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Mathematics and the Art of Statecraft: The 1969 Reapportionment Cases

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MATHEMATICS AND THE ART OF STATECRAFT: THE 1969 REAPPORTIONMENT CASES.

Kirkpatrick v. Preisler[1] and its companion case, *Wells v. Rockefeller*,[2] represent the final opinions of the Warren Court in the area of legislative reapportionment. They would be of significance for that reason alone, for it was that Court which first established judicial responsibility in this area. The importance of these cases, however, is not merely historical. They assert, for the first time, a precise standard by which reapportioning legislatures are to be guided.

The involvement of the judiciary as a forum for legislative reapportionment is of comparatively recent vintage. Until 1962, reapportionment was found to be outside the scope of the judicial function.[3] The rule of *Colegrove v. Green*[4] governed, holding that reapportionment was an issue for the legislative branch, "of a peculiarly political nature and therefore not meet for judicial determination."[5] The rationale was that "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."[6] In 1962, however, the Supreme Court handed down its historic opinion in *Baker v. Carr*[7] and asserted a role for the judiciary in the field of reapportionment.

In *Baker*, the Tennessee scheme for apportioning its state legislature was attacked as violating the Fourteenth Amendment guarantee of equal protection of the laws.[8] The Tennessee legislature had not been reapportioned since 1901, and later population shifts had resulted in underrepresentation of urban areas. The lower federal court, following *Colegrove*, denied jurisdiction over the subject matter, and dismissed the action. The Supreme Court reversed. Justice Brennan, speaking for the majority, determined that the trial court had jurisdiction of the subject matter, that the appellants had standing to sue, and more importantly, that the issue of reapportionment was justiciable.

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1 394 U.S. 526, *rehearing denied*, 395 U.S. 917 (1969).

2 394 U.S. 542 (1969).

3 An exception is Gomillion v. Lightfoot, 364 U.S. 339 (1960), where the Supreme Court reversed a dismissal of a suit for a declaratory judgment on the constitutionality of a municipal boundary change in view of the requirements of the Fifteenth Amendment.

4 328 U.S. 549 (1946).

5 *Id.* at 552.

6 *Id.* at 553-54.

7 369 U.S. 186 (1962).

8 U.S. CONST. amend. XIV, § 1 reads in part, "[nor] shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court directed the lower court to hear the case on the merits, thereby foreclosing the formulation at that time of any standard by which state legislators would be guided in reapportioning in a constitutional manner. It was *Gray v. Sanders*[9] which first intimated the standards that were to be set.

Gray was not a reapportionment case; it involved a challenge to the Georgia county unit system[10] in primary elections. Justice Douglas, writing for the majority of the Court, declared that the Georgia system violated the voters' rights to equal protection of the laws, in that it "weights the rural vote more heavily than the urban vote . . . ."[11] The Court held that equal protection of the laws in the area of voter's rights "can mean only one thing—one person, one vote."[12]

Justice Douglas reiterated that this was not a reapportionment case, and that the *Gray* standard was not a reapportionment standard. Voting and reapportionment, however, are closely related, and the adoption of the *Gray* standard, or one similar, in the area of reapportionment, appeared inevitable.

The Supreme Court set such a standard in *Wesberry v. Sanders.*[13] *Wesberry* involved a challenge to a Georgia system of congressional districting. Justice Black held that the Georgia system was in violation of Article I, Section 2 of the Constitution, which demands that the representatives be chosen "by the People of the several States."[14] The mandate of Article I, Section 2 was that "[w]hile it may not be possible [for the states] to draw congressional districts with mathematical precision,"[15] the Constitution requires "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[16] The use of this provision rather than the Equal Protection Clause of the Fourteenth Amendment[17] elicited a persuasive dissent from Justice Harlan. He reasoned that if Article I,

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9 372 U.S. 368 (1963).

10 Under the county unit system, each county is entitled to a specified number of representatives in the state's assembly. The Georgia plan included the following provisions: 1) The candidate who receives a plurality in the county gets two votes for each representative to which the county is entitled; 2) a majority of the statewide county unit vote nominates a governor or a U.S. Senator. A plurality is sufficient to nominate all others. *Id.* at 370-71.

11 *Id.* at 379.

12 *Id.* at 381.

13 376 U.S. 1 (1964).

14 *Id.* at 7. The applicable paragraph of U.S. CONST. art. I, § 2 reads:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have [the] Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

15 376 U.S. at 18.

16 *Id.* at 7-8.

17 Justice Clark, concurring in *Wesberry*, would have based the opinion on the Equal Protection Clause. *Id.* at 19.

Section 2 leaves to the states the power to determine the qualifications to be required of its voters,[18] it would be illogical to claim that the very sentence which allows states to disqualify voters also prevents states from apportioning as they choose.[19]

As Article I, Section 2 applied only to congressional elections, *Wesberry's* use as precedent was effectively limited. No standards for directing the apportionment of state legislatures had yet been developed. In 1964, in *Reynolds v. Sims*,[20] the Supreme Court set such a standard, and expanded the *Wesberry* rule to apportionment of state legislatures.

