (1962) (Harlan, J., dissenting), such an inquiry could have little or no value since no individual legislator is empowered to speak with authority for the body. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).

10 This Court has suggested that a central principle of the Fourteenth Amendment is to provide "a just framework within which the diverse political groups in our society may fairly compete." Washington v. Seattle School District No. 1, 458 U.S. 457, 470(1982)(quoting Hunter v. Erickson, 393 U.S. 385, 393(1969)). Such a principle is inconsistent with judicial ranking of political groups.

11 Redistricting practices are substantially different in California. *See* pages 52a-53a in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed in this Court on January 30, 1985 in Cause

No. 84-1226 in the case entitled Badham, *et al*. v. California, *et al*. The petitioners there present a chart showing that the 1984 California Congressional elections resulted in twenty-three seats with a Democrat percentage of 60% or more, seventeen seats with a Republican percentage of 60% or more, and only three seats within the 45%- 55% range.

12 Earlier, redistricting in California in the 1960's managed to produce Congressional constituencies such that a shift of as much as 15% in the popular vote in every district would have moved not a single seat from one party to the other. *See* Rogowski, *Representation in Political Theory and in Law,* 91 Ethics 395, 426 (1981).

13 Such a large number of marginal seats is unusual. A study of Congressional elections in recent years reports that the number of districts with close elections and small vote margins is decreasing rapidly. *See* Mayhew, *Congressional Elections: The Case of the Vanishing Marginals,* 6 Polity 295, 301, 304 (1974).

14 This belief that the lack of proportional representation may constitute a constitutional violation, on the record in this case, is a fundamental misconception. "It is impossible to create safe districts, much less to provide proportional representation, for every race, religion and political viewpoint." Howard & Howard, *The Dilemma of the Voting Rights Act-Recognizing the Emerging Political Equality Norm,* 83 Colum. L. Rev. 1615, 1618 (1983).

15 *See* Backstrom, Robins and Eller, *Issues in Gerrymandering: An Explanatory Measure of Partisan Gerrymandering Applied to Minnesota,* 62 Minn. L. Rev. 1121, 1128 ("Because the vote from a single uncontested race will in all probability add more to the total of the winning party than the margin by which several opposition candidates win in contested races elsewhere, the result will be a distortion in the total vote considered to reflect overall party strength.").

16 "There is no sure way to detect gerrymandering by examining election results; the most innocent districting plan will penalize a party whose voters are either inordinately concentrated (like Michigan Democrats) or inordinately dispersed (like Missouri Republicans)." Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts,* in Reapportionment in the 1970's 249, 276 (N. Polsby ed. 1971). "Large concentrations of excess votes are not always to be attributed to the deftness of the mapmakers. Many cities contain large 'natural' aggregations of Democrats and they inevitably produce top-heavy majorities for at least some of that party's candidates. While Democratic legislatures occasionally have tried to redistribute their excess votes, they seldom succeed." A. Hacker, Congressional Districting, The Issue of Equal Representation 56-7 (1964). *See also* Wildsen & Engstrom, *Spatial Distribution of Partisan Support and the Seats-Votes Relationship,* Legislative Studies Quarterly 3 423 (1980) (wherein the authors in developing their formula state that "the model employed highlights the importance of keeping vote dilution attributable to residential patterns conceptually distinct from dilution attributable to the placement of district boundaries, a distinction to which empirical measures of gerrymandering should be sensitive"); Grofman, *For Single-Member Districts Random is not Equal,* in Representation and Redistricting Issues 55-58 (B. Grofman ed. 1982).

17 The use of the neutral criterion of not diluting Black voting strength also is evident from the reduction of the Black percentages in Old House District 5 (now 14) from 91.2% to 69.9%, in Old House District 45 (now 51) from 63.8% to 61.2%, in Senate District 3 from 84.8% to 71.9%, and in Senate District 34, from 68.1% to 58.4% (SEN 1971 "Black %", HR 1972 "Black %", SEN 1982 "Black %" and HR 1982 "Black %", A-123) A chart relating old and new district numbers is provided for the Court's convenience in an appendix to this brief.

18 Where at large elections antedate the Voting Rights Act, their continuance does not require certification under Section 5. *See* Rogowski, *supra,* at 422.

19 In Hacker, *supra* note 16 at 77, the author states "All in all, the compact and homogeneous constituency has severe drawbacks for those who live in it. Certainly, it is not clear that setting a standard of compactness would solve more gerrymandering problems than it would create, or at least perpetuate." *See also* Mayhew, *supra* note 16, at 273 ("Emphasizing community can also violate the compactness standard. No natural law ordains that people with community ties live in areas of regular geometric shape.").

20 In California the 1980 Congressional reapportionment resulted in three Republican incumbents being thrown together in one Congressional district. Ayers & Whiteman, *Congressional Reapportionment in the 80's: Types and Determinates of Policy Outcomes,* 99 Political Sci. Q. 303, 306 (1984).

21 Whether the early standard of Fortson v. Dorsey, 379 U.S. 433 (1965) which suggested non-intentional effects might violate the Fourteenth Amendment, has survived the "motive" decisions of this Court in Washington v. Davis, 426 U.S. 229 (1976) and Arlington Heights v. M.H.D.C., 429 U.S. 252 (1977) has been recently stated to be "unclear". Rogowski, *supra,* note 12, at 420. The opinions of *Mobile,* however, leave little doubt that only intentional conduct is proscribed.

22 An Indiana Democrat campaign chairman stated in 1982 that the Republicans were "piggish" in creating a large number of marginal Republican districts "that cannot withstand a good Democratic year". (Exhibit L)

23 *See* Note, *Group Representation and Race Conscious Apportionment: The Roles of States and the Federal Courts,* 91 Harv. L. Rev. 1847, 1860 (1978) ("Although the Supreme Court compares projected effects of multi-member districts to the potential effects of single member districting, the Court has not recognized a right to any particular design of single member districts.")

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