2003

Section 5: First Amendment & Election Law

Institute of Bill of Rights Law at The College of William & Mary School of Law

02-1580 Vieth v. Jubelirer

Ruling Below: (*Vieth v. Pennsylvania*, M.D. Pa., 241 F. Supp. 2d 478)

Partisan gerrymandering in redrawing congressional district lines does not violate equal protection clause of 14th Amendment in absence of facts indicating that persons complaining of redistricting have been shut out of political process.

Question Presented: (1) Did district court err in effectively concluding that voters affiliated with major political party may never state claim of unconstitutional partisan gerrymandering, thereby nullifying this court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986)? (2) Does state presumptively violate equal protection clause when it subordinates all traditional, neutral districting principles to overarching goal of drawing congressional redistricting map that achieves maximum partisan advantage for members of one political party? (3) Does state exceed its delegated power under Art. I of Constitution when it draws congressional district boundaries to ensure that candidates from one political party will consistently capture supermajority of state's congressional seats even if those candidates win less than half of popular vote statewide?

Richard VIETH, Norma Jean Vieth, and Susan Furey, Plaintiffs
v.
COMMONWEALTH OF PENNSYLVANIA, et al., Defendants

United States District Court,
M.D. Pennsylvania

Decided January 24, 2003.

[Excerpt; some footnotes and citations omitted]

PER CURIAM.

Before the court are Plaintiffs' motion to impose remedial districts and Defendants' motion for summary judgment. The parties have briefed the issue, as has *amicus curiae.* Additionally, the parties have presented oral argument on the instant motion. Accordingly, the matter is ripe for disposition.

I. Background

This case involves an ongoing challenge to Pennsylvania's congressional redistricting effort. The Commonwealth initiated the redistricting process in response to the year 2000 decennial census which indicated that Pennsylvania would lose two seats in Congress due to shifts in the national population. Accordingly, the Commonwealth enacted its initial redistricting plan. That plan has been referred to throughout this litigation as Act 1.

Shortly thereafter, Plaintiffs initiated the instant suit seeking to have Act 1 declared unconstitutional, based on the

following constitutional doctrines: (1) as an unconstitutional gerrymander in violation of the Fourteenth Amendment to the United States Constitution; (2) as a violation of the
principal of the one person-one vote doctrine as that doctrine is embodied in Article I and the Fourteenth Amendment Equal Protection Clause; (3) as a violation of the Privileges and Immunities Clause of the Fourteenth Amendment; and (4) as a violation of Plaintiffs' right to political association pursuant to the First Amendment. In accordance with the requirements of 28 U.S.C. § 2284, Chief Judge Edward Becker of the United States Court of Appeals for the Third Circuit appointed the present three judge panel to hear the challenge.

By an order dated February 22, 2002, the court dismissed all of Plaintiffs' claims, save for the one person-one vote claim. *See Vieth v. Pennsylvania,* 188 F.Supp.2d 532 (M.D.Pa.2002) [hereinafter "*Vieth I* "]. On March 11 and 12, 2002, the court held an evidentiary hearing on that claim. On April 8, 2002, the court issued an opinion and order in which a majority of the court held that Act 1 violated the dictates of one person-one vote and enjoined its implementation. *See Vieth v. Pennsylvania,* 195 F.Supp.2d 672, 679 (M.D.Pa.2002) [hereinafter "*Vieth II* "]. Additionally, the court granted the Pennsylvania General Assembly three weeks to submit a plan that would remedy the constitutional deficiencies in Act 1. *Id.*

Accordingly, on April 17, 2002, the General Assembly enacted a revised congressional redistricting plan. The next day, Governor Schweiker signed into law the new plan, Act 34. That bill repealed Act 1 and replaced it with Act 34's boundaries. Defendants then petitioned the court to stay its decision regarding Act 1 and to allow the 2002 congressional elections to proceed under Act 1's boundaries. Because primary elections were set to be held on May 21, 2002, the court agreed to stay its decision regarding Act 1 in order to allow the primary election to take place as scheduled. Therefore, Act 34 was not in operation for the congressional elections that took place in November of 2002. However, Act 34 is scheduled to govern the next round of congressional elections in November of 2004.

