1985 WL 670008 (U.S.) (Appellate Brief)
Supreme Court of the United States.

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

No. 84-1244.
October Term, 1984.
March 4, 1985.

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

Amicus Curiae Brief of the Members of the California Democratic Congressional Delegation

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QUESTION PRESENTED

Did the court below violate the principles of *Ashwander V. Tennessee Valley Authority,* 297 U.S. 288 (1936) and *Railroad Commission of Texas V. Pullman Co.,* 312 U.S. 496 (1941) in inadequately evaluating federal statutory issues and ignoring state constitutional issues that could have obviated the need to reach out to create a new purported federal constitutional claim for "partisan gerrymandering" that is in conflict with controlling decisions of the circuit of the court below and with the teachings of this Court?

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*1 SUMMARY OF ARGUMENT

As this Court observed in *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944):

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.

See also Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) and cases cited, *infra,* in Section I.

In this case, the district court was faced with alleged violations of the Indiana Constitution, the Voting Rights Act and the novel federal constitutional claim that complaints of partisan gerrymandering are within the purview ***2** of the

Equal Protection Clause. The district court stood the principle of *Ashwander* and *Spector Motor Service* on its head, and reached out, over a federal statute and a state constitution, to make new and erroneous constitutional law. The court's error was three-fold.

First, the court gave only casual attention to the Voting Rights Act claim and failed to evaluate the districts in terms of the recognized statutory criteria. Then, despite finding that the challenged multi-member districts had "hard and harsh" disadvantaging effects on black voters, the court analyzed this disturbing finding only in terms of its partisan gerrymandering theory, dismissing the Voting Rights Act claim on the basis of an intent test abandoned by the 1982 amendments to the Act. The court's offhand treatment of this statutory claim has deprived this Court of an adequate basis for review.

Second, the court utterly failed to consider the plaintiffs' claims that the Indiana legislative districts violated the state's own constitution. While this Court has refused to place the burden of resolving partisan disputes about the fairness of redistricting plans on the shoulders of the federal courts, it has noted and approved efforts by the states to tame partisan zeal within their boundaries. Because of the sensitive state policies at play in the redistricting process and the nascent state of Indiana law in the area, the district court should have carefully considered whether the abstention doctrine of *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 (1944), counseled it to permit the Indiana courts the opportunity to pass on the state issues, which could have obviated the perceived need to make new constitutional law. Even if abstention had not been strongly indicated, the district court clearly was obliged to consider carefully the state constitutional claims. It nowhere did so.

Third, once it had forced the partisan gerrymandering issue upon itself, the court failed to evaluate the threshold ***3** justiciability issue, ignoring controlling authority and fundamentally misconstruing the import of *Karcher v. Daggett,* 462 U.S. 725 (1983).

Accordingly, this Court should summarily vacate the judgment and order below, and remand this case for further consideration in light of these principles.

ARGUMENT

I

THE DISTRICT COURT FAILED PROPERLY TO CONSIDER THE PLAINTIFFS' VOTING RIGHTS CLAIM.

The plaintiffs below alleged violations of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (as amended), as well as violations of the Fourteenth and Fifteenth Amendments. In its zeal to reach out to make new constitutional law, the district court devoted only the most perfunctory analysis to this statutory claim before dismissing it. *See* Juris. Stmt. Appx. A-18-20. The dismissal was wholly grounded on the court's conclusion that while the challenged plans indeed had harsh disadvantaging effects on black voters, the drafters of the plan intended to disadvantage these voters because of "their politics and not because of their race." *Id.* at A-20. Dismissal of the Voting Rights Act claims on this basis fundamentally misapprehended the Act. The judgment should be vacated and the case remanded for proper factual and legal consideration of the plaintiffs' statutory claims, which could obviate the need for this Court to decide the case on constitutional grounds.

The court's factual findings on the race discrimination claims are incomplete at best. Nonetheless, they certainly ***4** suggest that the court found that the challenged redistricting plans had significant discriminatory effects. The findings include the following:

1. "The disadvantaging effect of the plan's multi-member districts falls particularly hard and harsh upon black voters in the state." Juris. Stmt. Appx. at A-18.

2. "Among blacks, 81.2 percent of the population resides in multi-member districts. An estimated 65 percent of the white population, by comparison, resides in single member districts. In addition, other evidence indicates that only 43 percent of the blacks living in multi-member districts live in so-called minority/majority districts, *i.e.,* they reside in the district where blacks comprise a majority of the voters." *Id.*

3. "The multi-member district approach is particularly effective in 'stacking' blacks into large majority districts and fragmenting their population among other districts." *Id.* at A-19.

