1985 WL 670039 (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, 1985.
June, 1985.

Appeal from the United States District Court for the Southern District of Indiana

Brief of Appellees Indiana NAACP State Conference of Branches

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***1 I.**

Proceedings Below

Instant appellees represent black citizens of Indiana, through the NAACP States Conference of Branches, four local NAACP branches and eight named individual plaintiffs. Below, black appellees challenged the Indiana House and Senate redistricting plans, adopted in February 1982, as violating the 14th and 15th Amendment to the Constitution and Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. 1973. They submitted that the Indiana House reapportionment both impermissibly and intentionally fragmented and diluted minority voting ***2** strength. Particularly, appellees attacked the House plan's selective use of multi-member legislative districts which submerged, to overwhelming white populations, black voters, already often fragmented by the district lines drawn by the plan's architects. Black plaintiffs claimed that the Senate plan had this same feature.

The district court agreed that black citizens of Indiana had been "hardly and harshly" treated by the House plan's use of multi-member districts. (A-18). It found "the multi-member district approach . . . particularly effective in 'stacking' blacks in large majority districts and fragmenting their population among other districts." (A-19). However, finding (a) that Indiana's black voters overwhelmingly support Democratic candidates and (b) that the dominant Republican majority intended to minimize the number of Democratic districts in the state Legislature, the district court concluded that while the challenged plans "had a significantly adverse impact upon black voters," this was "because they (blacks) characteristically align themselves with the Democratic Party, but not because of their race." (A-20-21).

The majority held that "the infirmities which reside in the 1981-82 redistricting plan arise under the Fourteenth Amendment's fundamental equal protection guarantees of fair and effective representation," not its prohibition against racial discrimination. [1] In any event, the court held that "*the relief . . . ordered below with respect to the Bandemer plaintiffs . . . accords to the NAACP plaintiffs that relief to which they are entitled under the facts herein.*" (A-21). (Emphasis added.)

***3** While continuing to believe that the appellants violated Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments based on their racial discriminatory intent and the effects of these plans, black appellees herein chose not to cross appeal, but to defend the district court's ultimate conclusion that the challenged plans are unconstitutional in their discrimination against Democrats and blacks as Democrats.

We do so because the district court opinion, if affirmed, promises to provide blacks with relief from the needless fragmentation of population concentrations and the selective and unprincipled use of multi-member districts which further dilute minority voting strength with no governmental justification.

II.

Refutation of "Factual" Assertions in Appellants' Brief

A. *Introduction*

Appellants contend that the clearly intended partisan gerrymander of Indiana's State legislature-specifically designed to forward and safeguard the maximum number of "safe" Republican legislative seats-necessarily had this consequence to protect black electoral interests.

Below, black appellees show that as a factual matter this claim is entirely fanciful and fatuous. [2] Indeed, almost every claim in Appellants' Brief concerning the intent and ***4** impact of the State's plan with regard to blacks is deceptive and unsupported by record evidence. Likewise, appellants' mischaracterize the alternative redistricting plans, offered by State Representative William Crawford (the Crawford plan) and State Senator Julia Carson (the Carson plan).

Contrary to the State's contention that it benevolently treated blacks, thereby necessarily causing injury to non-black Democrats, the Republican plans had a particularly hard and harsh impact on the aspirations of black residents of Indiana. For this reason, black representatives and Senators unanimously opposed the controverted House and Senate plans, viewing them as continuations of the disparate and unequal treatment of blacks by Indiana's overwhelmingly white Republican majority. [3]

Rather than serving black electoral interests, the challenged House plan first fractures minority population concentrations in Indiana's three largest urban areas-Indianapolis (Marion County); Gary (Lake County) and Ft. Wayne (Allen County). In each of these counties, the plan then employs multi-member districts, effectively and intentionally diluting minority voting strength. As the district court correctly found, 81.2% of Indiana's black population is districted into multi-member districts while only 35.2% of the state's white population is so situated. (Tr. II, p. 16, Pl's Ex. 216). The alternative, Crawford plan, supported unanimously by the legislature's black members, respected black population concentrations and utilized only single-member districts, thereby substantially reducing the dilution of black voting strength.

Likewise, the Republican's Senate plan fragmented black population concentrations in Lake and Marion Counties, ***5** the only counties with sufficient black populations to elect State Senators. The controverted plan created two majority black Senatorial districts (out of fifty).

In Section B below, we demonstrate the exclusionary process by which these plans were adopted and show that the appellants' current suggestion that the principle of non-retrogression of minority vote required these plans' cited characteristics is counter-factual and, indeed, absurd. In Section C, we show that the district court's conclusion-that the

multi-member districts used in the House plan serve no governmental purpose and intentionally disadvantage black and Democratic voters-is well-founded and should be affirmed. Moreover, as we argue more generally in the legal argument, III, *infra,* where multi-member districts serve no governmental purpose, i.e., the representation of counties *qua* counties in the lower legislative body, *see, Cosner v. Dalton,* 522 F. Supp. 350, 357, 362 (E.D. Va. 1981), and, instead, intentionally disadvantage specific racial and political groups, they are unconstitutional.