Ostensibly, Act 34 is a zero-deviation congressional redistricting plan. That is, the district-to-district populations vary by only one person, the minimum variation given that Pennsylvania's population does not divide into nineteen even districts. On April 22, 2002, Plaintiffs filed a motion for the court to impose remedial districts or, in the alternative, to begin remedial hearings. Through information presented in that motion, the court learned for the first time of a decision by the Court of Common Pleas for Armstrong County, Pennsylvania. That decision was issued on March 15, 2002 – after enactment of Act 1, but before Act 34's enactment. The decision effectively altered the boundary between two voter precincts in Armstrong County – South Buffalo District Western and South Buffalo District Eastern. Those two precincts also represented the line dividing the 3rd and 12th Congressional Districts under both Act 1 and Act 34. The alteration had the effect of moving forty-nine people from the 12th Congressional District to the 3rd Congressional

District. Apparently, this would have resulted in Act 34 having a deviation of ninety-seven between its most and least populated districts. This number would have represented a deviation over fives times greater than that in Act 1. On May 16, 2002, the Commonwealth enacted another statute, Act 44, seeking to retroactively rescind the Armstrong County Court's ability to alter voter precinct boundaries.

The Board of Elections for Armstrong County then petitioned the Armstrong County Court of Common Pleas to vacate its decision altering the voter precinct boundary. By an order dated July 29, 2002, the Armstrong County Court of Common Pleas denied the motion to vacate its decision. Eventually, this court scheduled a hearing for January 9, 2003 for the parties to present oral argument regarding whether Act 34 remedied the constitutional defect that the court found rendered Act 1 infirm.

In the interim, Governor Schweiker signed Act 150 into law on December 9, 2002. That statute amended § 506 of the Pennsylvania Election Code to add the following statement:

In administering elections for the nomination and election of candidates for the United States House of Representatives and the General Assembly, county boards of election shall adhere to the following rule: Where an election district is used in or pursuant to a congressional redistricting statute or the final plan of the Legislative Reapportionment Commission to define the boundary of a congressional district or state legislative district, the boundary of such election shall be the boundary existing and recognized by the Legislative Reapportionment Commission for the adoption of its final plan. The boundaries of the Congressional districts, as established by statute, and state legislative districts as set forth in the final plan of the Legislative Reapportionment Commission shall remain in full force and effect for use thereafter until the next reapportionment or redistricting as required by law and shall not be deemed to be affected by any action taken pursuant to this title.

Therefore, Act 150 had the apparent effect of negating the alteration of the boundary dividing the 3rd and 12th Congressional Districts. Defendants subsequently filed a motion for summary judgment on December 20, 2002. On December 30, 2002, the court issued an order indicating that the parties should be prepared to present oral argument on this motion at the January 9 hearing and that Plaintiffs should file their brief in opposition to summary judgment before the date of the hearing. On January 7, 2002, Plaintiffs filed their response to Defendants' summary judgment motion. On January 9, 2002, the court held its hearing.

The court's order of April 8, 2002 gave Defendants a period of time to "enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion." *See Vieth II,* 195 F.Supp.2d at 679. In response, the Commonwealth enacted Act 34. In accordance with the matters discussed at the January 9 hearing, the court finds that Act 34 sufficiently remedies the constitutional deficiencies of Act 1. Our hearing, was basically a review of Act 34 and we are

now giving final approval to it. For the reasons stated below, the court finds that Act 34 does not violate any constitutional doctrine. The court, therefore, will deny Plaintiffs' motion to impose remedial districts. This decision renders Defendants' motion for summary judgment moot. The court, therefore, will not address that motion.