4. The Indiana plan "had a significantly adverse impact upon black voters." *Id.* at A-20.

5. "The majority party through the use of multi-member districts stacked or split concentrations of black democratic voters so that their elective power would be minimized." *Id.* at A-30.

Despite these disturbing findings, the majority summarily rejected the NAACP plaintiffs' claims, apparently on the theory that the "harsh" and "significantly adverse" effect on black voters was not directed against blacks *qua* blacks, but rather against blacks as voters "likely" to vote for Democratic candidates.

This analysis of the defendants' animus is, of course, irrelevant to the proper disposition of the plaintiffs' Voting Rights Act claims. It is well recognized that the 1982 amendments to Section 2 of the Voting Rights Act relieved ***5** plaintiffs of the often insurmountable task of proving discriminatory intent. *See* Pub. L. No. 97-205, § 3, codified at 42 U.S.C. § 1973(b) (1982). A Section 2 claim can be established by showing that the challenged "structure or practice *results* in a dilution of minority voting power." *Major v. Treen,* 574 F. Supp. 325, 350 (E.D. La. 1983) (emphasis in original). Determination of such dilution is to be determined under "the totality of circumstances." 42 U.S.C. § 1973(b) (1982).

From the desultory factual findings of the district court, it is impossible to determine whether a Voting Rights Act violation did or did not occur. [1] It is, however, quite clear that the district court erred when its haste to reach the partisan gerrymandering claim led it to dismiss the Voting Rights Act claim on the basis of its conclusions about the defendants' motivations. It is equally clear that a fundamental tenet of federal jurisprudence is that a federal court should never ignore a valid statutory claim in preference to a decision on a federal constitution ground; rather, in order to preserve and properly delimit the power of federal judiciary, the court should decide cases on statutory rather than constitutional grounds. *See City of Mobile v. Bolden,* 446 U.S. 55, 61 (1980) (lower court failed to address Voting Rights Act claim) (plurality); *New York City Transit Authority v. Beazer,* 440 U.S. 568, 583 (1979); *Rescue Army v. Municipal Court,* 331 U.S. 549, 568-69 (1947); *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944); *Ashwander v. Tennessee Valley* ***6** *Authority,* 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). [2] As the court wrote in the *New York Transit* case:

"If there is one doctrine more deeply rooted than any other in the process of constitional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." [citation] Before deciding the

constitutional question, it was incumbent on those courts [the district court and court of appeals] to consider whether the statutory grounds might not be dispositive.

New York Transit Authority v. Beazer, supra, 440 U.S. at 583 (footnote omitted).

This Court recently affirmed these principles in *Escambia County, Florida v. McMillan,* 466 U.S. 48, 104 S. Ct. 1577 (1984). In that case, black voters challenged the at-large system for electing Escambia County commissioners under the First, Thirteenth, Fourteenth and Fifteenth Amendments, the Civil Rights Act of 1957, and the Voting Rights Act. The district court found that the at-large system intentionally disadvantaged black voters and that the scheme violated the Fourteenth and Fifteenth Amendments and the Voting Rights Act. The court mandated single member districts. The court of appeals affirmed this judgment and order, but did so solely on Fourteenth Amendment grounds. The court concluded that the finding of the Fourteenth Amendment violation obviated the need to review the lower court findings under the Fifteenth Amendment or under the Voting Rights Act. 104 S. Ct. at 1577-78.

This Court declined to review the question apparently presented by the appeal. Noting the lower court's failure ***7** properly to consider the Voting Rights Act claim, the Court stated:

> Affirmance on the statutory ground would moot the constitutional issues presented by the case. It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case. See *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347, 56 S. Ct. 466, 483, 80 L. Ed. 688 (1936) (Justice Brandeis concurring).

104 S. Ct. at 1578-79. Accordingly, the Court vacated the judgment and remanded the case for consideration under the Voting Rights Act.