B. *The Challenged Plans Were Heavy-Handed Republican Attempts to Insure Continued Political Hegemony, Not Efforts to Fairly Represent Black Representational Interests*

(i) Legislative Process

In 1980, Indiana's Republican leadership determined to fashion a state legislative reapportionment of the greatest political advantage to their political party. (Dailey Dep. at 63); (Bosma Dep. at 96, 121). A vice chairman of the Republican State Committee worked with a political consulting firm from Detroit, Market Opinion Research, (MOR), to develop sophisticated computer programs to allow Republican map-makers to precisely carve out districts for maximum political advantage. (Sutherline Dep. at 14-15, 18-20). Statements by those directly respensible for reapportionment clearly illumine the majority's substantively partisan goal and confirm the intentionally exclusionary ***6** nature of the process, by which this outcome would be assured. [4]

After developing the needed computer hardware and software with MOR, the Republican State Committee retained this firm to assist in the redistricting process. (Sutherline Dep. p. 23). Two computers were installed-one at Republican State Committee headquarters and another at space rented by the RSC. (Id. at 28, 31). MOR assembled data enabling legislative leaders and their staffs to manipulate for partisan advantage district lines. Working with Republican staff, MOR combined its sophisticated computer programs with detailed political knowledge to fashion the most partisan outcome they could put together. (A. 8, 9).

During the final two days of the 1981 legislative session, the Republicans presented their House and Senate redistricting proposals. (A-9). [5] Contrary to the suggestion in appellants' brief, these plans were developed by an exclusively Republican conference committee not to "advance the legislative process" (Appellants' Brief at 3), but to insure that Democratic and black legislators had no access to the scheming of the Republican leadership. [6]

***7** Having defeated an earlier Democratic-sponsored reapportionment plan which utilized only single member districts, the Republican House plan substantially fragmented black population concentrations. (A-19). However, as senior black state Representative Crawford explained at trial, "we had no opportunity to analyze the impact" before the April 30, 1981 vote. "We did not know what the maps looked like, nor what impact it might have." (Tr. II, p. 80). The Republican sponsored House and Senate plans passed along party lines, with all black representatives and Senators opposing.

After the 1981 session ended, Representative Crawford asked David Dreyer, a legislative aid, to analyze the impact of the enacted plans upon blacks. To redress the substantial dilution of black voting strength Dreyer found in both plans, Crawford and State Senator Carson introduced their alternative redistricting plans before the start of the 1982 session. [7] Not surprisingly, a central difference between Crawford's plan and the Republican one was the latter's selective use of multi-member districts and the former's creation of 100 single member districts. [8] By creating contiguous districts which respected black population concentrations, Crawford's plan included eight majority minority seats and Carson's had four senatorial districts in which blacks were in the majority. These plans received insubstantial legislative consideration and the Republican majority overwhelmingly defeated both. (A-19).

***8 (ii) The House Plan Substantially Diluted Black Voting Strength**

As the district court found, the use of multi-member districts both diluted and fragmented minority voting strength in Indiana. [9] (A-19-20). Representative Crawford gave an example of the challenged plan's fragmenting effect upon blacks in Marion County:

"The area, the basic dividing line (between district 51, the majority black three-member district created by the House plan and other overwhelmingly white districts) is 38th Street. The precincts that you have identified North of 38th Street, north of the 51st district, basically with the exception of the area just to the west where it bulges out north of 38th Street, well that is the-up to about 46th Street-is predominantly black. It's the area called Butler-Tarkington, as we come further east, it becomes Meredian-Kessler, as we come further East it is the Forest Manor area. *There is no discernible distinction between blacks that live on one side of the 38th Street line or the other*. As a matter of fact, just East, around Parker, there is a subsidized low income housing complex. It used to be called the Meadows. (Emphasis added.)
Q. Where is that . . .?

A. It would be in this area just North of the line."

(Pl's Ex. 8 with overlay of Pl's Ex. 205).

***9** Mr. Dreyer also explained the fragmentation of blacks in Marion County effected by the House plan. (Tr. I, p. 182). District 51 is 61.2% black; district 49 is 21.6% black and district 51 is 3.7% black. (Tr. I, pp. 183-84).

The fragmentation and cracking of black population concentrations and the grouping of such disaggregated black populations with much more populous white areas diluted black voting strength in Indiana. In Fort Wayne-Allen County, the House created two three-member districts, numbers 19 and 20. Blacks are residentially segregated in urban Ft. Wayne. (Tr. I, p. 187). To dilute black voting strength, the House plan first split this black population concentration (which numbers about 26,000 persons) and then associated each segment with overwhelmingly white Republican population concentrations, including many persons from rural counties, sharing no known community of interest with those urban blacks. (A-16); (Pl's Ex. 200 overlayed with Pl's Ex. 201; Tr. I, pp. 180-181). Both the splitting of the black population and the creation of multi-member districts diluted black voting strength in Ft. Wayne. When combined, these independent techniques buried black political aspirations and opportunities.