In *Reynolds*, an Alabama scheme for the reapportionment of that State's legislature was struck down as being in violation of the Fourteenth Amendment guarantee of equal protection of the laws. Chief Justice Warren, after stressing population equality as the primary consideration in reapportionment, fixed the standard by which future legislators were to be guided. They were required to make a good faith effort to apportion both houses as nearly as is practicable on an equal population basis.[21]

The *Wesberry* and *Reynolds* standards were hardly definitional. Legislatures had been given rough guidelines, but they still were faced with uncertainty concerning the constitutionality of their plans. In the instant cases, the Court was required to examine more incisively the standards it had created, and to elucidate the "as nearly as is practicable" standard in a specific factual setting. Several choices were available to the Court in this definitional context. Each possible standard, however, could be developed only upon the foundation of the goals reapportionment seeks to achieve.

It is not sufficient to suggest that the goal is "one person, one vote," for that mandate is in itself a method which in turn is used to guarantee that all persons will be equally able to express themselves through the legislatures.[22]

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[18] *Id.* at 24. *See* note 14 *supra* for the applicable text of U.S. CONST. art. I, § 2.

[19] 376 U.S. at 25-26.

[20] 377 U.S. 533 (1964). There were five companion cases handed down with *Reynolds*. They were, WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. 44th Gen. Assembly, 377 U.S. 713 (1964).

[21] 377 U.S. at 579-81. Chief Justice Warren made it clear that representation of special interests was subordinate to the individual's right of voting power: "Citizens, not history or economic interest, cast votes." *Id.* at 580. The only non-population element recognized as justifiable in state reapportionment schemes was the existence of political subdivisions, on the ground that some decentralization of authority within that state government was necessary and that local government must therefore have a voice in the state legislature. *Id.* at 580-81.

[22] It should be noted that "one person, one vote" is not limited to legislatures. It applies as well to the election of county commissioners, Avery v. Midland County, 390 U.S. 474 (1968), and to the election of junior college trustees, Hadley v. Junior College Dist., 90 S. Ct. 791 (1970).

The basic goal of reapportionment, then, is to ensure the integrity of the electorate's opportunity of expression. This statement of the goal, however, needs some refinement. What policies should be capable of expression? What, if anything, should reapportionment legislation seek to prevent?

Justice Brandeis had suggested that the policies "which an informed, intelligent, just-minded, civilized man could rationally favor"[23] must be capable of expression. The effect of reapportionment, therefore, is not only to preserve the means of effective expression and political power, but also to "prevent a minority of the population or a minority party from consistently controlling the state legislature or a congressional delegation,"[24] and denying to others the ability of expression when such expression conflicts with self-interest. This has been a recurrent theme of the Warren Court:

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.[25]

Given this goal, what standards are available for its implementation?

It has been noted by Professor Israel that after *Baker v. Carr*,[26] lower federal courts adopted three separate substantive approaches. The first was that no variation from "practical" equality was acceptable; the second was that deviations from absolute equality were acceptable upon justification; the third was that state plans were acceptable if they were rational rather than arbitrary.[27]

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[23] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 406 (1928) (dissenting opinion).

[24] Wells v. Rockefeller, 394 U.S. 542, 555 (1969) (White, J., dissenting).

[25] Reynolds v. Sims, 377 U.S. 533, 565 (1964).

[26] 369 U.S. 186 (1962). As the Court in *Baker* did not reach the merits, the lower federal courts were left for a short time to strike out on their own.

[27] Israel, *On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 MICH. L. REV. 107 (1962).

Professor McCloskey has suggested in the context of state legislature reapportionment that the primary analytical division in discussing standards is that of procedural versus substantive considerations. McCloskey, *Forward* to *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54 (1962). The procedural considerations are those which analyze whether the people of the state have had an adequate opportunity to, or in fact did, manifest their will. Thus, if one legal avenue of public expression exists (e.g. a popular referendum statute) reapportionment is unnecessary. The scheme in *Baker v. Carr* would thus have been invalid not because the districts were unequal, but because, as Tennessee lacked such an avenue, public will could not have effectively, legally been voiced. Under the substantive analysis, which McCloskey disapproves and which the Supreme Court has adopted, an investigation of districts and their respective populations is undertaken.

The practical equality test, the strictest of the three in that the legislature is given the least discretion, demands that each district contain approximately the same number of voters. No considerations other than population are acceptable, and justification of variances is considered irrelevant. When a court applies this test it looks to the population figures of the reapportioned districts, and on that basis alone determines whether the districts are practically equal. The test, although ostensibly objective, is subjective in effect because it attempts to define "approximately". Set guidelines are inconsistent with this position; districts are either practically equal or they are not.