In this case, the district court "never explained [its] haste to address a naked constitutional issue despite the presence in the case of alternative statutory issues." *New York Transit Authority, supra,* 440 U.S. at 583 n.23. As in *Escambia County,* this case presented a Voting Rights Act claim that could have invalidated the redistricting plan at issue and thereby obviated the need to reach any novel constitutional issues. Unfortunately, the district court's enthusiasm to make new constitutional law has deprived this Court of adequate findings on which to conduct review of the statutory claim. Accordingly, the Court should summarily vacate the judgment below and remand the case for proper consideration of the plaintiffs' Voting Rights Act claims.

***8 II**

THE COURT BELOW ERRED IN FAILING TO ADDRESS THE PLAINTIFFS' CLAIMS OF PARTISAN VOTE DILUTION UNDER THE INDIANA CONSTITUTION AND IN FAILING PROPERLY TO CONSIDER THE *PULLMAN* ABSTENTION DOCTRINE IN CONNECTION WITH THOSE CLAIMS.

While the federal courts have been steadfast in their refusal to consider claims of "partisan gerrymandering" under the federal constitution, [3] the courts have in no way impugned attempts on the state level to restrain partisan zeal. *See, e.g., Karcher v. Daggett,* 462 U.S. 725, 103 S. Ct. 2653, 2660 n.6 and 2663 (1983) (noting and approving state requirements that districts be compact, respect local governmental boundaries, preserve cores of prior districts and avoid contests between incumbents; interpreting these as "steps to inhibit gerrymandering"). For instance, while the federal constitution does not require "compactness", *Gaffney v. Cummings,* 412 U.S. 735, 752 n.18 (1973), many states have enacted it and

similar limits on the redistricting process.[4] Other states have constitutional provisions that permit dissatisfied voters, via popular referenda and initiatives, to strike down laws, including redistricting laws, of which they do not approve or to enact ***9** provisions more to their liking.[5] Several states have gone so far as to take the redistricting task away from their legislatures and place it in the hands of what are hoped to be "neutral" commissions.[6] Finally, recognizing the basic intractability of providing "fair" representation to all cognizable political groups in the context of single-member, geographically based districts, some states and local governments have adopted proportional representation systems like those used in some European democracies.[7] Thus, the states are a fertile area for experimentation with ***10** responses to the often-invoked claim of partisan gerrymandering.

In this case, the plaintiffs asserted, in addition to their novel federal constitutional theory, two state constitutional grounds which they believed would invalidate the redistricting statute that they believed to threaten their political aspirations. Specifically, the plaintiffs alleged that the Indiana redistricting plans violated article II, § 1, and article IV, § 6 of the Indiana Constitution. Juris. Stmt. Appx. at A-51, 52. Article II, § 1 provides that "[a]ll elections shall be free and equal." This phrase has been interpreted by the Indiana Supreme Court to require that "the vote of every elector [be] equal in its influence upon the result to the vote of every other elector." *Blue v. State ex rel. Brown,* 206 Ind. 98, 114, 188 N.E. 583, 589 (1934), *overruled on other grounds, Harrell v. Sullivan,* 220 Ind. 108, 40 N.E.2d 115 (1942). Article IV, § 6 provides that "[a] senatorial or Representative District, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for Senatorial apportionment, shall ever be divided." So far as *amici* are aware, the Indiana courts have not had an opportunity to construe either of these constitutional provisions in the context of the claim of partisan gerrymandering. In such circumstances, the district court should have given careful attention to the abstention doctrine of *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 498 (1941).[8]

An exhaustive discussion of the *Pullman* abstention doctrine is obviously beyond the scope of this amicus brief. Simply stated, the doctrine counsels abstention where the presence of an unclear issue of state law could obviate the ***11** need to reach a federal constitutional issue that touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative is open. *See Railroad Commission of Texas v. Pullman Co., supra,* 312 U.S. at 498. Reapportionment, of course, is a peculiarly sensitive area of state social policy. *E.g., White v. Weiser,* 412 U.S. 783, 794-95 (1973); *Badham v. United States Distict Court for the Northern District of California,* 721 F.2d 1170, 1172, 1176 (1983). Moreover, the Indiana constitutional issues that plaintiffs raised are certainly unclear or susceptible of doubt - the Indiana courts have never addressed a political party's claim of invidious partisan discrimination under the State's constitution nor have they addressed the requirement to avoid unnecessarily splitting county units in this context. Plaintiffs undoubtedly asserted their Indiana constitutional grounds in good faith, correctly believing that, if established, they would void the redistricting plan their political party opposes. In similar circumstances, a recent Ninth Circuit panel, in an opinion by Judge Wallace, unanimously affirmed a unanimous abstention order rendered by a three-judge District Court. *Badham v. United States District Court, supra.*[9] Indeed, one of the three independent state grounds that supported abstention in the *Badham* case was a claim that the challenged redistricting plan split an excessive number of city and county units in alleged violation of article XXI of the California Constitution. *Badham, supra,* 721 F.2d at 1179. The plaintiffs' Indiana constitutional claim mirrors this claim. In the face of an unprecedented federal constitutional theory about partisan gerrymandering, the assertion of a ***12** state constitutional ground purportedly aimed at restraining exactly such partisan excesses provides a particularly compelling basis for invocation of the *Pullman* doctrine. At a minimum, the *Ashwander* doctrine obligated the district court at least to consider the state claims before reaching out to make new constitutional law.