II. Analysis

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C. Partisan Gerrymandering

Plaintiffs also seek to preserve their argument that Act 34 is a partisan gerrymandering and, thus, violates the Equal Protection Clause of the Fourteenth Amendment. As discussed earlier, Plaintiffs presented the same argument with respect to Act 1. In *Vieth I,* the court dismissed this claim because "Plaintiffs [did not] allege facts indicating that they have been shut out of the political process and, therefore, they cannot establish an actual discriminatory effect on them," as required by *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). *Vieth I,* 188 F.Supp.2d 532, 547 (M.D.Pa.2002). Act 34 is essentially the same redistricting plan as Act 1, except for the fact that Act 34 does not possess an avoidable population deviation. Accordingly, whatever partisan effect Act 1 had, Act 34 will have as well. The court, therefore, incorporates by reference its discussion in *Vieth I* regarding partisan gerrymandering and holds that the undisputed facts in this case are insufficient to establish such a claim. *See id.* at 543-47.

IV. Conclusion

Act 34 does not violate the principal of one person-one vote. Therefore, Act 34 remedies Act 1's constitutional defect. Additionally, Act 34 is not a partisan gerrymandering, at least as far as that term is defined by the Supreme Court in *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986). Therefore, the court will deny Plaintiff's motion to impose remedial districts. Because the court has decided that Act 34 cures the constitutional defect found by the court in its memorandum and order of April 8, 2002, Defendants' motion for summary judgment is moot. An appropriate order will issue.

Supreme Court Takes up State Redistricting

The New York Times

June 28, 2003

By Linda Greenhouse

Taking up a highly charged issue of partisan politics, the Supreme Court agreed today to decide whether Pennsylvania's Democrats were victims of an unconstitutional partisan gerrymander at the hands of the Republican controlled Legislature in Congressional redistricting after the 2000 census.

The case will be argued in the court's next term. It was one of five new appeals that the justices granted on a final cleanup day before the summer recess. In the absence of any retirement announcements in this final week, the prospect that any member of the court is planning to retire this year appears extremely remote, last-minute rumors to the contrary.

Pennsylvania, where registered Democrats outnumber Republicans by 3.7 million to 3.2 million, lost two seats in the House of Representatives as a result of the last census. The Legislature then drew new district lines with the goal of favoring Republicans to the greatest degree possible.

In two districts, pairs of Democratic incumbents were required to run against one another. Another Democratic incumbent was placed in a heavily Republican district. Counties were split and districts given highly irregular shapes in order to create Republican supermajorities.

As a result, the state's Congressional delegation went from 11Republicans and 10 Democrats to 12 Republicans and 7 Democrats.

Three Democratic voters sued in federal court, claiming that the redistricting had deprived them of their right to equal protection. A 1986 Supreme Court decision in a partisan gerrymandering case from Indiana opened the door to this constitutional argument, but the decision provided few guidelines for its application and has been invoked reluctantly and inconsistently in the lower courts.

A special three-judge federal district court in Harrisburg dismissed the Democrats' case on the ground that they had not demonstrated sufficient injury, which the court defined as being "completely shut out of the political process." In their appeal, the Democrats are asking the justices to take a new look at the 1986 precedent, Davis v. Bandemer, and "clarify that extreme partisan gerrymandering is not only justifiable in theory but remediable in actual practice."

For their part, the Republican legislative leaders are asking the court instead to

overturn the precedent and remove political gerrymanders from the jurisdiction of the federal courts. This was the position expressed in dissent in the 1986 case by Justice Sandra Day O'Connor and Chief Justice William H. Rehnquist, who was then an associate justice. Warren E. Burger, who was then chief justice, also dissented in Davis v. Bandemer.

The Pennsylvania legislative leaders told the justices in the case today that the fears the dissenters expressed in 1986 had come to pass as partisan battles were shifting from the political arena to the courts.

"To permit challenges to duly-enacted Congressional redistricting legislation on the basis of partisan gerrymandering delegitimizes the political process," the Republicans' brief said.

The case is "incredibly significant," said one election law expert, Richard Pildes of New York University Law School. He said gerrymanders of one kind or another have helped create district maps that have left the great majority of House seats uncompetitive.

Partisan gerrymander battles have erupted in Michigan and Florida. In Texas last month, House Democratic lawmakers fled to Oklahoma to deprive Republicans of a quorum for a redistricting plan, while in Colorado, Republicans succeeded last month in accomplishing a favorable and highly unusual second post-census redistricting.