Finally, in Lake County, the legislature created one two-member majority minority district, but, otherwise intentionally diluted minority voting strength. The relevant districts are: 11-4.9% black; 12-30.6% black; 13-13.3% black and 14-69.9% black. (Tr. I at 186).

The Crawford alternative avoided the fragmentation of contiguous predominantly minority precincts while firmly adhering to the one person/one vote requirement. In Marion County, rather than one three-member majority black district, Crawford's plan created four black majority single member districts-87-55.7% black; 88-66.7% black; 89-65.6% black and 94-62% black. (Tr. I at 190-191, Pl's ex. 207). In Allen County, rather than fashioning ***10** two three-member districts, [10] 19 and 20, each less than 12% black in composition, Crawford proposed six single-member districts including #50, 40.2% black, encompassing all of urban Fort Wayne.

Finally, in Lake County (Gary), rather than four two-member and one single-member district, the Crawford alternative offered nine single-member districts and minimized the dilution of the minority vote:

House Plan			*Crawford Alternative*		
11	4.9%	black	48	70.9%	black
12	30.6%	black [11]	49	64.6%	black
14	69.9%	black [11] ??	31	57.5%	black
			15	54.2%	black

In summary, the House plan created two majority-minority districts-#51 (with three seats) in Marion County and #14 (with two seats) in Lake County. Redressing the House plan's egregious and needless fragmentation of black voting strength, the Crawford plan created 8 majority minority districts, four in Marion and four in Lake Counties. Comparing these plans, it is obvious that the Crawford plan preserves black voting strength far more fairly than does the House plan, which intentionally minimizes black voting strength.

***11 (iii) The Appellants' Defenses of the Racial Dilution Effected by Their Redistricting Plan Are Baseless**

Defending the House plan, appellants repeatedly assert that it provides blacks proportional representation. [12] But, as the district court correctly concluded, appellants' suggestion that blacks have achieved "proportional representation" under the challenged House plan "seems to represent hindsight and chance-an argument asserted after the accidental fact of proportional representation." (A-17-18). In fact, at their depositions, taken before the 1982 elections which produced six black House members and one white elected from the majority black district in Marion County, no Republican legislator mentioned any concern for insuring blacks proportional representation nor any commitment to this outcome.

In 1982, blacks won six seats in the House when in one majority-white district, #12, two whites ran against a single black in the general election, splitting the majority white vote and allowing the black, Harris, to squeak into office. And one black representative, Hurley Goodall, was elected from an overwhelmingly white district, the first time that had happened in the State. As Craig Campbell, the chief Republican staff person on the House redistricting testified, "The plan that we adopted did, in fact, increase the number of minority seats, *but I certainly would not have projected or planned that that would happen*." (Emphasis added.)

"Q. Exactly, when you created a 30% black district in Lake County, you didn't project that Mr. Harris would win in a three way race, right?

A. Correct."

***12 (iv) The State Senate Plan Likewise Minimized Black Political Strength**

In the Senate, the Republicans created two majority black seats, one in Lake and one in Marion County. In so doing, the Senate replicated the fragmentation of black neighborhoods perpetrated in the House plan.

The Carson alternative proposed four majority black districts-two each in Marion and Lake Counties. Ms. Carson's plan avoided fragmenting black precincts as "there are no majority (minority) precincts outside of these . . . districts." (Tr. II, pp. 4-14; Pl's Exs. 200, 205, 208, 209, 210, 214). As Mr. Dreyer explained, in drawing these four districts, he did not cross any kind of political sub-division line not traversed by the Senate's own plan. (*Id.* at 13).

(v) The Alternative Plans Far Better Recognize Black Communities of Interest

In trying to show that the Crawford and Carson alternatives were worthy of the short shrift they received in the House and Senate, appellants raise a number of rather ludicrous arguments: first, they state that they cannot tell, nor can a reviewing court, whether the alternative plans serve black electoral interests better than do the challenged plans because the alternatives only re-drew district lines for the three most populous counties-Marion, Allen and Lake. This suggestion is preposterous. Appellants are apprised that these are the only counties where substantial black population exists and where the issue of vote dilution of blacks has any importance. In these counties, the alternative plans, as demonstrated above, far better protect black population concentrations from needless fragmentation than do either the House or Senate plan. To raise the suggestion that the Republican plans better served blacks elsewhere in the State is meritless, as elsewhere in Indiana blacks do not have sufficient population concentrations to make this an issue.

***13 (vi) "Retrogression" Is Not the Applicable Legal Standard to Measure the Permissibility of the Challenged Plans**

More importantly, the district court found that one articulated criteria in the redistricting process was "no retrogression." This finding does not indicate (a) that the legislators understood what retrogression is; (b) that retrogression was the appropriate legal standard for assessing the plans in question or (c) the achievement of non-retrogression, assuming the Republicans could meet this standard, and that it applied, required the rather bizarre shapes chosen by the plans' architects or the selective use of multi-member districts which, as shown above, minimize minority voting strength.