The court below, propelled by zeal to decide a novel federal constitutional claim, failed to give adequate consideration to the teachings of *Pullman* and the distinct possibility that a decision under the Indiana Constitution could obviate the

need or desire to pioneer new federal constitutional law. The judgment should be vacated and the case remanded for consideration in light of these principles. [10]

***13 III**

THE DISTRICT COURT'S RUSH INTO THE POLITICAL THICKET IGNORED CONTROLLING PRECEDENT AND FUNDAMENTALLY MISCONSTRUED *KARCHER V. DAGGETT*

Some commentators have suggested that in *Reynolds v. Sims,* 377 U.S. 533 (1964), and *Wesberry v. Sanders,* 376 U.S. 1 (1964), the United States Supreme Court ventured into an impenetrable political thicket that would resist any attempt at judicial management. [11] They are wrong. The basic principle established in those cases is that state legislators and congressional representatives are to be elected from districts containing an equal number of individuals. This principle of equipopulous districts is readily managed by a judiciary equipped for rudimentary arithmetic. A quite different enterprise, however, was urged below in this case. The Democrats complained that they were entitled, as a group, [12] to be distributed over Indiana legislative districts in a manner that was likely to elect more representatives of their political affiliation. The claim is one for ***14** equally effective group representation, and lies at the very heart of the political thicket.

Judicial forays into this thicket have been exceedingly rare, and have so far been undertaken only on behalf of racial groups whose history of oppression strongly counsels special judicial vigilance. Even there, however, courts have acted only in the most extraordinary cases, when a dominant white government has effectively blocked black citizens from participation in the political process. These rare forays have produced some of the most anguished and divided opinions the Supreme Court has written, reflecting the intractability of the political issues involved. [13] Indeed, Justice Stevens has stated that unless the Court abandons its present Equal Protection analysis in favor of one now supported only by himself, such cases invite the Court into "a vast wonderland of judicial review of political activity." *Rogers v. Lodge,* 458 U.S. 613, 649 (1982) (Stevens, J., dissenting).

The district court, however, paid little attention to this Court's or any court's cautions about the political thicket. To justify its headlong rush to the heart of the thicket, it engaged in a fundamental misreading of *Karcher v. Daggett,* 462 U.S. 725 (1983), and failed utterly to consider the subsequent history of that case, including this court's disposition of a stay petition from the district court's order on remand. *Karcher v. Daggett,* 466 U.S. 910, 104 S. Ct. 1691, 1696-97 (1984).

A. The Courts Have Uniformly Refused to Adjudicate Partisan Gerrymandering Disputes.

The judicial authority against the justiciability of political gerrymandering is overwhelming. It includes a United States Supreme Court decision and a Seventh Circuit opinion that were controlling on the district court. The district ***15** court ignored these cases, however, believing that a judicial revolution had occurred in *Karcher v. Daggett, supra. Karcher* reflects no such reapportionment revolution.

The Supreme Court precedent that should have bound the district court is *WMCA, Inc. v. Lomenzo,* 382 U.S. 4 (1965). In that case, the district court upheld a redistricting plan for the New York state legislature against several federal constitutional claims, including one based on alleged partisan gerrymandering. This court summarily affirmed. Justice Harlan concurred in the affirmance and explained its significance:

> The three-judge court . . . rejected contentions that apportioning on a basis of citizen population violates the Federal Constitution, and that partisan "gerrymandering" may be subject to federal

> constitutional attack under the Fourteenth Amendment. In affirming this decision, this Court necessarily affirms these two eminently correct principles.

382 U.S. at 5-6 (emphasis omitted). Such a summary affirmance is binding on another three-judge court. *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975).