"We are losing the ability to put on meaningful elections," Professor Pildes said in an interview. "It's become a terrible problem in the system. It's become almost like the Middle East -- both sides recognize that the situation isn't good, but they can't let go. There needs to be outside intervention."

He said the court's decision to hear the case, Vieth v. Jubelirer, No. 02-1580, might reflect the justices' recognition of a problem that requires their attention.

The Pennsylvania Democrats, represented by a Washington lawyer, Paul M. Smith, quoted judges and scholars who have recently called on the court to address partisan gerrymandering. Richard A. Posner, the federal appeals court judge in Chicago, argued in a recent book that "judicial insouciance" toward partisan gerrymanders and the creation of safe seats had undermined "electoral competition, the lifeblood of democracy."

In rejecting the Democrats' case, the district court in Pennsylvania said that in order to bring a successful challenge to a partisan gerrymander, plaintiffs must show that they have been not only outmaneuvered, but also cut out of the political process, to the extent of not being able to register, organize, campaign or raise money.

This was a good 24 hours for Mr. Smith, the Democrats' lawyer; he made the winning argument in the gay rights case the court decided on Thursday. By coincidence, Bowers v. Hardwick, the precedent the court overruled on Thursday, was decided on the same day in 1986 as Davis v. Bandemer, the gerrymander decision at the center of the new appeal.

GERRYMANDERING AND POLITICAL CARTELS

Harvard Law Review

December, 2002

Samuel Issacharoff

[Excerpt; some footnotes omitted]

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The place to start is the breakthrough case of Davis v. Bandemer,[11] in which the Court first recognized a claim of unconstitutional discrimination in the redistricting context based on partisanship rather than the familiar equal protection category of racial classifications. In Davis, the Court grounded its constitutional concerns in the ability of political insiders to manipulate electoral boundaries to magnify their political power and frustrate the legitimate aspirations of their political rival, defined for all practical purposes as one or another of the two major parties. The conceptual underpinning of the Court's analysis in Davis is undeveloped but appears to rest on an unelaborated intuition of unfairness to the political party not enjoying the bounties of incumbent power. Davis introduces the actionable claim of political vote dilution, an uncomfortable analogue of the concept of minority vote dilution, which in turn is an extension of antidiscrimination law. But the analogy breaks down across many dimensions, and the unfortunate result is a new equal protection doctrine with an impossibly high burden of proof for actually making out a claim. As described below, the end result is a legal standard of potentially sweeping breadth but of virtually no meaningful application.

[11] 478 U.S. 109 (1986).

The conceptual weakness in how the Court has treated the potential for mischievous manipulation of redistricting is evident in a less criticized earlier case, Gaffney v. Cummings.[14] There, the Court found unobjectionable a political compromise between the Democrats and Republicans of Connecticut to partition the state so as to lock in the political status quo ante. The Court reasoned that there could be no partisan harm, regardless of the geographic contortions of the district lines, when the two parties had negotiated a redistricting plan without either of them seeking to exploit the other for legislative gain. The Connecticut experiment in a negotiated division of power, which political scientist Bruce Cain terms a "bipartisan gerrymander,"[16] does not present the problem of discrimination against one of the parties and thereby avoids the equal protection framework the Court has employed thus far. Put another way, if a legislative plan were to provide the two major political parties with reasonable prospects of achieving what they believed to be their appropriate shares of representation,

[14] 412 U.S. 735 (1973).

[16] Bruce E. Cain, The Reapportionment Puzzle 159-66 (1984).

what could be objectionable in such a coalition effort? From the vantage point of equal protection law, neither party should be considered a victim of discrimination under such a sharing of electoral opportunity.

The label "bipartisan gerrymander" suggests that there may be grounds for concern but does not elucidate the exact source of that concern. The invocation of the gerrymandering label may express an aesthetic objection to the contours of the districting lines, or it may hint at the stench of backroom politics improperly shielded from public scrutiny, but it does not capture any substantive conception of what is wrong with the outcome when the two incumbent parties carve up the state into mutually acceptable bailiwicks.