The variance justification test is less strict as it permits greater legislative discretion. The basic premise is per capita equality, but deviations are assumed. Consequently, the problem becomes one of analysis. In applying this test, variances are examined in light of two distinct principles. The first is the notion of de minimus. A court must decide whether some variances are sufficiently minimal so as to be inherently permissible and therefore not require explanation. Were a court to employ this concept, it must then determine whether the variance in question falls within the de minimus area. Two alternatives exist: a court could adopt a fixed de minimus (for example, variances of less than five percent are permissible per se), or an "abstract" de minimus (for example, variances in districts which are "approximately" equal would not have to be justified).

After having accepted or rejected the de minimus concept, a court would still have to decide how to treat variances which were not de minimus. The state would be called upon to justify such a variance. A court, then, must decide what factors other than population may be constitutionally considered by the state legislature, and determine whether its consideration in a given fact situation justifies the variance which exists.

The third standard by which the conduct of legislatures could be governed involves a determination of whether the policies by which the legislatures were guided were rational rather than arbitrary. This, of course, gives greatest latitude to legislative action.[28] A policy is not rational merely because its formulation was a result of much mental effort. A reasoned policy could well be irrational, if rationality is defined as a policy which allows the "fundamental values of our society"[29] to be represented. Obviously the gerrymander, an extremely well reasoned policy, would, in constitutional terms, be arbitrary rather than rational. Also, rationality does not depend per se upon population. It would not be irrational, for example, to give rural areas more representation than would result if population were the

[28] One of the concepts underlying the rationality test is minimization of judicial control over the state legislatures. It does little, however, to encourage legislators to alter an ongoing legislative apportionment scheme in the interest of equal representation, in view of the fact that legislators would then be apportioning themselves out of jobs.

[29] Israel, *supra* note 27, at 138.

primary consideration. They have peculiar economic needs, and the problem of access of rural voters to their representatives still lingers.[30]

The adoption of any of the above standards would adequately serve to elucidate "as nearly as is practicable." The differences of opinion that existed among Justices Brennan, Fortas, White, and Harlan in the instant cases can be attributed to the choice of a standard, and the application of that standard to the problems at hand.

Wells v. Rockefeller[31] and *Kirkpatrick v. Preisler*[32] had similar judicial histories. In *Wells*, a three-judge District Court for the Southern District of New York invalidated a congressional districting statute and retained jurisdiction pending action by the state legislature.[33] New York offered a new plan, whereby seven sections of the state, making up thirty-one of the state's forty-one districts were treated as homogeneous units and subdivided into areas of equal population within the unit. The other ten districts were created along multi-county lines. A variance of over twelve percent was created: the population of the smallest district was 382,277, while that of the largest was 435,880.[34]

The District Court sustained the constitutionality of the New York statute.[35] On appeal, the Supreme Court reversed on the merits. Justice Brennan, writing for the majority, relied on the test established by *Kirkpatrick*[36] and determined that the Constitution "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[37] The Court concluded that New York's plan of equalizing population only within "substates" did not meet this requirement.[38]

In *Kirkpatrick*, a three-judge District Court for the Western District of Missouri had twice struck down state plans for constructing congressional districts and retained jurisdiction pending legislative correction.[39] This, the third plan, was the subject of controversy in the instant case.

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30 The majority in *Kirkpatrick*, however, believed that because of advancements in communication and transportation such a claim was "rather hollow". 394 U.S. 526, 535-36 (1969).

31 394 U.S. 542 (1969).

32 394 U.S. 526 (1969).

33 273 F. Supp. 984 (S.D.N.Y.), *aff'd mem.*, 389 U.S. 421 (1967).

34 Wells v. Rockefeller, 394 U.S. 542, 547-49 (1969).

35 Wells v. Rockefeller, 281 F. Supp. 821 (S.D.N.Y. 1968).

36 394 U.S. 526 (1969).

37 Wells v. Rockefeller, 394 U.S. 542, 546 (1969), *quoting* Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

38 394 U.S. at 546. The Court also disapproved New York's argument that it should be permissible to keep regions with distinct interests intact, and therefore denied use of the plan in the next election and remanded to the trial court. *Id.* at 547.

39 Preisler v. Secretary of State, 257 F. Supp. 953 (W.D. Mo. 1966), *aff'd mem. sub nom.*, Kirkpatrick v. Preisler, 385 U.S. 450 (1967); Preisler v. Secretary of State, 238 F. Supp. 187 (W.D. Mo. 1965).

The plan in question left a variance of 5.97% between the largest and smallest districts. The population of the largest district was 445,523, while that of the smallest was 419,721. As the average population per district was 431,981, the variances ranged from 12,260 or 2.84% below to 13,542 or 3.13% above.

The District Court, observing that the plan was made in reliance on data less accurate than available census figures, that the legislature had rejected plans which would have resulted in smaller variances, and that the mere switching of counties would have greatly reduced deviations, declared the Missouri scheme invalid.[40] Appeal was thereupon taken to the Supreme Court.