The controlling force of *WMCA* has been recognized by numerous lower courts, which have followed it in holding claims of partisan gerrymandering nonjusticiable. *E.g., Cousins v. City Council of the City of Chicago,* 466 F.2d 830, 844 (7th Cir.), *cert. denied,* 409 U.S. 893 (1972); *Ferrell v. State of Oklahoma,* 339 F. Supp. 73, 82 (W.D. Okla.), *aff'd,* 406 U.S. 939 (1972); *Meeks v. Avery,* 251 F. Supp. 245, 250-51 (D. Kan. 1966). Indeed, the lower courts have augmented the authority of *WMCA* by analyzing the justiciability problem for themselves. In the course of these analyses, they have identified the critical problem: the lack of judicially manageable standards.

***16** In *Wendler v. Stone,* 350 F. Supp. 383 (S.D. Fla. 1972), the court dismissed a complaint which alleged partisan gerrymandering, holding the claim nonjusticiable. The "critical criterion," the court said, was the lack of standards. First, voting statistics from past elections were "grossly unreliable when used for prognostication." [14] Second, if the court were to redraw district lines in the plaintiffs' favor, it would be subject to "'charges of judicial political gerrymandering.'" A plan that favors one interest group "would, however, exclude or divide certain other interest groups." [15] Third, the Constitution does not provide any guaranty of proportional group representation:

***17** [W]here the only alleged Constitutional defect is an envisioned weakening of an interest group's political strength, rather than any alleged deprivation of an individual's right to vote, no equal protection claim can be sustained. [16]

The court acknowledged that there is a "very limited right to representation" in cases where the alleged vote dilution was based on race or country of origin, but it attributed this right to the "special thrust" of the Civil War Amendments and the "specific concern of the Fifteenth Amendment for the voting rights of black citizens." 350 F. Supp. at 840-41.

Other courts agree with *Wendler* that past voting statistics are unreliable.

> Recent election figures . . . are only indicative of the voters' reaction to a particular candidate. . . Plaintiff's approach of a fixed Republican-Democrat society ignores the all-important factors, amongst others, of the candidate's personality, the public's conception of his ability and integrity and current issues which he may espouse, or offer to espouse, on behalf of his constituents.

Wells v. Rockefeller, 311 F. Supp. 48, 51-52 (S.D.N.Y.) (rejecting partisan gerrymandering challenge to congressional reapportionment), *aff'd,* 398 U.S. 901 (1970); *accord, Kilgarlin v. Martin,* 252 F. Supp. 404, 433 (S.D. Tex. 1966) ("only demonstrable way available to fathom the political inclinations of a certain area at any given time is ***18** at the ballot box on a given election day"), *aff'd in part and rev'd in part on other grounds sub nom. Kilgarlin v. Hill,* 386 U.S. 120 (1967).

The courts also agree that the least representative branch has no neutral basis on which to redraw district lines, and that the only remedy open to it is to engage in a "remedial gerrymander":

> It would seem impossible for a court to pass upon the validity of political interests without itself making a political judgment or appearing to do so . . . [I]t rests with voters, rather than the Court, to review the soundness of the partisan decisions which may inhere in the lines the legislature drew.

Ferrell v. State of Oklahoma, supra, 339 F. Supp. at 84 (quoting *Jones v. Falcey,* 48 N.J. 25, 33 (1966)); *accord, In Re Pennsylvania Congressional Districts Reapportionment Cases,* 567 F. Supp. 1507, 1517 (M.D. Pa. 1982) ("[t]he remedy lies in the ballot box, not in a federal courthouse"); *Wells v. Rockefeller, supra,* 311 F. Supp. at 51. [17]

Finally, the courts have been especially wary of claims that explicitly or implicitly invoke any right to proportional representation. *See City of Mobile v. Bolden, supra,* 446 U.S. 55, 79 (1980) ("the Court has sternly set its face against the claim, however phrased, that the constitution somehow guarantees proportional representation") (plurality); *Kilgarlin v. Martin, supra,* 252 F. Supp. at 432-33.

In sum, no court until the *Bandemer* court had ever held political gerrymandering to be justiciable. As one district court observed:

> The summons to us . . . to pursue the gerrymander into the depths of the political thicket is one which has been ***19** often ignored or declined by the Supreme Court: the trumpet has not given even an uncertain sound, it has lain all but mute.

Jimenez v. Hidalgo County Water Improvement District No. 2, 68 F.R.D. 668, 673 (S.D. Tex. 1978) (footnotes omitted), *aff'd,* 424 U.S. 950 (1976). The district court in the *Bandemer* case incorrectly concluded, however, that this Court had sounded the trumpet in *Karcher*.

B. The Opinions in Karcher in No Way Constitute a Precedent Making Claims of Partisan Gerrymandering Justiciable.

Karcher was not a case about gerrymandering; rather, it was a case about population equality. It was not tried on a gerrymandering theory, 103 S. Ct. at 2677 (Justice Stevens, concurring); the district court did not address gerrymandering, *id.* at 2690 (Justice Powell, dissenting); and the jurisdictional statement in this Court did not treat the gerrymandering issue. Justice Stevens and Justice Powell, however, did express, in dicta, their views that sufficiently egregious instances of partisan gerrymandering should be found to constitute a violation of the Equal Protection Clause. The district court, however, erroneously concluded that Justice White's dissenting statements disapproving of partisan gerrymandering evidenced a "willingness to analyse such claims under the Equal Protection Clause," Juris. Stmt. Appx. at A-43, and that the three justices who joined in his opinion concurred in that view. In so doing, the district court failed to acknowledge the subsequent history of the *Karcher* case.

As this Court well knows, on consideration of an application to stay the district court's order on remand, Justice Brennan, dissenting from a denial of the stay, stated unequivocally: "We have never concluded, nor in my view should we conclude, that the existence of noncompact or ***20** gerrymandered districts is by itself a constitutional violation." *Karcher v. Daggett,* 104 S. Ct. 1691, 1696-97 (1984). His opinion was joined by Justice Marshall and, significantly, by Justice White, on whose opinion the *Bandemer* court relied. Thus, of the Justices who commented on the partisan gerrymandering issue in *Karcher,* three reaffirmed this Court's historical unwillingness to entertain such claims, while only two opined that the rule should be changed. The district court's failure to take cognizance of the stay opinion, a matter of record months before it rendered its opinion, only underlines the court's precipitous approach to the justiciability issue in this case.

IV

CONCLUSION

For all the foregoing reasons, this Court should summarily vacate the judgment below and remand the case for consideration under the Voting Rights Act and the *Pullman* abstention doctrine.

Dated: March 4, 1985.
Respectfully submitted,

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Footnotes

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1 As the dissent correctly pointed out, the Senate Judiciary Committee report that accompanied the 1982 amendments set forth seven factors that courts should consider in evaluating a Section 2 claim. The opinion of the court declined to examine these factors.

2 In *Rescue Army v. Municipal Court, supra,* 331 U.S. at 568, this Court identified *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792) as the decisional forbear of this rule, whose rationale the Court found in the Article III of the Constitution.

3 *See* Section III, *infra,* for a brief discussion of the relevant authorities.

4 Almost half of the states require that districts be compact. *See Congressional Research Service, State Constitutional and Statutory Provisions Concerning Congressional and State Legislative Redistricting* (June 1981). According to the same report, twenty-nine states require contiguity. Redistricting statutes have run afoul of state compactness requirements. *E.g., Acker v. Love,* 178 Colo. 175, 178, 496 P.2d 75, 76 (1972); *In Re Legislative Districting of General Assembly,* 193 N.W.2d 784, 791 (Iowa 1972); *Preisler v. Doherty,* 365 Mo. 460, 284 S.W.2d 427 (1955).

5 *See generally* D. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment,* 26 U.C.L.A. L. Rev. 505, 509 n.7 (1982) (listing states which allow popular initiatives). The California example is perhaps best known. In 1981, President Reagan, the California Republican Party and the Republican National Committee took their political objections to the voters and led a successful referendum campaign against the state's new congressional districts. *See Assembly v. Deukmejian,* 30 Cal. 3d 638, *cert. denied and app. dismissed sub nom. Republican National Committee v. Burton,* 456 U.S. 941 (1982). When a new statute was enacted in 1982, the Republicans eschewed this political remedy, preferring to take their renewed objections to the federal courts in a suit charging the judiciary with the task of evaluating the Republicans' charge of unfairness. *See Badham v. United States District Court for the Northern District of California,* 721 F.2d 1170 (9th Cir. 1983).

6 According to an October, 1982 report by the National Conference of State Legislatures, eight states used commissions to design representative districts for the 1980's: Arkansas, Colorado, Hawaii, Missouri, Montana, New Jersey, Ohio and Pennsylvania. In California, State Assemblyman Don Sebastiani has recently announced plans for a state constitutional initiative that would replace the state's current districts with ones drawn by a "neutral" political consultant.

7 *See* A. Lijphart, *Comparative Perspectives on Fair Representation, the Plurality Majority Rule, Geographical Districting, and Alternative Electoral Arrangements,* 9 Pol'y Stud. J. 899, 913-14 (1981) ("Approximately 25 American cities have experimented

with [proportional representation systems] and Illinois used the cumulative vote . . . for the election of its lower house from 1870 to 1980."); *see generally* Note, *The Constitutional Imperative of Proportional Representation,* 94 Yale L.J. 163, 186 n.103 (1984).

8 A brief review of the record below indicates that defendants in fact made a motion under *Pullman*. The motion appears to have been ignored or summarily denied; no memorandum order discussing the issue appears in the record.

9 As the Court is aware, a petition for a writ of certiorari has been filed in this Court challenging the *Badham* abstention order. *Badham v. Eu,* No. 84-1226.

10 Of course, abstention is not to be undertaken lightly in a case claimed to involve the right to vote, *e.g., Badham, supra,* particularly in view of the fact that some such cases may be attended by exigency imposed by impending election deadlines. In this case, however, the district court's own order was to have no effect whatsoever on any impending election. Instead, the first elections that would be affected by the court's December 13, 1984 order are the 1986 elections, which were almost two years away - plainly an adequate time period in which to provide the Indiana courts an opportunity to decide the issue.

11 *See, e.g.,* Auerbach, *The Reapportionment Cases: One Person, One Vote - One Vote, One Value,* 1964 Sup. Ct. Rev. 1 (1964); Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr,* 61 Mich. L. Rev. 107 (1962); Sindler, *Baker v. Carr: How to "Sear the Conscience" of Legislators,* 72 Yale L.J. 23 (1962).

12 *See* Note, *The Constitutional Imperative of Proportional Representation,* 94 Yale L.J. 163 (1984), for a discussion of this distinction. The note concludes that efforts to insure equally effective group representation for the myriad political groups that comprise our society requires that the United States adopt a system of proportional representation like that employed in some European democracies. Academic commentators have increasingly concluded that equally effective group representation requires such a system of proportional representation. *See, e.g.,* A. Lijphart, "*Comparative Perspectives*" in *Representation and and Redistricting* at 155 (quoting Professor Dixon); J. Pennock, *Democratic Political Theory* 358 (1979).

13 *See, e.g., Rogers v. Lodge,* 458 U.S. 613 (1982); *City of Mobile v. Bolden,* 446 U.S. 55 (1980).

14 The district court acknowledged this fact, Juris. Stmt. Appx. at A-13, but then proceeded to base its analysis, in part, on assumptions about the identity of persons who would "align themselves with the Democratic Party" in future elections. *Id.* at A-26. These assumptions, of course, are based on voting statistics from past elections.

15 The most intractable political problem the courts would have would be to determine which groups are "identifiable" or "salient" enough to merit protection. As the plurality opinion in *Mobile v. Bolden* wondered:

Can only members of a minority of the voting population in a particular municipality be members of 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" 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?

City of Mobile v. Bolden, supra, at 79 n.26. Even worse, of course, are the problems that would inevitably confront the Court in evaluating claims from groups whose desire for "fair" representation conflicted with the claims of other groups. *See United Jewish Organizations v. Carey,* 430 U.S. 144 (1977) ("affirmative" gerrymandering for black voters alleged to have fractured Hasidic Jewish community's vote).

16 Suggestions for judicial resolution of partisan gerrymandering claims are all ultimately grounded on proportional representation. Any concept of "vote dilution," in order to be intelligible, must posit an ideal state from which dilution can be alleged to have occurred. Careful analysis reveals that this implicit ideal state is assumed to be one of proportional representation. Justice Stevens and Justice Powell would not make all gerrymanders unconstitutional; instead, judicial intervention would be permitted only in sufficiently "egregious" cases, presumably ones in which the plaintiff political group's share of seats differed too greatly from its statewide share of votes.

17 *See* notes 3 through 7 and accompanying text, *supra,* for a discussion of political and state judicial remedies for claimed partisan excesses.