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II. Gerrymandering as a Harm

A useful starting point in examining the relation between constitutional law and politics is the question of political gerrymandering as defined through Davis v. Bandemer. Of all the Supreme Court's forays into the political process after the reapportionment cases of the 1960s, the political gerrymandering cause of action enunciated in Davis leaves the smallest trail in the actual political life of the country. Certainly when compared to the compelled decennial redistricting occasioned by Baker and Reynolds, or the limitation on campaign finance reform after Buckley v. Valeo, or the representation of minorities in the wake of the vote dilution cases and then the Shaw line of cases, the constitutional concern over partisan distortions enunciated in Davis fades into quick oblivion. Most evidently, unlike in any other area of legal oversight of the political process, the definition of the constitutional harm involved in partisan gerrymandering has remained frustratingly imprecise. While other areas of the law settled on judicially recognizable concepts, such as one person, one vote, the evidentiary standard for partisan gerrymandering never moved beyond a concern over an ill- defined "consistent degradation" of a partisan group's electoral influence.

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Doing our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role

Notre Dame Law Review

January, 2003

Luis Fuentes-Rohwer

[Excerpt; some footnotes omitted]

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3. Back to Baker: Davis v. Bandemer

Three years later, the Court finally confronted the hated gerrymander. The setting this time was the Indiana redistricting process; the case was Davis v. Bandemer.[151] In Bandemer, the plaintiffs brought a challenge to the state reapportionment plan, alleging that the enacted plan had been drafted in order to disadvantage the Democratic Party and its delegates. According to their claim, "each political group in a State should have the same chance to elect representatives of its choice as any other political group." Put differently, the claim here is that "Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination." Put this way, the question of political representation arises quite forcefully. Unsurprisingly, the Court's answer to this decidedly complex question left a lot to be desired.

Declaring this claim a justiciable one, a Court plurality held that the plaintiffs must "prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" in order to prove their claim. The intentionality inquiry poses modest requirements; after all, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." The effects prong has proven to be far more cryptic. In the Court's words:

> [U]nconstitutional discrimination occurs when the electoral system is arranged in a manner that will consistently degrade a voter or a group of voters' influence on the political process as a whole. . . . [T]he question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. . . . In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process.

Under this exigent test, political gerrymanders are unconstitutional in their most egregious forms. It is not enough for the plaintiffs to claim that they lost a political battle or a series of elections. According to the Court, the plaintiffs must show a political process breakdown where the system could no longer, by any sensible account, be called democratic. Bandemer thus signals a judicial propensity to safeguard the democratic process gingerly.

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[151] 478 U.S. 109 (1986).

As long as the process functions properly, the Court will remain uninvolved; only when the process malfunctions, to the point of collapse, will the Court intervene and afford litigants a remedy, in the name of democratic principles.

Seen this way, one may analogize the Court's position in Bandemer to a market scenario, in the sense that benefits to consumers are best reflected in healthy, robust competition in a free market. Once a firm achieves its goals too well and monopolizes its given field, however, federal law is immediately implicated. Similarly, Bandemer calls for judicial intervention only when redistricters do their jobs too well. Due to the difficulties inherent in the redistricting task, this will not happen often. To some, this is Bandemer's undoing; to my mind, therein lies its virtue.

Curiously, the scholarly commentary on Bandemer is predominantly critical of the Court's position. In general, critics complain not that Bandemer is an unwelcome intrusion into political matters, but, puzzlingly, that Bandemer does not extend the Court's doctrinal venture far enough. As one critic put this point, "it is a necessary accompaniment to the one person, one vote accomplishment to make sure that election procedures are truly fair." Another such critic explained, in my view more sensibly, "the ultimate test of Davis v. Bandemer will be determined by its ability to provide relief from egregious political gerrymandering without exposing virtually every districting plan to tedious and unnecessary judicial scrutiny." These accounts posit the Court as democratic arbiter, as the only institution with both the will and the wherewithal to police the combustible arena of political reapportionment.