The Supreme Court had previously decided, in *Swann v. Adams*,[41] that the state must carry the burden of articulating "acceptable reasons for the [population] variations . . ."[42] in its reapportionment plan. Accordingly, Missouri presented two arguments. It claimed at the outset that the variance was so small as to be de minimus and thus did not require justification. In the alternative, it attempted to justify the variance as resulting from consideration of permissible factors. These factors were: 1) The necessity of avoiding fragmentation of areas with distinct social or economic needs, 2) the political realities of the legislative forum, 3) the preservation of existing political subdivisions, 4) adjustments for population shifts after the most recent census, 5) adjustments for non-voters within the general population, and 6) the desirability of geographical compactness.[43]

Justice Brennan, writing for the majority, rejected Missouri's arguments. Relying upon the statement in *Wesberry v. Sanders*,[44] that "equal representation for equal numbers of people [represents] the fundamental goal,"[45] the Court stated that the "as nearly as is practicable" standard requires that the state make a good faith effort to achieve precise mathematical equality. Inherent in this concept was that the only permissible population variances were those which were "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[46] Missouri's plan was found defective under this formulation.

Missouri urged that its redistricting was valid under the notion of de minimus.[47] Conceptually, de minimus rests upon the principle that complete population equality is unobtainable, that variance is inevitable, and therefore it is illogical to demand that all variations be justified. The diffi-

40 Preisler v. Secretary of State, 279 F. Supp. 952 (1967).
41 385 U.S. 440 (1967).
42 *Id.* at 443.
43 Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).
44 376 U.S. 1 (1964).
45 *Id.* at 18.
46 Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).
47 *Id.* at 530.

culty with this use of de minimus is that it demands the fixation of a numerical limit. The function of the judiciary in reapportionment is to direct the legislatures, and the problem in *Kirkpatrick* was that the phrase "as nearly as is practicable" gave the legislatures direction without definition. To maintain that an abstract de minimus has a place in the definition of "as nearly as is practicable" is to beg the question.

De minimus must be either fixed numerically, or discarded. Justice Brennan discarded it. A primary consideration was the requirement that the states "make a good-faith effort to achieve precise mathematical equality."[48] A minimal variance could still be the product of a lesser effort on their part. De minimus was therefore inconsistent with the requirement of good faith. Also, the fixing of a numerical limit below which variances would be de minimus would of necessity be arbitrary, and neither flexible nor necessarily protective of the voting power of citizens of the state. Finally, the adoption of a de minimus standard would encourage the legislature to strive for that goal rather than for absolute equality, the constitutional epitome of reapportionment.[49]

Having rejected the use of the de minimus concept, Justice Brennan addressed himself to the justifications advanced in explanation of the variance. As any variance must be justified, justifications fall into one of two categories. They are either unacceptable per se, or they are potentially acceptable upon sufficient proof. Those considerations which fall into the latter category will suffice to explain variances only if their use was consistent with a good faith effort to achieve equality.

Missouri's consideration of the need to represent social and economic interests fell into the former category. It was held to be antithetical to the basic premise of the constitutional command to provide "equal representation for equal numbers of people. . . ."[50]

If the goal were defined as equality of representation so as to ensure majority rule, however, it has been convincingly argued that allowance must be made for pressing, minority views.[51] This concept, at least as it concerns the rural minority, is out of favor. *MacDougall v. Green*,[52] held that:

> It would be strange indeed, and doctrinaire, for this Court . . . to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight . . . not available to the former.[53]

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[48] *Id.* at 530-31.

[49] *See id.* One Missouri legislator in fact suggested that the legislature attempt to achieve a 2% variance. *Id.* at 531.

[50] *Id.* at 530, *quoting* Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

[51] King, *The Reynolds Standard and Local Reapportionment*, 15 BUFF. L. REV. 120, 141 (1965).

[52] 335 U.S. 281 (1948). The issue in *MacDougall* was not one of reapportionment, but of nomination requirements in national elections. *See* note 54, *infra*.

[53] 335 U.S. at 284.

But *MacDougall* has been recently overruled by *Moore v. Ogilvie*.[54]

The holding of *Kirkpatrick*, however, should not be read as antagonistic to pressing social needs. Rather, the case maintains that social needs are best represented, *considering the alternatives*, by adherence to the letter and spirit of "one person, one vote." Thus there is nothing in the decision inconsistent with the statement in *Holt v. Richardson*[55] that,

> [The] community of interests, community of problems, socio-economic status, political and racial factors—each and all must be considered, and . . . the sum total of all of the districting must result in substantial equality of meaningful representation to each and all of the voters of the State.[56]

This statement embodies the essential goal of reapportionment. It assumes that there are local interests and local problems (would there be a need to discuss reapportionment otherwise?), and yet realizes that these interests and problems can be expressed only through the voters. The corollary, then, is that all voters should have a substantially equal opportunity to express themselves, and that the majority will cannot be subordinated by overrepresentation afforded to a minority.

The justification of legislative practicality was also rejected out of hand, on the ground that "the rule is one of 'practicability' rather than political 'practicality'."[57] It cannot be denied that reapportionment is primarily a legislative matter,[58] and it has been suggested that legislative compromise and interplay should therefore serve to justify some variance.[59] If, however, the function of the judiciary is to secure equal voting power for equal numbers of people, the essence of reapportionment is the protection of the individual's specific constitutional rights, not the resolution of the problems caused by partisan politics.

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[54] 394 U.S. 814 (1969). *MacDougall* and *Moore* dealt with Illinois' requirement that one prerequisite for listing of independents or of new party candidates on the ballot was the obtaining of at least 200 signatures in at least 50 of the state's 102 counties. The Court equated the problem of nomination requirements with that of reapportionment in that, in either case, abridgement of the right to vote violates the constitutional guarantee of equal protection of the laws.

[55] 240 F. Supp. 724 (D. Hawaii 1965).

[56] *Id.* at 730. *Holt* was vacated by Burns v. Richardson, 384 U.S. 73 (1966), on other grounds. Hawaii's reapportionment plan had included multi-member districts. After the District Court had disapproved of the plan (it was of the opinion that at least one house of the state legislature should be composed of single-member districts), the Supreme Court remanded, holding that multi-member districts per se do not violate the Equal Protection Clause.

[57] Kirkpatrick v. Preisler, 394 U.S. 526, 533 (1969), *quoting* the District Court opinion, Preisler v. Secretary of State, 279 F. Supp. 952, 989 (N.D. Mo. 1967). The District Court felt that practicable was synonymous with feasible. Political practicality is something else entirely, for it emphasizes the interworking of legislators which aids the passage of legislative enactments. That which is feasible is not necessarily politically practical.

[58] *Notes—Reapportionment*, 79 HARV. L. REV. 1228, 1267 (1966).

[59] *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 97, 102 (1969).

Justice Brennan further rejected Missouri's claim that some variance was permissible to maintain political subdivisions, on the same ground, that the problems of practical politics, of which this was a variant, will not serve to justify population deviations. Allowance for political subdivisions had been an acceptable justification in *Reynolds v. Sims.*[60] *Reynolds*, however, had involved the reapportionment of a state legislature. It was argued there that consideration of political subdivisions was allowable because state governments require that some of their functions be performed locally, and also, that preservation of local governmental units was necessary if the legislatures were to be responsive to local needs.

The argument loses its efficacy when, as here, a congressional apportionment is being challenged. Obviously, both national and state functions are performed at a local level. Difference lies in that state functions are performed *by* local government units while national functions are performed *within*, yet without relation to, local governmental units. The inference can be drawn from *Reynolds* that there exists reciprocity between state legislatures and local units.[61] This interaction is seemingly absent between Congress and local units. Since local units derive their authority from the State, they are not characterized by any reciprocity with Congress. If it could be argued that the federal government does delegate authority to local units, such a delegation would be, at most, sporadic.

Although *Reynolds* is distinguishable, political subdivisions could still assert that if their voice is worthy of preservation in the state legislature, it is doubly important to maintain representation in Congress, given the continuing expansion of that body's domain. It should be recalled, however, that allowance for political subdivisions is an exception to the population equality rule. Something more than expediency must exist before the exception can be made. In reapportionment of state legislatures, maintenance of political subdivisions is *necessary* because of the state government's delegation of authority to the local unit. Maintenance of political subdivisions in congressional reapportionment is, at the most, *expedient.*

The implication is that there are different standards for the reapportionment of congressional and of state legislative districts. If reapportionment protects the same rights of the individual in each case, the result is a seeming inconsistency. It is readily recognized, however, that there can be no absolutes in the area of reapportionment. In state legislatures the rights of the individual must be balanced against the need for a state legislature which is responsive to local governmental units to whom it has delegated authority. There is no need for such a balancing when the disputed plan involves reapportionment of congressional districts. No interplay exists between that legislature and local units.

[60] 377 U.S. 533, 580 (1964).
[61] *Id.* at 580-81.

Another consideration offered by Missouri and rejected by the majority was the need for geographical compactness. The Court determined that the existence of this justification was largely historical, and that there was little merit to the claim that sparsely settled areas contributed to a lack of access to representatives, given the rapid advances in communication technology.[62] Professor McKay's analysis of the geographical justification appears consistent with this rationale:

> If the right protected by the [equal protection] clause is the right of individuals, as is assuredly the case, it seems not permissible to measure—and restrict—the right of franchise in terms of factors not related to the individual. . . . Geography as such does not merit protection from outlawry by the equal protection clause.[63]

Professor McKay's argument, however, is tempered by that of Professor Lucas:

> The design of representation schemes obviously reflects a compromise between notions of majority rule on the one hand, and representation of a variety of points of view on the other, and where the geographical districts which serve as the basis for interest representation were designed as a secondary device, never intended to represent mere acreage or mere population, it should be obvious that their rationality cannot be measured either in hides or in heads.[64]

To demonstrate this position, Professor Lucas created a mythical 110 man state, where there were ten districts, each with eleven voters. Consequently, having six votes in each of six districts would enable a minority party of thirty-six to effectively control the legislature. Sixty votes, therefore, could result in entire domination, notwithstanding exact population equality. One possible effect of the use of geographic compactness is to eliminate the gerrymander. Regular shaped districts would curtail political districting adjustments designed to achieve these inappropriate ends.[65]

Geographical compactness, as has been illustrated, could play an important role in reapportionment. Absolute population equality, without more, does not prevent gerrymandering. It is pointless to suggest that equal opportunity for each voter to make his interests known is enough. One of the goals of reapportionment is to avoid the subordination of the majority will by the minority. There must, therefore, be some check on the gerrymander which pure population equality does not provide. Allowing legislatures to consider geographic compactness appears a simple solution to the gerrymander. It allows the legislature to provide effective representation and yet opens "no avenue for subterfuge."[66]

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62 394 U.S. at 535-36.

63 McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 696 (1963).

64 Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711, 766 (1963).

65 *Id.* at 767.

66 *See* Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969). A legislature which plead geographical compactness without attempting to achieve it would be soon discovered.

The Court gave summary consideration to these contentions, stating that "[a] State's preference for pleasingly shaped districts can hardly justify population variances."[67] It is questionable whether this is a sufficient basis to deny Missouri the opportunity to justify a portion of the deviation by a showing that geographical compactness was considered when the reapportionment plan was devised.

Missouri's two other arguments, that allowances were made both for nonvoters and for shifts in population, were rejected, not because they were unacceptable themselves, but because Missouri's conduct did not evidence a good faith effort to apply them. Justice Brennan stated that "Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population . . . ."[68]

Since Missouri had failed to justify the variances which existed in its reapportionment plan, the District Court's finding that the Missouri plan was unconstitutional was affirmed.

Justice Fortas concurred. He believed that the Court's opinion on its face had placed far too stringent a requirement on state legislators, and that the good faith requirement should be considered met if the state plan was "based upon some orderly and objective method."[69] He then proceeded to attack the Court's application of the variance justification test:

> The Court . . . also requires that any remaining population disparities 'no matter how small,' be justified. It then proceeds to reject, *seriatim*, every type of justification that has been—possibly, every one that could be—advanced.[70]

Justice Fortas's position is curious. He does not believe that minor variances should have to be justified, on the one hand,[71] and agrees with the majority's rejection of the numerical de minimus principle on the other.[72] Although he does not object to the majority's choice of the variance justification standard, Justice Fortas does disagree with its application. His position appears to be that there should be an "abstract" de minimus, and that variances which exceed it would have to be justified. He nevertheless concurred in the majority opinion, as under either test Missouri's failure to make a good faith effort rendered the plan unconstitutional.

There is no apparent reason to suppose that were geographical compactness a permissible justifiction, abuse of discretion would result.

[67] *Id.* at 536.

[68] *Id.* at 534-35.

[69] *Id.* at 537. Justice Fortas wrote separate concurring opinions in *Kirkpatrick* and in *Wells*. In *Wells*, he agreed that New York had failed to show a good faith effort to achieve mathematical equality, but did not join the majority for the reasons stated in his *Kirkpatrick* opinion. Wells v. Rockefeller, 394 U.S. 542, 549 (1969).

[70] Kirkpatrick v. Preisler, 394 U.S. 526, 537 (1969).

[71] *Id.* at 538.

[72] *Id.* Justice Fortas' position, although it resembles the practical equality standard,

A preference for an "abstract" de minimus is unfortunate for two reasons. First, it adds nothing to the "as nearly as is practicable" doctrine. In terms of guiding the legislatures, it would leave them in exactly the same position they were in before *Kirkpatrick* was litigated. Second, it has no practical effect. A legislature would have no way of knowing whether the variances produced by a reapportionment plan were in fact de minimus. It would still be forced to justify all variances in court.

Justice White, dissenting, agreed that the majority's test was too rigid. He argued, instead, that a numerical de minimus standard should be established, and that the rejection by the majority of certain of Missouri's justifications was inappropriate.

Justice White suggested that a population variance figure of no more than ten to fifteen per cent between the largest and smallest districts should be established, and that if a state plan created a lesser variance, justification should not be required in the absence of unusual circumstances.[73] The rationale was that,

> This would be far more reasonable than the Court's demand for an absolute but illusory equality or for an apportionment plan which approaches this goal so nearly that no other plan can be suggested which would come nearer.[74]

Such an argument would weigh effectively against the majority's holding that a fixed de minimus is not only arbitrary but also contrary to the good faith requirement if the demands the Court has made on the state legislatures are in fact as rigid as Justice White claims. All that the majority has done, however, is require that a state legislature make a good faith attempt to create districts of equal population, and defend resulting variances by showing that it took into account only permissible factors.

This is not an unduly strict requirement. A state legislature is not expected to achieve absolute equality, although it is expected to try to achieve it. The Court recognizes that some variances will be unavoidable. In addition, it provides that larger variances can be justified by consideration of permissible factors. The Court does not require a superhuman effort; rather, it asks merely for good faith. Population variances which are *unavoidable despite* this good faith effort are explicitly allowed.[75]

The plan has the advantage of conducing to greater certainty. If a legislature knows what is required, even if the requirements are strict, the test is not unduly difficult to implement, assuming, of course, that a legislature does have the capacity to comply. The majority's standard is not beyond

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is inconsistent with that standard. He would not subscribe to a standard which, in theory, placed a greater burden upon state legislatures than does the standard adopted by the majority (by refusing to allow justification of the variance).

[73] Wells v. Rockefeller, 394 U.S. 542, 553 (1969). Justice White's dissenting opinion in *Wells* applied to both cases.

[74] *Id.* at 553-54.

[75] Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

such compliance.

Justice White also disagreed with the majority's disposition of certain of Missouri's variance justifications. Missouri had attempted to show that the preservation of political subdivisions and geographical compactness had been validly considered. He was disturbed that the majority discarded the *Reynolds* suggestion that state legislatures should be allowed to consider political subdivisions[76] without making an attempt to distinguish *Reynolds*.[77] Mr. Justice White argued that these factors were not only permissible, but were in fact desirable as a defense against the gerrymander.

The rationale of this position is that the norms inherent in established boundaries will deter a legislature inclined to gerrymander. This presumes that set lines will have effective force. This, in itself, is questionable. When the intent and opportunity to gerrymander arise, it is doubtful that a legislature would in fact constrict redistricting within existing political subdivisions. Further, it should be noted that the existing subdivisions may also be the result of a previous gerrymander. Regardless of the strength of this position, however, the argument arises in a strange context. Were Justice White's contention valid, the state legislature, the only political organ which could gerrymander, asks the Court to prevent it from doing so. The majority, on the other hand, essays to preserve the equality of one person, one vote, by allegedly facilitating the gerrymander.

Justice White's observations would have merit if addressed to the issue of geographical compactness. It is necessary to make a distinction between undesirable motive and desirable effect. The state legislature would certainly contend that geographical compactness should be a justification because it would facilitate the formulation of its reapportionment plan. In order to maintain geographical compactness, however, the legislature would have to utilize it. Failure to do so would be evident on the face of the map. The effect of the legislature's attempt to obtain latitude would be to stifle the gerrymander.

Justice White further objected to the majority opinion as representing an unnecessary involvement of the judiciary in the legislative task. He characterized the Court as,

> groping for a clean-cut, *per se* rule which will minimize confrontations between courts and legislatures while also satisfying the Fourteenth Amendment. If so, the Court is wide of the mark. Today's result simply shifts the area of dispute a few percentage points down the scale . . . .[78]

This view is analogous to the dissent of Justice Harlan.

Justice Harlan found the majority's holding to be an irrational extension of what he considered to be an irrational doctrine, the rule of *Wesberry v.*

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[76] 377 U.S. 533, 580 (1964).

[77] As has been discussed, *Reynolds* is nevertheless distinguishable.

[78] Wells v. Rockefeller, 394 U.S. at 555.

Sanders.[79] His dissatisfaction stemmed from the majority's "all-pervasive distrust of the legislative process [which] is completely alien to established notions of judicial review."[80] Agreeing with Justice White, he went on to state that "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort."[81]

Justice Harlan objects to what appears to be the judiciary's self-asserted domination over the state legislatures.[82] The crux of the problem between the judiciary and the legislatures in the area of reapportionment, however, is not one of judicial overkill, but of direction. The judiciary has a duty to invalidate state reapportionment plans which are unconstitutional. It has a correlative duty to define as clearly as possible what the ingredients of a constitutional reapportionment plan are. The judiciary has failed to perform its function when it gives the state legislatures inadequate guidelines. Separation of powers arguments do not eradicate such a failure.

Justice Harlan's comments on the nature of the subordination of the legislatures imply an appropriate criticism on the placement of the burden of proof. *Swann v. Adams*[83] established the principle that the state carried the burden of justifying its plan. Justice Harlan dissented in *Swann*:

> This holding seems to me to stand on its head the usual rule governing this Court's approach to the validity of legislative enactments, state as well as federal, which is, of course, that they come to us with a strong presumption of regularity and constitutionality.[84]

When a state is required not only to defend its plan, but also to prove that it acted in good faith, the question is no longer simply one of who can most conveniently come forward with evidence. Such a requirement presumes, in effect if not in fact, that state legislators do not act in good faith. That is a presumption which is contrary to the very basis of representative government. It should not be indulged in lightly or across the board.

Implicit in Justice Harlan's argument in *Swann*, and in his dissent in the present cases, is the fear that the Court no longer considers the state legislators morally capable of acting in good faith. Hopefully, Justice Harlan is mistaken, and the Court harbors no such sentiments. In that case, a presumption that state legislators do not act in good faith has no place in the reapportionment standard. If, on the other hand, Justice Harlan is correct, either the Court is mistaken, in which case there is no need for the pre-

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79 376 U.S. 1 (1964). Justice Harlan felt that he was bound by the *Wesberry* rule, but that both the New York and Missouri plans were well within the "as nearly as is practicable" requirements of that rule. 394 U.S. at 552.

80 394 U.S. at 550. Justice Harlan's dissent in *Wells* was applicable to both cases.

81 *Id.* at 551.

82 *Id.* at 550. This is not a new theme for Justice Harlan. *See, e.g.*, his dissents in Reynolds v. Sims, 377 U.S. 533, 589 (1964); Wesberry v. Sanders, 376 U.S. 1, 20 (1964); and Baker v. Carr, 369 U.S. 186, 330 (1962).

83 385 U.S. 440 (1967).

84 *Id.* at 447.

sumption, or the legislatures are in fact morally incapable. If the latter is the case, the definition of a reapportionment standard is futile, for the fault lies in the choice of a system of representative government.

The question here, however, is whether this logic consistently culminates in Justice Harlan's later statement that "the question before us is whether the Constitution requires that mathematics be a substitute for common sense in the art of statecraft."[85] Aside from the issue of the presumption, if a deprivation of equality of representation, of which gerrymandering is only one technique, is to result, it will in the great majority of instances be at the hands of these legislatures.

It must be remembered that in the area of reapportionment "the cure is often worse than the disease." Given that a congressional election is never more than two years away, what can be done when a reapportionment scheme is struck down? If the state legislators cannot repair the damage in time,[86] what are the courts to do?

Former Solicitor-General Cox has noted that there are four remedies open to the courts: they can order at-large elections; they can enjoin the conduct of the election; they can apportion the districts themselves; or they can reweight the votes of the various legislators without changing the boundaries of the districts.[87]

All of these remedies are subject to criticism. At-large elections would effectively destroy any guarantee that local interests would be fully represented. The essence of reapportionment is the guarantee that manifestation of interests will be population based. Here, local interests entitled to proportional representation would find that a bare majority, consistent with Professor Lucas' hypothetical previously given, might control every seat. Secondly, any injunction against the election itself serves to maintain the status quo, and thus perpetuate an adjudged invalid system. It could also lessen the responsiveness of the legislators to their constituents.

The third possibility is reapportionment of the districts by the judiciary itself. This could create serious separation of powers problems. Reapportionment is still primarily a legislative function; yet this remedy interposes a conflicting, co-equal branch of government. Finally, the court could reweight the votes of various legislators without changing the boundaries of the districts. This would not guarantee that local interests in populous areas would be represented. One man with two votes in the legislature could not respond to or even discover the needs of his large constituency as well as two legislators with one vote each. In addition, the practical problems

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85 Wells v. Rockefeller, 394 U.S. 542, 552 (1969).

86 The instant case marks Missouri's third consecutive failure. *See* Preisler v. Secretary of State, 257 F. Supp. 953 (W.D. Mo. 1966), *aff'd mem. sub nom.* Kirkpatrick v. Preisler, 385 U.S. 450 (1967); Preisler v. Secretary of State, 238 F. Supp. 187 (W.D. Mo. 1965).

87 Cox, *Current Constitutional Issues*, 48 A.B.A.J. 711, 713 (1962).

which would arise within the legislative process could seriously hamper the effectiveness of the legislature.[88]

No court will be forced to use one of these remedies until it finds itself in a situation where the use of the remedy is preferable to leaving a reapportionment scheme as it is while directing the legislature to repair it, or until the legislature manifests an unwillingness to repair it. The need to use any of these remedies will be avoided by a court created reapportionment standard which tells the legislature in clear terms exactly what is expected of them. Uncertainty, since *Baker v. Carr*,[89] has led to unconstitutional reapportionment, and it is unconstitutional reapportionment which creates the need for the remedies. Their harsh nature lends strength to Justice Brennan's majority opinions.

The court in the instant cases addressed itself to the problem of lending substance to the "as nearly as is practicable" standard of "one person, one vote." The result was a principle that variances beyond those unavoidable despite a good faith effort to achieve absolute mathematical equality must be constitutionally justified. This is not a perfect test. It may well be that numerical equality alone will not guarantee equality of representation. But the Court has at least provided a guideline which more closely approaches precision than any of the preceding reapportionment standards albeit a subjective good faith requirement remains. The problems of uncertainty which confronted New York and Missouri and culminated in the Supreme Court decisions appear solved. No longer can states complain of working in a vacuum. Further, it does not seem difficult for state legislatures to meet the demands of *Wells* and *Kirkpatrick*. The Court has not imposed requirements which are realistically unattainable.

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88 *Id.*

89 369 U.S. 186 (1962).