Throughout this litigation, the appellants have refused to recognize that the principle of *non-dilution* of minority voting strength requires the consideration, in any legislative redistricting effort, of alternative plans or methods to determine whether a proposed fragmentation of black voting strength is necessary to the achievement of other cardinal redistricting principles and goals. Minority voters cannot be fragmented and their votes diluted before unimportant or less weighty principles. *See,* Grofman (appellants' expert) (Tr. II, p. 265).

Indeed, Indiana's Republican map-makers admitted to not having seriously considered the impact of a single member districting alternative on black voting strength. (Campbell) (Tr. II, pp. 176-177, 180-181). Instead of approaching redistricting with a recognition of the importance of non-dilution, yet adhering admittedly to the recognition of communities of interests, the Republicans have elevated the principle of non-retrogression-they assert that so long as they create as much (or as little) representational opportunities for blacks as the former plan provided they have met all applicable legal standards-regardless of the existence of practical alternatives which better respect black population concentrations and fully satisfy *Baker v. Carr, infra,* standards.

***14** This test, however, is not the law. Non-retrogression is an insufficient safeguard against the perpetuation of dilution, which can be judged best by a comparison of the challenged plan with preferred alternatives which, assertedly, minimize dilution while respecting other first principles.

Critically here, partisan intent, not non-retrogression, informed the use of multi-member districts in Marion, Lake and Allen Counties, Pl's Ex. 230. As legislators testified at their depositions, they did not seriously examine single member districting plans to determine whether same could achieve less dilution and fragmentation of black population.

(vii) "Non-Retrogression" Did Not Require the Political Gerrymander in Marion County

Appellants suggest that the legislative decision to create or retain 15 House seats dominated by Marion County related, somehow, to the implementation of the non-retrogression principle. This claim is totally unsupported by, indeed, it is contrary to, the record. Republican legislators admit that maintaining these 15 seats in five three-member districts, allowed their party to keep "safe" control over 12 of them.

As the Crawford map demonstrates, Marion County had a 1980 population sufficient to support 13.8 House seats, not 15. (A-15, n. 1). The County could have been re-districted into 14 seats, without the needless and injurious crossing of county lines. At the same time, *four* majority black districts could have been formed. This alternative conclusively shows that dilution could have been *avoided* entirely without the use of multi-member districts or the traversing of county lines. Appellants' contention (Brief at 28-29) that adhering to the non-retrogression principle somehow entailed the politically motivated maintenance of 15 legislative seats for Marion County is simply baseless and dishonest.

***15 (viii) Shifting Black Population in Urban Areas Does Not Excuse the House Plan's Racial Dilution**

Finally, the Republicans suggest that changes in the patterns of black population concentration made quite difficult the retention of even three majority black seats in Marion County or two in Lake County and that only their sincere commitment to non-retrogression impelled the Republican majority to maintain the previous number of black majority districts. In support of this contention, appellants show that black population substantially decreased in the former (1972) black-majority districts.

Again, appellants' contention is frivolous. Black population migrated into northeast Marion County during the 1970's. Blacks left neighborhoods once constitutive of the core urban ghetto, increasing substantially the minority populations of contiguous, formerly white areas. Grofman (Tr. II, p. 261); Campbell (Tr. II, pp. 175-176). However, while its epicenter shifted, black population *remained* heavily segregated and concentrated *within* Marion County.

The consequence of this shift for the possibility of black majority districts is best measured by the Crawford and Carson plans' ability, fully complying with other cardinal redistricting principles, to create four majority House districts and two majority black senatorial districts in Marion County and a like number in Lake County, concerning which appellants advance the same baseless demographic claim. That these districts could be formed, subsuming all black population concentrations, entirely refutes appellants' argument that black mobility made more difficult the creation of black majority districts or, put another way, made necessary the kind of fragmentation of black population concentrations evident in the House and Senate plans, *Accord, Major v. Treen,* 574 F. Supp. 325 (D.La. 1983), or the partisan gerrymander engineered by the majority.

In short, appellants' contention that they had to harm non-black Democrats to protect blacks is belied both by the ***16** extremely negative effects of their plan upon blacks and the beneficial consequences for minority voting strength of the Carson and Crawford plans, both of which received strong Democratic Party support.

C. *The House Plan Used Multi-Member Districts Without the Semblance of a Governmental Purpose*

As described above, the Indiana House plan selectively used multi-member districts-in some urban areas and not in others; [13] in some locales where such districts had been in use previously and not in others; [14] in some areas where doing so required combining very rural townships with highly urbanized areas from a different county. [15]

The district court correctly found that the use of multi-member districts in Indiana served no "governmental purpose," as that term has been used in prior cases before this Court. Pl's Ex. 232; Sutherline Dep. pp. 79-82; 86-87; Campbell Dep. pp. 35-92; Dailey Dep. pp. 22, 29; *Zimmer v. McKeithen,* 485 F. 2d 1297 (5th Cir. 1973); *cf. Whitcomb v. Chavis,* 402 U.S. 363 (1972) (county *qua* county represented through the use of multi-member districts).

Contrary to their suggestion that "the combined use of single districts and multi-member districts is quite common in legislatures occurring in 13 states in 1981," appellants' own expert conceded (a) that for state legislatures, multi-member districts are increasingly uncommon and (b) that after the 1980 round of redistricting, only six states used a majority of multi-member districts along with a majority of single member districts, as did Indiana. Grofman (Tr. II, pp. 258-260).

***17** Each Indiana state legislator who played a substantial role in structuring the challenged House plan, as well as their staffs, were asked at depositions to provide explanations and rationales for each multi-member district. No rationale (except the forwarding of partisan advantage), [16] was adduced, other than an occasional "that's the way the district was." When asked whether they had made any inquiry as to why a multi-member district had been used originally or for how long the particular multi-member district had been in use, the legislators and their staffs invariably did not have any idea. (Campbell, Tr. II, pp. 172-173). Appellants' expert had "no knowledge" of the purpose for which the State House used multi-member districts. Grofman (Tr. II, p. 259).

With respect to the impact of multi-member districts upon blacks in Allen and Marion Counties, Magnus, the Chair of the House Reapportionment Committee, knew of no community of interests furthered by the combination of Allen County's predominantly urban area (once itself divided in half) with the rural communities to the North and South. (A-16). Magnus stated that he had been to Fort Wayne once at 2:00 A.M.; that he "guessed" that the townships in adjacent counties which he had connected up with the city were "rural"; that he had no idea whether the blacks divided by the House plan lived contiguous to one another and was ignorant as to the racial impact of the plan. Likewise, when asked similar questions concerning the racial impact of the multi-member districts in Marion County, Campbell, the chief House staff member, admitted that the question of whether electoral districts which less fragmented blacks could have been drawn was an "empirical" one and that he had never drawn single member districts to determine the possibilities of that structure.

***18** Appellants defend multi-member districts on the ground that they forwarded the "neutral criterion" of "least change plan." In the same breadth, appellants state that, where incumbents agreed, the House leadership converted former multi-member districts into single member districts. This weak justification for multi-member districts cannot survive their discriminatory partisan and racial impact.

Nowhere have appellants suggested why multi-member districts are used or should be used in Indiana. Nowhere have appellants articulated any governmental purpose forwarded by them. Moreover, the ease by which incumbent legislators could convert these districts to single member districts substantially undermines any suggestion that the legislature was committed, in principle, to the concept of "least change plan." Campbell (Tr. II, p. 174) (on change of district 11 from multi-member to single member district). Even if the principle of adherence to least change plan had more substantial basis here, as appellants' expert conceded, this concept is "certainly not" a principle which weighs as heavily as non-dilution of minority voting strength. (Tr. II, p. 270).

Against this weak rationale, appellees suggest that multi-member districts group unlike constituencies; dilute minority voting strength; reduce legislative accountability and diminish the effectiveness of these legislators given broader geographic territory and more people to service. Republican architects of the House plan, *themselves all from single-*

member districts, agreed with these criticisms of multi-member districts in Indiana. Mangus Dep. at 79-80; Sutherline, Dep. at 159.

The absence of a substantial state purpose or policy in support of multi-member districts, when combined with the discriminatory impact caused by them, strongly points to their unconstitutionality, as found by the district court. *Major, supra,* at 352.

***19 III.**

Under Current Constitutional Standards, Indiana Intentionally Discriminated Against Blacks in Adopting the Challenged Redistricting Plans

In light of the foregoing analysis which demonstrates the disadvantages to black voters as a group of multi-member districts and the lack of governmental justification for them, black appellees submit that the continued use of multi-member districts violates the Equal Protection Clause of the Fourteenth Amendment. [17]

Below we show first that voting is a fundamental right, not only for individuals, but for protected racial groups, as groups; that blacks are such a protected class due to the nation's legacy of slavery and racial discrimination and that where, as here, the fundamental rights of a protected class are minimized or cancelled out, a State must provide compelling bases for the challenged action. *Gaffney v. Cummings,* 421 U.S. 751 (1975). Since Indiana has adduced no rational, let alone compelling, basis for its use of multi-member districts, its House plan should be held unconstitutional under the Equal Protection Clause.

We next submit that under the standards set out in *Arlington Heights v. Metro Housing Center,* [18] 429 U.S. 252 (1976), Indiana's exclusionary enactment of redistricting plans which (a) selectively use multi-member districts and (b) fragment minority population concentrations while ***20** claiming adherence to communities of interest in drawing district lines, was racially discriminatory and, thus, a violation of the Fourteenth Amendment. [19] This argument forms yet another independent basis of support for the district court's ultimate conclusion that the House and Senate plans are unconstitutional under the Fourteenth Amendment.

A. *Voting Is a Fundamental Right and the Deprivation or Minimization of the Right to Effectively Vote, Particularly Against Members of a Protected Group, Requires a Compelling Basis*

As this Court reaffirmed earlier this Term, *Hunter v. Underwood,* 53 L.W. 4468 (4/16/85), the right to vote is fundamental to our democratic system of self-government. *Harper v. Va. Board of Elections,* 383 U.S. 663, 667 (1966), *Yick Wo v. Hopkins,* 118 U.S. 370 (1886). ("Though not regarded as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless, it is conceded a fundamental political right, because preservative of all rights.")

The Fourteenth Amendment requires equality of weight for each voter. *Baker v. Carr,* 369 U.S. 186 (1962). This principle applies to Congressional districting and, with slightly less stringency, to State legislative and municipal apportionment as well.

And, this Court has recognized that gerrymanders, intended to diminish or cancel out a racial or political group's electoral strength, may be unconstitutional. *United Jewish Organizations v. Carey,* 430 U.S. 144, 166 (1977); *Chapman v. Meier,*

420 U.S. 1, 19 (1975); ***21** *White v. Regester,* 412 U.S. 755, 765 (1973);[20] Note, *At-Large Elections,* 41 Albany Law Review, 363, 370 (1977) ("True responsiveness remains a fiction and minority voting nothing more than an exercise in futility if a voting scheme prevents the collective voice from effectively making known its needs within the democratic political process. One person's vote, though it be the absolute equal of another's cannot alone preserve anything but the status quo. Only with a collective voice can civil rights be preserved.")

Since individuals are able to achieve political goals through groups and as politics is an ongoing struggle between competing groups, courts must safeguard the political arena against gerrymanders which threatens to fence out or substantially diminish the electoral possibilities of discrete and insular minorities. *Rogers v. Lodge, supra.,* at 1019; *Fortson v. Dorsey,* 379 U.S. 433 (1965). Where plaintiffs adduce substantial proof that a redistricting plan selectively employs devices which effectively dilute the voting rights of a protected minority, courts have required the plan's advocates to justify its use of such techniques by reference to neutral principles. *Cosner v. Dalton, supra.; Busbee v. Smith,* 549 F. Supp. 494, 517 (D.D.C. 1982) (". . . the absence of a legitimate, non-racial reason for a voting change is probative of discriminatory purpose, particularly if the factors usually considered by the decision- ***22** maker strongly favors a decision contrary to the one reached.")[21]

Where a legislature exclusively uses multi-member districts in the districting of its lower House, no suspicion arises that this technique has been chosen to harm one group or another. This is so because, though multi-member districts may inherently submerge minorities, their *consistent* use may be justified by reference to arguments and purposes generally and positively associated with multi-member districts, i.e., their assistance in focusing voters on broad issues of importance to the entire community or their role in developing identification with a political subdivision, rather than with its components.[22]

However, where multi-member districts are selectively employed, particularly where the vast majority of a lower house's districts are single-members, suspicion naturally arises as to the legislature's reasons for using multi-member districts at all. And, if, as in Indiana, further inquiry demonstrates that such districts have been used to disadvantage all substantial concentrations of minority voters, the state has the burden to explain why it chose this pattern of redistricting.[23]

In this setting, the State cannot adduce "general" reasons to justify its selective use of multi-member districts. ***23** *Cosner, supra*. For, if such reasons had actual currency, or in fact, had motivated it, the legislature could not explain the infrequency of its employ of such districts.[24] In other words, resort to general representational rationales, as parrotted by appellants, for the selective use of multi-member districts, must fail.

Instead, the state will have to show the specific circumstances which occasion and justify each instance of multi-member districting. "In evaluating equal protection challenges to districting plans, just as in resolving such attacks on other forms of discriminatory action, I would consider whether the plan has an adverse impact on an identifiable political group, whether the plan has objective indicia of irregularity, and thus, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole." *Karcher v. Daggett,* 102 S.Ct. 2653, 2670 (1984) (Stevens, J., concurring).

The nature of the State's evidence must not be general, but must differentiate the specific areas where it used multi-member districts from the many more numerous occasions when it did not. Put another way, "A tenuous state policy supportive of a particular districting scheme is probative on the question of the fairness or unfairness of that scheme's impact on black voters." *Major v. Treen, supra,* at 352.

In Indiana, the state could not articulate any convincing explanation for the "pattern" of its House redistricting plan. The district court's finding in this regard is amply supported on the record. Moreover, the plan's Republican architects admitted that they represented single-member districts; believed that such districts afforded greater accountability ***24** to voters and had made no effort during the 1981-82 redistricting process to convert *their* single-member districts to multi-members. This only confirms the general preference for such districts shown most clearly by the number of single-member districts (61) in the plan and makes even more acute the state's unmet obligation to justify its selective use of multi-member districts.

At least implicitly, the majority party understood the need to make such a particularized argument in defense of multi-member districts. At trial, House staff member Campbell testified that the high costs of media buys in urban areas justified the creation of multi-member districts. Unfortunately for this suggested rationale for multi-member districts, the record discloses that no candidate for State Senator from Lake or Marion Counties has ever employed television ads. Moreover, those who testified on the question of campaign costs, whether Republican or Democratic, stated that campaigning in multi-member districts is much more costly than in single-member districts.

Appellants also assert that the criteria of "least change plan" justifies the continued use of multi-member districts in urban areas. But, as discussed fully above, adherence in the House plan to this principle was, itself, quite imperfect. Throughout the redistricting, Republican leaders stood prepared to dismantle multi-member districts at the request of their incumbents. Finally, the specific multi-districts created in Marion and Lake Counties made substantial changes from pre-existing districts.

In short, the State has provided no rational, let alone compelling, basis for its very selective use of multi-member districts. Dismantling these districts and their replacement by a fair plan, which does not dilute black electoral strength, would likely cause a loss to the Republican party of several seats in the House. But while motivating the creation and maintenance of such districts, this possibility hardly affords a compelling governmental justification for ***25** a plan which treats black voters differently from white voters, substantially submerging the formers' group voting strength as well as the value of the ballot to black voters. And where only such a partisan loss measures the nature of the 'state interest', the Constitution cannot permit this differential treatment of black as opposed to white voters. Indeed, adherence to the state's redistricting principles, i.e. respect for communities of interest compels the elimination of the selectively used multi-member districts.

B. ***Application of Arlington Heights Standards Supports the District Court's Conclusion***

Above, we have shown that as voting is a fundamental right and blacks a protected class, the use of gerrymanders which disadvantage blacks as a group must meet a standard of compelling or at least substantial state or governmental interest. Indiana fails whichever standard applies and its House and Senate redistricting plans are unconstitutional under the Equal Protection clause of the Fourteenth Amendment.

A second form of Fourteenth Amendment analysis supports the same ultimate conclusion. Courts have increasingly recognized the importance of evaluating both the process of legislative enactment or administrative decision-making as well as the substantive standards embodied in legislation or administrative action in judging the constitutionality of actions which disproportionately disadvantage and unequally treat blacks. *Hunter, supra,* at 4469; *Arlington Heights, supra,* at 266-267. Holding government to a standard of regularity serves to insure the consistent application of substantive principles as between groups through settled procedures. On the other hand, divergence from either procedural norms or generally applied rules of decision, where same disadvantages racial minorities, raises considerable suspicion of discrimination.

While the first constitutional argument does not focus on intentionality, but rather weighs the nature of the right ***26** in question and the group disadvantaged by the challenged state action against the magnitude of the state interest, the second focuses directly, if often only by inference, upon legislative intent.

Here, the disproportionate impact of the use of multi-member districts (81% of Indiana's blacks are grouped in multi-member districts against 35% of the State's white persons), when combined with both procedural and substantive departures from generally applied procedures and principles, supports the conclusion that Indiana's legislature harbored racially discriminatory intent. The closed nature of the redistricting process precluded participation by black members of the General Assembly. The short shrift the Republican majority gave to alternative districting proposals, as developed by black legislative leadership, belies any legislative intent to fairly and deliberatively consider serious alternatives and indicates, instead, a pre-determination to reject proposals deemed favorable by and to racial minorities. Finally, the last minute presentation of the majority plans confirms that those in charge sacrificed any semblance of procedural fairness before the twin altars of racial and partisan advantage. *Major v. Treen, supra*.

Likewise, while using single member districts in the vast majority of districts, the House employed multi-member legislative districts in *every* area of substantial black population concentration. Simultaneously, the House architects converted several other cities from multi-member to single-member districts.

In addition, while the both Senate and House plans group geographic areas based on community of interests, both needlessly fragment black population concentrations which share strong communities of interest, further contributing to the submersion of black political strength. *Busbee, supra,* at 501; *Major, supra,* at 335.

***27** Combining these results with the depicted legislative history proves that the State legislature harbored discriminatory intent sufficient to support the district court's declaration that the challenged plans are unconstitutional. As Justice Stevens wrote in *Karcher, supra,*

> [Where] a state is unable to respond to a plaintiff's prima facie case by showing that its plan is supported by adequate neutral criteria . . . a court could properly conclude that the challenged scheme is either totally irrational or entirely motivated by a desire to curtail the political strength of the affected political group.

Application of this standard to the claim of black appellees in Indiana supports the conclusion that the State has intentionally discriminated against them and that the district court's declaration of unconstitutionality should be affirmed.

CONCLUSION

For the foregoing reasons, the district court's opinion finding Indiana's 1981-82 State redistricting unconstitutional should be affirmed.
Respectfully submitted,

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Footnotes

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1 We note that the majority opinion below does not discuss black plaintiffs' section 2 claims nor weigh with any care the evidence adduced by black plaintiffs at trial concerning such issues as Indiana's history of racial segregation and discrimination; the closed nature of the slating process to blacks; the lack of participation by blacks in the Republican party leadership and the unresponsiveness of House and Senate Republican majorities to legislation of particular interest and concern to blacks.

2 Under the House plan, 43% of the state's black population reside in majority black districts, while the Crawford plan, *infra,* placed 59% of the black population statewide in black majority districts. (Tr. II, p. 16). For the Senate, the State's plan placed 34% of Indiana's blacks in black majority districts while the Carson plan, *infra,* placed 62.5% of blacks in majority black State senatorial districts. (Tr. II, p. 17). The notion that the challenged plans fairly treated blacks is simply without any foundation.

3 No black Republican serves in the House or Senate. As the district court correctly found, and as appellants concede, black voters overwhelmingly support Democratic candidates and this was known to all the legislators involved integrally in redistricting.

4 The Indiana legislature, Republican operatives knew, had sophisticated computers, but they chose to ignore these and work outside the legislative structure. (Sutherline Dep. pp. 21-23).

5 Pl's Ex. 218 shows that the Senate Bill, #80, was filed by the Reapportionment Committee on April 29, 1981 and adopted on April 30, 1981, while the Conference Report on the House Bill was filed on April 30, 1981 and voted upon by the full House the same day, the session's last under State law. (Tr. II, p. 21). Democratic legislators did not see the respective plans until they were presented on the floors of the House and Senate.

6 Rather disingenuously, appellants suggest that the technique of using vehicle bills to create a phony conflict between the House and Senate for the purpose of creating an exclusively partisan conference committee had been employed nine times in 1981 by Democrat O'Bannon: this argument fails for, in 1981, O'Bannon, as a member of the minority party, lacked the capacity to form a conference committee or to get a vehicle bill passed without Republican support. These powers are held by the majority party.

7 The legislature still had to make changes in the State's plans during the 1982 session and the blacks offered their plans as alternatives when the Republican leadership re-introduced their plans for needed changes in early 1982.

8 Led by Crawford, the legislature's black caucus had introduced legislation requiring single-member districts in the House since 1975. At trial, Crawford testified that, throughout the annual legislative debates on his proposal, “There was no statement made by any legislator that I can recall giving any reasons supporting multi-member districts.” (Tr. II at 85). *Also see* corroborative testimony by Rep. Day. (Tr. II, pp. 279-280).

9 As appellant's expert Grofman explained, “You measure fragmentation in two different ways. One, you measure fragmentation with respect to the number of black districts relative to the total black population in the area. And secondly, you measure it by looking at the extent to which substantial concentrations of black population have been preserved.”
“Q. And substantial black populations have been fragmented?

A. Yes."
(Tr. II, p. 269).

10 The five triple member districts in Marion County and the two in and around Allen County are the House plan's only three-member districts. These districts cross county lines, while the Crawford plan's treatment of the same major counties avoids this consequence.

11 These two districts are two-members in the House plan.

12 Black plaintiffs did not argue for proportional representation, either in the legislature or at trial. Instead, they asserted that where blacks are residentially segregated and live in contiguous precincts, any redistricting plan should not needlessly fragment such population concentrations, thereby reducing the chance of the minority gaining substantial expression in the State House and Senate.

13 For instance, in Elkhart; Evansville and South Bend, multi-member districts were discontinued in the 1981 House plan.

14 State Exhibit EE shows this very checkered and erratic history.

15 Examples include districts 7, 19, 20 and 75.

16 With regard to district Nos. 9 (Dailey Dep. pp. 37-38); 10 (Dailey Dep. pp. 38-39); 19 and 20 (Mangus Dep. 86 and Dailey Dep. p. 52); 48-52 (Mangus Dep. p. 92; Dailey Dep. 63, 31-32, 34), the architects of the House plan expressly conceded partisan motivation in the use of the multi-member district.

17 The district court found the challenged plans violated the "fair and effective representation" clause of the 14th Amendment in part due to the use of multi-member districts. We support its conclusion that, as used, multi-member districts are unconstitutional though, as is shown below, we submit that this conclusion is correct for different reasons.

18 In *Rogers v. Lodge,* 458 U.S. 613, 618 (1982), the Supreme Court expressly recognized the applicability of *Arlington Heights* analysis in voting rights cases.

19 In understanding this claim, it is critical to note that *whereever* blacks were sufficiently populous to form House districts, multi-member districts were used.

20 As opposed to the claims made in these cases and in the instant case, *Whitcomb v. Chavis,* 402 U.S. 363 (1972), did not involve an alleged gerrymander, but rather the claimed effect on black voters of a plan which created 15 at-large House seats for Marion County. Plaintiffs in *Whitcomb* specifically acknowledged that their claim did *not* involve an assertion that the plan's framers intended to discriminate against blacks. Moreover, plaintiffs failed to prove that whites elected at-large in the County were generally unresponsive to black political, social or economic interests. On the contrary, black appellees argued below that the current plan intentionally diluted black voting strength and that the House delegates from Marion County have been terribly unresponsive to black interests.

21 At the same time as proscribing the intentional dilution of the voting rights of protected groups, the court has never endorsed the concept of proportional representation for such groups. *City of Mobile v. Bolden,* 446 U.S. 55, 78-79 (plurality opinion of Stewart, J.); at 86 (Stevens, J., concurring); *Chapman v. Meier, supra*.

22 In such cases of exclusive and general use, multi-member districts could still be challenged as intentionally diluting minority voting strength, but the State could assert at least a rational bases for their use.

23 This burden should be particularly heavy where multi-member districts are combined with the fragmentation of black population concentrations, itself an independent violation of Section 2. *Busbee v. Smith, supra*.

24 "Substantive departures too may be relevant (to a finding of intentional discrimination), if the factors usually considered important by decision-makers strongly favor a decision contrary to the one reached." *Arlington Heights, supra*.

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