These criticisms have gained much currency in recent years. This Section takes direct issue with them. To be clear, it concedes the prior point, whether the Court could develop useful standards in this area without subjecting our political institutions to a system of proportional representation. On this point, the critics are both ready and willing to provide standards, and this Section does not dispute them. The better question is whether the Court should intervene in these highly political contests. The answer is not as facile as many critics periodically posit. As a result, this Section sidesteps the critics' contention that Bandemer's doctrine is practically non-existent in any useful sense. It is true that federal courts have only once struck down a redistricting plan on Bandemer grounds.[165] This is a function of the Court's understanding of democratic politics; by definition the question of "egregious" gerrymanders will necessitate the enduring control of a state majority by one party. This is very difficult to do, perhaps impossible. Seen this way, Bandemer is thus a case for relaxed standards and

[165] See Republican Party v. Martin, 980 F.2d 943, 950-58 (4th Cir. 1992). This case is important for many reasons, particularly for the way in which it highlights the philosophical differences between defenders of an aggressive posture to judicial review of politics and the more passive model I defend here. Soon after the Fourth Circuit affirmed the lower court finding of an unconstitutional partisan gerrymander, the Republican party managed to stage a comeback in the midterm elections, obtaining a legislative majority in the state House for the first time in this century. See Edward Walsh, North Carolina Reflects Voting Shift in South: GOP Takeover Nov. 8 Both Wide and Deep, Wash. Post, Nov. 26, 1994, at A1. Professor Issacharoff brands this judicial incursion an "embarrassment," Issacharoff, supra note 11 (manuscript at 11-12, on file with author), and I do not disagree with the label. To his mind, this means that the case law must provide clearer standards by which to guide lower courts; to my mind, in contrast, this means that courts must play a very passive role.

intervention only for extreme cases, as Grofman's words intimate and others have accurately forecasted. On this reading, I have yet to see a case that calls for judicial intervention. Interestingly, neither has the Court.[169]

Before turning to and answering some of the leading objections to the partisan gerrymandering doctrine, it is worth pausing briefly to underline the current state of the doctrine. In light of Davis v. Bandemer,[170] it is clear that the Court now has at least a semblance of a theory of democratic politics. This is the lockout theory, which worries whether groups have been completely shut out of the political process. The Court's initial entry into the redistricting thicket was influenced in great measure by this problem, as political and geographical minorities in state legislatures simply refused to release their strangleholds on state power. We saw this problem in Tennessee pre-Baker and in Alabama pre-Reynolds, among others. In Baker, for example, Justice Clark did not side with the ultimate majority on the question of judicial intervention until he was convinced that the courts were the only institution capable of dislodging the existing power glut. In Reynolds, the district court took a similar view of the facts at issue, and in so doing sought to "releas[e] the strangle hold on the legislature sufficiently so as to permit the newly elected body to enact a constitutionally valid and permanent reapportionment plan."[172] On my reading of Bandemer, this is exactly the view of democratic politics pursued by the plurality. Short of a lockout, the political process should be left alone.

Further, it is worth keeping in mind two of the central premises of this Article: that all redistricting is gerrymandering and that redistricting raises difficult and contested political questions of the highest order. It is also worth remembering Justice Douglas's observation that the gerrymandering question is "the other half of Reynolds v. Sims."[174] In many important respects, these views are ref lected in the argument to this point. Its conclusion is also mindful of this reality. More specifically, we must treat the redistricting and gerrymandering questions together, for they are but two sides of the same coin. In doing so, this Article contends that the proper doctrinal approach is to adopt a de minimis standard across the board (which will take care of all future Karchers) and then apply Bandemer across the board.

[169] Consistent with early warnings of the Court's role in political matters, the plaintiffs must meet a very high standard. These claims, while justiciable, will not carry the day under most circumstances. See Badham v. Eu, 694 F. Supp. 664, 669-71 (N.D. Cal. 1988) (three-judge court), aff'd, 488 U.S. 1024 (1989).

[170] 478 U.S. 109 (1986).

[172] Reynolds v. Sims, 377 U.S. 533, 543 (1964).

[174] Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting).