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One Person-One Vote Round III: Challenges to the 1980 Redistricting

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ARTICLE

ONE PERSON-ONE VOTE ROUND III: CHALLENGES TO THE 1980 REDISTRICTING

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"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote."[1]

I.   INTRODUCTION

Ever since the United States Supreme Court entered the "political thicket"[2] of redistricting and reapportionment[3] courts and legislatures have been struggling with issues relating to the Court's mandate of "one person, one vote."[4] The re-drawing of congressional and legislative district boundaries after the 1980 census was only the third time that district boundaries have been drawn according to the Supreme Court's mandate of "one person-one vote."

Round One of redistricting occurred during the 1960's in the wake of *Baker v. Carr*,[5] which invalidated the gross malapportionment of congres-

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[1] Gray v. Sanders, 372 U.S. 368, 381 (1963).

[2] 369 U.S. 186 (1962).

[3] Technically, the members of the United States House of Representatives are "apportioned" among the states, and then "districted" into congressional districts by the states. The courts, however, have used the terms interchangably. See, for example, Justice Rehnquist's opinion in Mahan v. Howell, 410 U.S. 315 (1973), where he refers to "a state reapportionment statute for federal congressional districts." *Id.* at 320. Before *Baker*, many states "apportioned" seats in their state legislature to counties or other governmental units. Legislative seats are now "districted" into equally populated districts rather than "apportioned" to counties. However, many states attempt to preserve political subdivision lines in state legislative districts. Thus, in this Article, *redistricting* will refer to the process of re-drawing congressional districts, and *reapportionment* will refer to re-drawing state legislative or other political districts.

[4] *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

[5] 369 U.S. 186 (1962). Three statistics are important in understanding redistricting terminology. The "ideal" district consists of the total population of the area to be districted divided by the number of districts (the arithmetic mean). The "average deviation" (or variance) consists of the average of all the districts' deviations from equality. The "maximum total deviation" (or variance), usually expressed as a percent or a ratio, is the amount by which the largest and smallest district populations are greater than and less than the population of the ideal district.

Thus, if a state has a population of 1,000,000 persons and 100 districts, the ideal district would contain 10,000 persons. If the largest district contained 11,0000 persons (10% above equality), and the smallest district had 9,000 persons (10% below equality), the maximum total deviation would be 2,000 persons, or 20%.

The early cases often referred to the percent of voters able to elect a majority of members of each house. However, this type of reference is deceiving, since 51% of the voters in 51% of the districts (or 26% of the state's population) could conceivably elect a majority of a state legislature. *See, e.g.*, Engstrom, *Post-Census Representational Districting: The Su-*

sional and other districts. Round Two of redistricting and reapportionment occurred after the 1970 census. The result was the evolution of standards for evaluating redistricting and reapportionment plans, including plans drawn by both legislative bodies and the courts.[6] These standards led to differences between challenges to congressional and state legislative redistricting. Round Three resulted in challenges to the redistricting and reapportionment of the early 1980's.

This Article discusses the legal requirements of one person-one vote and the continuing evolution of the legal standards in this area. Part II analyzes the evolution of one person-one vote doctrine in the United States Supreme Court cases of the 1960's and 1970's. Part III discusses Round Three and focuses on the cases in state and lower federal courts. Included in this section are discussions of the New Jersey and Wyoming cases,[7] the latest decisions of the Court on redistricting and reapportionment. Part IV examines several unresolved issues in the one person-one vote field, and concludes that the issues of gerrymandering[8] and fine-tuning of the mathematics of one person-one vote should be confronted in Round IV, the next round of redistricting and reapportionment cases.

II. BACKGROUND—ROUNDS I AND II

Before *Baker*, courts consistently left the issues of redistricting and reapportionment to the political process, which inevitably meant that the effects of malapportionment went uncorrected.[9] By the time *Baker* was

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preme Court, "One Person, One Vote," and the Gerrymandering Issue, 7 So. U.L. REV. 173 (1981); McKay, *Reapportionment: Success Story of the Warren Court,* 67 MICH. L. REV. 223 (1968).

⁶ Dodge & McCauley, *Reapportionment: A Survey of the Practicality of Voting Equality,* 43 U. PITT. L. REV. 527 (1982).

⁷ Karcher v. Daggett, ___ U.S. ___, 103 S. Ct. 2653 (1983); Brown v. Thomson, ___ U.S. ___, 103 S. Ct. 2690 (1983).

⁸ "Gerrymandering" derives its name from Eldridge Gerry, former Governor of Massachusetts. In 1812, while Gerry was in office, a newspaper editor noted that one legislative district drawn for maximum partisan advantage looked like a salamander.
    Gerrymandering is defined as:
        the practice of creating districting arrangements which dilute the voting strength of an identifiable group of voters, impending [sic] the group's ability to convert its electoral strength into the selection of representatives affiliated with it, or at least favored by it. This is accomplished by dispersing the group's voting strength across districts so that it constitutes ineffective minorities of voters within those districts and/or by concentrating its strength into districts in which it comprises extraordinary majorities of voters.
Engstrom, *supra* note 5, at 207.

⁹ Rural bias often occurred where the urban-rural differentials in district populations were large. "For example, in California the 6,380,771 residents of Los Angeles County elected one member of the State Senate, just as the 14,294 residents of the combined counties of Mono, Inyo and Alpine did." *Id.* at 176. Professor Engstrom notes that these legislatures created malapportioned congressional districts, ranging from 118.5 of the ideal dis-

decided, in 1962, plaintiffs faced a formidable array of decisions holding that reapportionment was a "political" and therefore non-justiciable question.[10]

Baker involved a challenge to Tennessee's legislative districts which had not been re-drawn since 1901.[11] The situation in Tennessee in 1962 was far from unique. In twelve states in 1962 at least one state legislative district deviated more than 500% from average. Deviations of congressional districts exceeded 50% in as many states. Over 200 congressional districts deviated from each state's average by more than 10%,[12] leading a commentator to suggest that "[w]e are permitting the streams of legislation to become poisoned at the sources."[13]

In an opinion by Justice Brennan, the *Baker* Court held that the Tennessee plaintiffs had raised a "justiciable constitutional cause of action," thus disposing of the "political question" doctrine that had for decades

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trict in Texas to -71.4% from the ideal in Michigan. *Id.* at 178. *See also* R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 630-31 (1968); T. O'ROURKE, THE IMPACT OF REAPPORTIONMENT (1980).

[10] Most prominent among the cases holding that districting challenges were not justiciable was Colegrove v. Green, 328 U.S. 549 (1946), a challenge to Illinois' congressional districts. Illinois' districts were among the most malapportioned in the nation, ranging in population from 914,053 residents in one district to 112,116 residents in another, and had not been redistricted since 1901. Illustrating the Court's reluctance to enter into a "political" area, Justice Frankfurter stated, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people." *Id.* at 553-54. A number of cases followed the lead of *Colegrove. See, e.g.,* Matthews v. Handley, 361 U.S. 127 (1959); Hartsfield v. Sloan, 357 U.S. 916 (1958); Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McCanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Cox v. Peters, 342 U.S. 936 (1952); Remmey v. Smith, 342 U.S. 916 (1952); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950); Colegrove v. Barret, 330 U.S. 804 (1947); Turman v. Duckworth, 329 U.S. 675 (1946); Cook v. Fortson, 329 U.S. 675 (1946). However, a small opening occurred in Gomillion v. Lightfoot, 364 U.S. 339 (1960). In *Gomillion* the Court entertained a challenge to the re-drawing of Tuskeegee's city boundaries from a square to "an uncouth 28-sided figure" for the purpose of excluding all but four or five blacks from municipal elections. *Gomillion,* however, is more properly considered a "voter exclusion" case, rather than a redistricting case, since the voters were totally excluded from municipal elections.

[11] The result of neglected reapportionment was that 28.7% of the state's population could elect a majority of the House of Representatives. Urban areas were severely under-represented, receiving only 18% of the Senate seats and 20% of the State House of Representatives seats while accounting for 42% of the state's population. Engstrom, *supra* note 5, at 184.

[12] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CONGRESSIONAL DISTRICT DATA BOOK, 93RD CONG. (1973) [hereinafter cited as DATA BOOK].

[13] Chafee, *Congressional Reapportionment,* 42 HARV. L. REV. 1015, 1016 (1929). H.L. Mencken observed in 1928 that "[t]he yokels hang on because old apportionments give them unfair advantages. The vote of a malicious peasant on the lower eastern shore counts as much as the votes of twelve Baltimoreans. . . . It is not only unjust and undemocratic, it is absurd." H.L. MENCKEN, H.L. MENCKEN ON POLICIES: A CARNIVAL OF BUNCOMBE 164 (1960). *See also* Dixon, *The Court, The People and One Man, One Vote,* in REAPPORTIONMENT IN THE 1970's (N. Polsby ed. 1971).

prevented plaintiffs from bringing districting challenges.[14]

Baker "opened the courthouse doors"[15] and subsequent plaintiffs have rushed through. Within a year, challenges were made to legislative or congressional districts in over thirty states.[16]

Justice Douglas hinted at the standard for evaluating districting plans in *Gray v. Sanders*,[17] the first of the cases after *Baker* to reach the Court. *Gray* involved a successful challenge to Georgia's "county-unit" system employed in its state-wide Democratic primary. Justice Douglas noted that while *Baker* was a challenge to state legislative districting, *Gray* assailed the state's method of weighting votes from rural counties. However, he clearly indicated in dicta that one person-one vote should be the standard for all elections.[18]

The adoption of this standard occurred in *Wesberry v. Sanders*,[19] a challenge to Georgia's malapportioned congressional districts. In an opinion by Justice Black, the Court held for the first time that congressional districts should be of substantially equal population. "[T]he command of Art. I, § 2, and that Representatives be chosen 'by the People of the Several states' means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[20] Inviting future

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[14] 369 U.S. 186, 237 (1962). For a discussion of the political question doctrine, see Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252 (1962).

[15] R. DIXON, *supra* note 9, at 159.

[16] For a list of these challenges, see McKay, *Political Thickets and Crazy Quilts*, 61 MICH. L. REV. 645, 706-10 app. (1963).

[17] Gray v. Sanders, 372 U.S. 368 (1963). "The case was filed, it is said, within half an hour after the decision in Baker v. Gray was announced." Lucas, *Legislative Apportionment and Representative Government*, 61 MICH. L. REV. 711, 786 (1963). The "unit votes" of each county were given on a "winner-take-all" basis to the candidate receiving the highest number of votes within the county. Each county had two votes for each seat in the legislature, up to a maximum of six "unit votes." Votes of residents in the Atlanta area (Fulton County) were diluted due to the malapportionment of the legislature and the six vote limit. Fulton County, with a population of 556,326 persons, had six votes, while Echols County, with a population of 1,876, had two votes. 372 U.S. at 372.

[18] *Id.* at 379.
> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the 14th Amendment.

Id.

[19] 376 U.S. 1 (1964). Georgia's fifth district, including Fulton County, had a population of 823,680 or more than three times the population of the smallest district, the ninth, with a population of only 272,154.

[20] *Id.* at 7, 8. Justice Black's interpretation of the meaning of Art. I, § 2 was challenged in a vigorous dissent by Justice Harlan, who noted that
> [n]othing that the Court does today will disturb the fact that although in 1960 the population of an average congressional district was 410,481, the States of Alaska, Nevada and Wyoming each have a Representative in Congress although their respective populations are 226,167, 285,278, and 330,046. It is whimsical to assert in

litigation on precisely what standards should be followed in redistricting cases, Justice Black stated that "[t]he question of what relief should be given we leave for further consideration and decision by the District Court in light of existing circumstances."[21]

The one person-one vote doctrine was extended to state legislative districts a few weeks later in *Reynolds v. Sims*,[22] a challenge to the Alabama legislative districts. The Alabama legislature had not been reapportioned since 1900 despite the state's constitutional provisions for decennial adjustment. The resulting population disparities[23] were held by the district court to violate equal protection, and the Supreme Court agreed:

> To the extent that a citizen's right to vote is debased, he is that much less a citizen. . . . The weight of a citizen's vote cannot be made to depend upon where he lives. Population is, of necessity, the starting point for consideration and the *controlling criterion* for judgment in legislative apportionment controversies. . . . [A]s

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the face of this guarantee [that each state have at least one representative] that an absolute principle of "equal representation in the House for equal numbers of people" is "solemnly embodied" in Article I.

Id. at 28-29 (Harlan, J., dissenting). Given this inequality in the "target population" of states, the standard really is that one person's vote in a congressional election *in the same state* should be worth as much as another's. Nonetheless, the "command" of Article I, § 2 is now a "fundamental principle of districting." *See* Engstrom, *supra* note 5, at 189. *See also infra* text accompanying notes 164-68.

For a discussion of the use of history in *Wesberry* and other cases in the 1960's, see Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

[21] 376 U.S. at 4. Note also, Justice Harlan's comments in dissent:

The Court's "as nearly as is practicable" formula sweeps a host of questions under the rug. How great a difference between the populations of various districts within a State is tolerable? Is the standard an absolute or relative one, and if the latter to what is the difference in population to be related? Does the number of districts within a State have any relevance? Is the number of voters or number of inhabitants controlling? Is the relevant statistic the greatest disparity between any two districts in the State or the average departure from the average population per district, or a little of both? May the State consider factors such as area or natural boundaries (rivers, mountain ranges) which are plainly relevant to the practicability of effective representation?

There is an obvious lack of criteria for answering questions such as these, which points up the impropriety of the Court's wholehearted but heavy-footed entrance into the political arena.

Id. at 21 n.4 (Harlan, J., dissenting).

[22] 377 U.S. 533 (1964). *Reynolds* was decided along with five companion cases: Lucas v. 44th Gen. Assembly, 377 U.S. 713 (1964) (Colorado); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) (New York); Maryland Comm. for Fair Representation and Taxes v. Tawes, 377 U.S. 656 (1964) (Maryland); Davis v. Mann, 377 U.S. 678 (1964) (Virginia); and Roman v. Sincock, 377 U.S. 695 (1964) (Delaware).

[23] While several alternate plans had been adopted by the Alabama legislature since *Baker*, under even the best of these plans 27% of the state's population resided in a majority of the Senate districts and 37% in a majority of the House districts. The districts deviated from equality from 20-1 in the Senate to 5-1 in the House. 377 U.S. at 545-50.

a basic constitutional standard, the Equal Protection Clause re-
quires that the seats in both houses of a bicameral state legisla-
ture must be apportioned on a population basis.[24]

Because challenges to state legislative districts were based upon the
equal protection clause rather than the Article I "command" of equi-
populous congressional districts, the mathematical standard that the
Warren Court formulated for state districts did not appear as strict as the
standard for congressional districts.[25] What was required of states was
"an honest and *good faith effort* to construct districts, in both houses of
its legislature, as nearly of equal population as is practicable."[26]

Before the 1970 census, the Court reviewed a number of lower court
redistricting and reapportionment decisions. In a Florida case, *Swann v.
Adams*,[27] the Court invalidated both the State Senate and House districts
because they deviated so much from the ideal. Furthermore, there was
"no attempt to justify any particular deviations, even the larger ones."[28]
In another case, invalidating a Texas House of Representatives redistrict-
ing plan that had a maximum deviation of 23.48%, the Court held in a
brief per curiam opinion that deviations of this size must be "satisfacto-
rily justified."[29]

The last major decisions in Round I were announced on April 7, 1969,
just one year before the 1970 census was taken. In these decisions nearly

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[24] *Id*. at 567-68 (emphasis added).

[25] "We realize that it is a practical impossibility to arrange legislative districts so that
each one has an identical number of residents, or citizens, or voters. Mathematical exactness
or precision is hardly a workable constitutional requirement." *Id*. at 577. "So long as the
divergences from a strict population standard are based on *legitimate* considerations inci-
dent to the effectuation of a rational state policy, some deviations from the equal-popula-
tion principle are constitutionally permissible." *Id*. at 579 (emphasis added). Much of the
litigation in Rounds II and III would center around precisely what considerations are "legit-
imate" and what size deviations these considerations could justify.

[26] *Id*. at 577 (emphasis added). One week after deciding these cases, the Court invali-
dated the apportionment of nine more state legislatures: Pinney v. Butterworth, 378 U.S.
564 (1964) (Connecticut); Swann v. Adams, 378 U.S. 553 (1964) (Florida); Hearne v. Smylie,
378 U.S. 563 (1964) (Idaho); Germano v. Kerner, 378 U.S. 560 (1964) (Illinois); Hill v. Davis,
378 U.S. 565 (1964) (Iowa); Marshall v. Hare, 378 U.S. 561 (1964) (Michigan); Nolan v.
Rhodes, 378 U.S. 556 (1964) (Ohio); Williams v. Moss, 378 U.S. 558 (1964) (Oklahoma); and
Meyers v. Thigpen, 378 U.S. 554 (1964) (Washington). Indeed, by the end of 1964 the Su-
preme Court was in the middle of the "political thicket" of redistricting and
reapportionment.

[27] 385 U.S. 440 (1967). The Senate districts had a maximum deviation of 25.65% or a
ratio for the largest to smallest district of 1.30 to 1. The House districts had a maximum
deviation of 33.55% and a ratio of 1.41 to 1.

[28] *Id*. at 445.

[29] Kilgarlin v. Hill, 386 U.S. 120 (1967). The Court also applied the one person-one vote
standard to local levels of government. *See, e.g.*, Hadley v. Junior College Dist., 397 U.S. 50
(1970); Avery v. Midland County, 390 U.S. 474 (1969). For a criticism of this extension, see
Note, *Reapportionment—Nine Years into the "Revolution" and Still Struggling*, 70 MICH.
L. REV. 586 (1972).

every justification for population deviations in congressional districts was held unacceptable by the Court. In a challenge to Missouri's congressional districts, the Court expanded on the equal population principle of *Wesberry*, holding that "the State must justify each variance, no matter how small."[30] The deviations involved in the Missouri challenge were less than six percent. New York districts, invalidated by *Wells v. Rockefeller*,[31] had a greater maximum deviation of 12.096%. However, dissent was not lacking. Justice Harlan, joined by Justice Stewart, termed these decisions "Draconian," criticizing the majority for transforming "a political slogan into a constitutional absolute."[32]

By the end of the 1960's it appeared to many commentators that the "arithmetic straitjacket"[33] rule applied to both congressional and legislative districts.[34] Round II however, clarified the distinction between standards for congressional and other districts.

The second round of challenges to reapportionment and redistricting after the 1970 census resulted in the development of a bifurcated approach to standards for state legislative and congressional districts. While the Round I cases were decided during the Warren Court years, Round II challenges arose during the early years of the Burger Court. The new personnel on the Court continued to apply a strict standard to congressional redistricting, while developing less stringent standards for evaluating reapportionment plans for state legislatures.

The first case in Round II to articulate this bifurcated approach was *Mahan v. Howell*,[35] a challenge to Virginia's 1971 legislative reapportion-

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[30] Kirkpatrick v. Priesler, 394 U.S. 526, 531 (1969). Each of Missouri's justifications for deviations of 5.97% were held unacceptable. Noting that the legislature had before it several plans with smaller population deviations, the Court found that the population variances were "not unavoidable." *Id.* Other justifications found unacceptable for deviations of this size included avoiding fragmentation of "areas with distinct economic and social interests," use of an "eligible voter" population base, and post-census population shifts. *Id.* at 533-36.

[31] 394 U.S. 542 (1969). New York had split the state into seven distinct regions and created districts within these regions that were close in population to the other districts within the region. However, the plan resulted in relatively large deviations for the entire state. This scheme did not meet the command "to equalize population in all the districts of the State. . . . Equality of population among districts in a sub-state is not a justification for inequality among all the districts in the State." *Id.* at 545-46.

After the *Wells* decision Republicans gained control of the legislature and Governor's office and constructed a redistricting plan designed to benefit the Republican Party while achieving population equality, much to the consternation of the original litigant. "Wells returned to the federal district court in February 1970 to plead that if it did nothing else it at least should restore the plan he had successfully contested the year before." Dixon, *One Man, One Vote—What Next?*, 60 NAT'L CIVIC REV. 265, 267 (1971).

[32] 394 U.S. at 549-50 (Harlan, J., dissenting).

[33] Dixon, *The Warren Court Crusade for the Holy Grail of One Man, One Vote*, 1969 SUP. CT. REV. 219, 226 (1969).

[34] For an excellent review of the theory and politics of Rounds I and II, see Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 Sw. L.J. 607 (1980).

[35] 410 U.S. 315 (1973). Justice Rehnquist argued that states were afforded "broader lati-

ment. Holding that the state had justified the 16% population deviations by its policy of not splitting political subdivisions, Justice Rehnquist stated that the plan "may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions. . . . While this percentage may well approach tolerable limits, we do not believe it exceeds them."[36] *White v. Regester*,[37] decided later the same Term, established that some de minimis deviations in state legislative districts need not be justified at all. Justice Brennan dissented, noting that most state legislatures had assumed that the same standard controlled legislative reapportionment as well as congressional redistricting: "[T]he outgrowth of that assumption has been a truly extraordinary record of compliance with the constitutional mandate."[38] To establish a new standard for state legislative districts would allow too much deviation from the goal of population equality, according to Justice Brennan. However,

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tude" under equal protection clause challenges to reapportionment. *Id.* Therefore, reapportionment plans were "not to be judged by the more stringent standards of *Kirkpatrick*," which was expressly limited to congressional redistricting challenges. *Id. See* Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("[m]athematical exactness . . . is hardly a workable constitutional requirement" for state legislative districts).

[36] 410 U.S. at 328, 329. A different statistical method calculated the deviation of the multi-member plan at 23.6%, but Justice Rehnquist "declined to enter this imbroglio of mathematical manipulation" and used the statistics used by the lower court. *Id.*

[37] 412 U.S. 755 (1973). *White* involved a challenged to the Texas legislative reapportionment. The Court held that population deviations of 9.9% in the state's reapportionment plan did not satisfy "the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause," despite the fact that no "acceptable" justifications were offered for the deviations. *Id.* at 764. Justice Brennan's dissent pointed out that the Round II cases meant that "one can reasonably surmise that a line has been drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever." *Id.* at 777 (Brennan, J., dissenting). *See also* Abate v. Mundt, 403 U.S. 182 (1971) (11.9% variance in county legislature must be justified).

[38] 412 U.S. at 79. The following table from the United States Census Bureau indicates that the redistricting picture changed rapidly from 1960 to 1970. Population deviations continue to be reduced in the 98th Congress.

Table 1: Population Deviations of Congressional Districts

88th, 93rd and 98th Congresses
(1963, 1973 and 1983)

Percentage Deviation from State Average	CONGRESS		
	88th	93rd	98th
Less than 1%	9	385	411
1 - 5%	81	41	18
5 - 10%	87	3	-
10% and over	236	-	-

See DATA BOOK, *supra* note 12, at ix.

the "higher mathematics" of one person-one vote was a major flaw in his argument. Justice Brennan recognized that "percentage figures tend to hide the total number of persons affected by unequal weighting of votes,"[39] but he nonetheless suggested that the majority "establishes a wide margin of tolerable error, and thereby undermines the effort" to achieve population equality.[40] However, the small size of state legislative districts combined with legitimate local concerns justifies the acceptability of higher percentage deviations.[41]

Despite the relaxation of mathematical precision for state legislative apportionment, the Burger Court remained steadfast in applying stringent standards in some one person-one vote cases. Invalidating Texas' congressional districts, which deviated from equality by only 4.13%, the Court clearly indicated that the less stringent review of reapportionment plans did not extend to congressional redistricting.[42] The Burger Court has also held both court-ordered redistricting and reapportionment plans to strict standards.[43]

Thus, by the end of Round II the Court had established that deviations in state legislative reapportionments could be justified by a number of consistently applied policies, but almost no population deviation among congressional districts would be tolerated.

III. CHALLENGES TO THE 1980 REDISTRICTING (ROUND III)

Challenges to redistricting and reapportionment after the 1980 census[44]

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[39] 412 U.S. at 781. For example, in a state with 10,000,000 persons, a 10% deviation in 20 congressional districts would mean a deviation of only 50,000 persons, while a 10% deviation in the same state's 50 State Senate districts would mean a deviation of 20,000 persons.

[40] *Id.* at 779. "[T]o consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality." *Id.* (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)).

[41] For an example of why higher percent deviations in state legislative districts may be tolerable, see *supra* note 39.

[42] White v. Weiser, 412 U.S. 783 (1973). The existence of other plans with smaller population deviations clearly demonstrated that the deviations were "not unavoidable" and were not justified by either the state's policy of preserving political sub-division boundaries or preserving the seniority of the state's congressional delegation. *Id.* at 790, 791.

[43] Chapman v. Meier, 420 U.S. 1 (1975). "[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid the use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variations." *Id.* at 26-27. *See also* Connor v. Finch, 431 U.S. 407 (1977) (16.5% variance in *court-ordered* plan not acceptable).

[44] Some plaintiffs also challenged the accuracy and reliability of the census itself, but were not successful. *See, e.g.,* Young v. Klutznick, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd,* 652 F.2d 617 (6th Cir.) (Mayor and City of Detroit lacked standing to bring action and issue was so hypothetical that it was not capable of judicial resolution), *cert. denied,* 455 U.S. 939 (1981); Carey v. Klutznick, 508 F. Supp. 420 (S.D.N.Y. 1980), *rev'd,* 653 F.2d 732 (2d Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982) (denied request to adjust census for alleged undercount of minorities). *See also* BUREAU OF THE CENSUS, U.S. DEP'T OF COM-

continued under the precedents set in Rounds I and II. Population deviations in congressional districts were given the strictest scrutiny, while deviations of up to 10% seemed acceptable for most state legislative reapportionments.

Other differences existed between congressional redistricting and state legislative reapportionment. Deadlocks in the political process were significant in bringing about court-ordered redistricting, but not nearly as much so in state legislative reapportionment. The issue of staggered senatorial elections occupied a central role in reapportionment plans. Geographic considerations were also important in reapportionments.

At the same time, however, the lower courts have followed the Supreme Court's lead in *Gaffney v. Cummings*,[45] and maintained a consistent policy of avoiding issues of partisan gerrymandering. On the other hand, blatantly racial gerrymanders have been invalidated by the courts, although challenges based on racial discrimination have not been raised as often as in the early years of the one person-one vote battle.

Nineteen states[46] have seen challenges to congressional district boundaries drawn after the 1980 census while thirty-one states[47] have had challenges to post-1980 legislative reapportionments.

The "box score" of challenges to the 1980 redistricting and reapportionment which follows shows that challengers were successful in overturning, modifying, or bringing about court-imposed districts in fifteen of the nineteen congressional redistricting cases discussed in section 2.1 Three challenges were not successful, and one case is still pending.[48]

MERCE, 1980 CENSUS OF POPULATION AND HOUSING, DATA USERS GUIDE 100 (1981); Bailey, *The Census, The Undercount and Black Power in Electoral Politics, reprinted in* BLACK PEOPLE AND THE 1980 CENSUS: PROCEEDINGS FROM A CONFERENCE ON THE POPULATION UNDERCOUNT 534 (1980); Kirksey, *The Black Undercount and Political Issues, reprinted in* BLACK PEOPLE AND THE 1980 CENSUS: PROCEEDINGS FROM A CONFERENCE ON THE POPULATION UNDERCOUNT 233 (1980); Note, *Constitutional Implications of a Population Undercount: Making Sense of the Census Clause*, 69 GEO. L.J. 1427 (1981) (concluding that the census should be adjusted for an undercount).

[45] 412 U.S. 735 (1973). Beyond requiring population equality "we have not ventured far or attempted the impossible task of extripating politics from what are the essentially political processes of the sovereign States." *Id.* at 753-54.

[46] The states are Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Kansas, Louisiana, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Texas and West Virginia.

Six states (Alaska, Delaware, North Dakota, South Dakota, Vermont and Wyoming) are entitled to only one member in the House of Representatives. Seven other states (Hawaii, Idaho, Maine, Montana, Nevada, New Hampshire and Rhode Island) have only two Representatives.

[47] *See infra* text accompanying notes 48-49.

[48] A challenge to congressional districts remains pending in West Virginia.

One Person-One Vote: Round III
BOX SCORE

State	Congressional District Challenge	Legislative District Challenge
Alabama		N
Alaska	*	Y
Arizona	Y	Y
Arkansas	Y	
California	N	
Connecticut		N
Colorado	Y	Y
Delaware	*	
Florida		Y
Georgia	Y	
Hawaii	Y	Y
Idaho		Y
Illinois	Y	Y
Indiana		Pndg.
Iowa		
Kansas	Y	N
Kentucky		
Louisiana	Y	
Maine		Pndg.
Maryland		N
Massachusetts		**
Michigan		Y
Minnesota	Y	Y
Mississippi	Y	
Missouri	Y	
Montana		N
Nebraska		
Nevada		
New Hampshire		N
New Jersey	Y	
New Mexico		Y
New York	N	N
North Carolina		
North Dakota	*	
Ohio	Y	
Oklahoma		
Oregon		N
Pennsylvania	N	N

Rhode Island		Y
South Carolina	Y	
South Dakota	*	N
Tennessee		Pndg.
Texas	Y	Y
Utah		Pndg.
Virginia		Y
Vermont	*	Y
Washington		
Wisconsin		Y
West Virginia	Pndg.	Pndg.
Wyoming	*	N

Key: Y = Successful Challenge
     N = Unsuccessful Challenge
     * = Only 1 Congressional District
   ** = Did not reapportion after 1980
Phdg. = Case currently pending

The box score illustrates that plaintiffs had a lower batting average in attacking state legislative reapportionments. Fourteen reapportionment plans were modified at least in part, while twelve plans were upheld. Five reapportionment cases remain pending.[49]

A. *Congressional Redistricting Challenges*

1. Political Deadlocks

Court-ordered plans were developed in five states not because a validly enacted plan violated constitutional requirements, but because the courts were required to break a stalemate in the political process. In Colorado,[50]

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[49] The Maryland Court of Appeals has dismissed the 10 challenges to the Maryland legislative reapportionment by a per curiam order, with a full opinion pending. Letter from the Maryland Sec. of State to the author (Sept. 7, 1983). Kansas reapportioned in 1979 using the results of a state census. The state was not constitutionally mandated to reapportion in 1980. Bacon v. Carlin, 575 F. Supp. 763 (D. Kan. 1983).

[50] Governor Lamm, a Democrat, vetoed three separate attempts at congressional redistricting by the Republican-dominated legislature. Following the second veto, plaintiffs sued for court-ordered redistricting. After the third veto, the court concluded that "the fate of redistricting has reached an impasse." Carstens v. Lamm, 543 F. Supp. 68, 76 (D. Colo. 1982).

The court reviewed 22 plans submitted by interested parties, but testimony focused on five plans with population deviations from 7-15 persons, or .0015% to .0031%. "To select one plan over another on the basis of population equality when only sixteen one-thousandths of a percent separates the plans ignores the realities of fair and effective representation." *Id.* at 92. The court noted that "[o]n balance, no one plan represents the best effort at providing fair and effective representation . . . because each plan has several undesirable elements which tend to outweigh any advantages." *Id.* at 93. The disadvantage mainly consisted of the fact that each plan divided counties or other political subdivisions.

Kansas,[51] Minnesota,[52] Missouri[53] and South Carolina,[54] elected officials were unable to agree on redistricting bills. While avowedly reluctant to do so, district court panels in each case ordered implementation of a court-imposed plan because a refusal to do so would have led to the use of the 1970 districts, since rendered constitutionally obsolete by the results of the 1980 census.[55]

2. Racial Discrimination

Redistricting plans were challenged on racial discrimination grounds in

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The court therefore developed its own plan incorporating the most desirable portions of each. For an interesting but tangential aspect of the Colorado story, see Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982) (denied writ of mandamus application to order judge to permit television coverage of negotiations, holding that provisions of the Colorado "Sunshine Law" were not applicable).

[51] In Kansas, plaintiffs brought suit after an apparent deadlock between the Republican legislature and the Democratic governor over redistricting. Governor Carlin had vetoed two redistricting bills, and the Kansas legislature was about to adjourn. One set of plaintiffs urged the court to adopt a plan favored by the Governor, while another supported the most recent bill to pass the legislature. Because both plans contained only small population deviations (the Governor's plan contained deviations of .11%, and the legislative plan deviated from equality by .09%) the court applied other factors, and attached "great importance to the preservation of county and municipal boundaries." O'Sullivan v. Brier, 540 F. Supp. 1200, 1203 (D. Kan. 1982). The court adopted a plan introduced in the legislature, but not passed by either branch, which was virtually identical to the Governor's plan, preserving county boundaries and containing a maximum deviation of only .338%.

[52] A deadlock in the legislature led to a three-judge district court's imposition of a redistricting scheme for Minnesota's eight congressional districts. Because 48.7% of Minnesota's population lived in metropolitan areas, the court selected a plan similar to one developed by the Democrat-Farm-Labor (DFL) party creating four metropolitan districts over a Republican plan that would have created three districts. LaComb v. Growe, 541 F. Supp. 145 (D. Minn. 1982). The dissent noted that in 1971 the state's metropolitan population was 49.3%, but the legislature "did not deem it necessary to adopt a congressional reapportionment plan based upon four metropolitan districts." *Id.* at 156 (Alsop, J., dissenting).

[53] The Missouri legislature failed to redistrict the state after a special session was called by the Governor for this purpose. A three-judge district court then drew its own redistricting plan. Shaver v. Kirkpatrick, 541 F. Supp. 922 (W.D. Mo. 1982).

[54] A three-judge panel ordered implementation of a plan adopted by the South Carolina House of Representatives as the "most acceptable" of the several plans brought before it. In addition to containing a low population deviation of .28%, the House plan also kept most counties intact, unlike the alternate scheme. Except for modifying one boundary line splitting a naval facility, the House plan was adopted as introduced in the House. South Carolina State Conf. of Branches of NAACP v. Riley, 533 F. Supp. 1178 (D.S.C. 1982).

[55] Two courts rejected the remedy of resorting to at-large elections in states where no redistricting plan was enacted, under 2 U.S.C. § 2a(c)(5) (1982). *See, e.g.,* Shaver v. Kirkpatrick, 541 F. Supp. 922 (W.D. Mo. 1982) (§ 2a(c)(5) was implicitly repealed by 2 U.S.C. § 2c). *But see* Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982) (§ 2a(c)(5) was a "limited stop-gap measure" intended to be used when a redistricting scheme was found invalid and there is insufficient time to implement a court-imposed plan). At-large congressional elections are also politically unsound, since candidates for Congress would be required to wage expensive state-wide campaigns for probably only one election.

only five states during Round III, perhaps because discrimination in most states is less obvious than it was in the 1960's. The more subtle nature of discrimination leads to problems in proving discriminatory intent.[56] In *Busbee v. Smith*,[57] however, a three-judge panel found one of the most blatant cases of racial discrimination in the 1980's in a Georgia redistricting plan. Georgia sought a declaratory judgment that its 1981 congressional redistricting plan did not violate the Voting Rights Act of 1965[58] after the Attorney General had found that the plan did violate the Act. In addition to a showing of a long history of discrimination in Georgia, the 1981 redistricting plan was shown to have both discriminatory impact and intent.[59] The court noted that State Representative Joe Mack Wilson, the chairman of the House redistricting committee, expressed his standards for redistricting by telling one Republican member of the reapportionment committee that "there are some things worse than niggers and that's Republicans."[60]

According to the *Busbee* court, a motion for declaratory judgment requires the state to demonstrate absence of discriminatory purpose. That the Georgia plan had a discriminatory purpose was indicated by testimony that Wilson stated that "the Justice Department is trying to make us draw nigger districts, and I don't want to draw nigger districts."[61]

Arizona's congressional and legislative redistricting plans failed to win the Attorney General's approval since they divided the 8,000 members of

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[56] "There are two reapportionment struggles going on in America—one based on population, the other based on race. While population-based reapportionment has been successful in the courts, racially-based reapportionment has been a failure." Smith, *The Failure of Reapportionment: The Effect of Reapportionment on the Election of Blacks to Legislative Bodies*, 18 How. L.J. 639, 639 (1975). But Professor Smith acknowledges that "population-based reapportionment did have some effect" in electing blacks to state legislatures, since the increasing concentration of blacks in cities makes racial gerrymandering more difficult under the one person-one vote rule. *Id.* at 674. Where there are large numbers of seats to be reapportioned, highly concentrated minorities are more likely to obtain representation.

[57] 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, ___ U.S. ___, 103 S. Ct. 809 (1983) (mem.).

[58] 42 U.S.C. §§ 1971, 1973-1973bb-4 (1982). The Voting Rights Act requires the subject jurisdictions to submit (or pre-clear) any proposed changes in its voting laws, practices or procedures (including redistricting and reapportionment plans) to the United States Attorney General or to the District Court for the District of Columbia. If the Attorney General objects to any voting changes, a state may seek a declaratory judgment in the District of Columbia federal court that the proposed changes do not invidiously discriminate against protected minorities. *See, e.g.*, REPORT OF THE U.S. COMM. ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS (Sept. 1981). *See also* City of Rome v. United States, 446 U.S. 156 (1980) (pre-clearance provisions of the Voting Rights Act upheld).

[59] "The discrimination in this case is explicit and implicit. The contradictions, illogical justifications and feigned ignorance reflected in testimony at trial indicate an attempt to cover-up the true motives of the Georgia General Assembly." 549 F. Supp. at 515.

[60] *Id.* at 500.

[61] *Id.* at 501. The court ordered the state to submit a new redistricting plan within 20 days and delayed the congressional primary and general elections until the plan was subsequently approved by the court.

the San Carlos Apache tribe into three congressional and three legislative districts, thereby diluting the voting strength of the tribe.[62] The Louisiana redistricting plan was also overturned on grounds of diluting minority voting strength.[63]

In Mississippi, a court-ordered plan was implemented when the state's plan did not survive the Attorney General's preclearance under the Voting Rights Act.[64] The court adopted a plan similar to the legislative plan, with the exception that one district contained a 53.77% black majority. Mississippi must now show that any other redistricting plan it enacts is not retrogressive as compared to this court-ordered plan.[65]

The Attorney General objected to the Texas congressional districting bill on the grounds that it diluted minority voting strength in at least two districts.[66] The three-judge court altered district boundaries in both the

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[62] Goddard v. Babbitt, 536 F. Supp. 538 (D. Ariz. 1982). The parties stipulated to changes that returned the tribe to one district and reduced the maximum population deviation from 1.4% to .075% for the congressional districts. *See also* Klahr v. Williams, 339 F. Supp. 922 (D. Ariz. 1972) (Arizona's reapportionment invalidated for attempting to split Navajo Indian reservation into three legislative districts). Presumably the state will not attempt to gerrymander tribes into separate districts in the next round of reapportionment.

[63] Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983).

[64] Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982), *vacated and remanded sub nom.* 103 S. Ct. 2077 (1983). In entering his objection to the state's plan, the Attorney General stated that "District Nos. 1, 2, and 3 have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength." *Id.* at 1139 n.4.

The reapportionment battle in the Mississippi legislature has lasted 15 years. *See* United States v. Mississippi, 444 U.S. 1050 (1980) (adopted 1978 legislatively enacted plan that compared favorably with court-ordered plan); Connor v. Coleman, 425 U.S. 675 (1976) (writ of mandamus ordering district court to develop a court-ordered plan); Connor v. Williams, 404 U.S. 549 (1972) (remanded to district court for proceedings before special master); Connor v. Winter, 519 F. Supp. 1337 (S.D. Miss. 1981) (awarded attorney's fees and costs of over $100,000); Connor v. Finch, 469 F. Supp. 693 (S.D. Miss. 1979) (adopted compromise plan for 1979 elections); Connor v. Finch, 419 F. Supp. 1072 (S.D. Miss 1976) (adopted court-ordered plan), *rev'd* 431 U.S. 407 (1977) (impermissibly high population variances in court-ordered plan); Connor v. Waller, 396 F. Supp. 1308 (S.D. Miss.) (upheld constitutionality of legislature's 1975 plan), *rev'd*, 421 U.S. 656 (1975); Connor v. Johnson, 330 F. Supp. 521 (S.D. Miss.) (finding that drawing single-member districts is an insurmountable problem), *relief denied*, 403 U.S. 928 (1971); Connor v. Johnson, 330 F. Supp. 506 (S.D. Miss.) (1971 legislative plan invalid), *rev'd in part*, 402 U.S. 690 (1971) (ordered single-member districts); Connor v. Johnson, 256 F. Supp. 492 (S.D. Miss.), *aff'd*, 386 U.S. 483 (1967) (court-ordered interim plan for 1967 elections).

[65] The court deferred to the legislature's expressed policy of creating two 40% black districts, rather than one 65% black district. Mississippi v. Smith, 541 F. Supp. 1329 (D.D.C. 1981). Court-ordered plans are generally temporary, and may be superceded by a validly enacted legislative plan.

[66] Seamon v. Upham, 536 F. Supp. 931, 1030 (E.D. Tex.), *rev'd in part*, ___ U.S. ___, 102 S. Ct. 1518 (1982). Chiding the Attorney General for objecting to the plan just three days before the filing deadline for candidates, and 140 days after receiving the plan, the trial court stated that "the unseemly delay, inattention and inactivity of the Office of the Attorney General of the United States provided the State of Texas with anything but an expedi-

affected districts and in Dallas County, but the Supreme Court reversed, stating that "[w]e have never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General."[67] On remand, the trial court found that since the Texas election schedule had already started, restoring the districts drawn by the legislature would disrupt the election process. The court also noted that the legislature could enact a valid plan for all parts of the state after the 1982 elections.[68]

3.   Other Successful Challenges

Challenges to congressional redistricting plans were also successful in Arkansas, Hawaii, New Jersey, Ohio and Illinois.[69] In Arkansas,[70] the trial court held that the state's redistricting plan containing population deviations of 1.87% exceeded the limits permitted under the applicable Su-

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tious mechanism for seeking approval of its congressional apportionment plan." *Id.* at 931 n.3.

   [67] ___ U.S. ___, 102 S. Ct. at 1518.

   [68] 536 F. Supp. at 935. The State of Texas has seen a remarkable history of long and expensive litigation over several reapportionment and redistricting plans: White v. Weiser, 412 U.S. 783 (1975) (upheld finding of unconstitutionality of congressional districts, but recommended implementation of a different plan); White v. Regester, 412 U.S. 755 (1973) (reversed in part lower court finding that 1972 House districts were unconstitutional); Bullock v. Weiser, 404 U.S. 1065 (1971) (permitted 1972 elections to be held using unconstitutional districts given closeness of scheduled elections); Weiser v. White, 505 F.2d 912 (5th Cir. 1975); Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex. 1982); Graves v. Barnes (Graves IV), 446 F. Supp. 560 (W.D. Tex. 1977); Graves v. Barnes (Graves III), 408 F. Supp. 1050 (W.D. Tex. 1976); Graves v. Barnes (Graves II), 378 F. Supp. 640 (W.D. Tex. 1974), *aff'd sub nom.* Briscoe v. Escalante, 435 U.S. 901 (1978) (resolved Department of Justice objections to Texas single-member districts drawn under *Graves I*); Graves v. Barnes (Graves I), 343 F. Supp. 704 (W.D. Tex.), *aff'd sub nom.* Archer v. Smith, 409 U.S. 808 (1972) (upheld constitutionality of 1972 State Senate districts); Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *aff'd sub nom.* Kilgarlin v. Hill, 368 U.S. 120 (1967) (declaring the 1961 reapportionment invalid); Bush v. Martin (Bush II), 251 F. Supp. 484 (S.D. Tex. 1966) (allowing 1964 congressional elections under the 1957 plan); Bush v. Martin (Bush I), 224 F. Supp. 499 (S.D. Tex. 1963) (1957 congressional redistricting declared invalid), *aff'd,* 376 U.S. 222 (1964) (per curiam); Clements v. Valles, 620 S.W.2d 112 (Tex. 1981) (invalidated 1981 legislative reapportionment); Mauzy v. Legis. Redistricting Bd., 471 S.W.2d 570 (Tex. 1971) (required L.R.B. to re-draw lines after the decision in Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971)); Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971) (invalidating 1970 state House districts). *See generally* Bickerstaff, *supra* note 34.

   [69] The successful New Jersey challenge is discussed *infra* text accompanying notes 129-51. A challenge to the Illinois redistricting also was successful. *See* Ryan v. State Bd. of Elections, 661 F.2d 1130 (7th Cir. 1981) (ordered convening of three-judge court to hear challenge to Illinois congressional districts); In re Illinois Reapportionment Cases, No. 81 C 3915 (N.D. Ill. Nov. 23, 1981), *aff'd sub nom.* Ryan v. Otto, 454 U.S. 1130 (1982) (mem.).

   [70] Doulin v. White, 528 F. Supp. 1323 (E.D. Ark. 1982).

preme Court standards.[71] Because the Governor did not then call a special session of the legislature to enact a new plan, the court implemented a redistricting bill originally introduced in the legislature with population variances of only 0.78%.[72]

Ohio's congressional districts were invalidated because of their variation from population equality, although an initial challenge on grounds of race discrimination was unsuccessful. A three-judge panel concluded that "with a good-faith effort the General Assembly could have significantly reduced" variances from equality.[73]

The Hawaii plan was struck down because the state used registered voters rather than census population figures as the population base for redistricting Hawaii's two congressional seats.[74] The court found "unpersuasive the state's argument that its high military population means that use of total population for congressional redistricting would be inappropriate and unfair to the citizens of the state. This large military population certainly aided the state in achieving its two congressional districts."[75]

4.   Redistricting Plans Upheld

Redistricting plans survived preliminary challenges in California,[76] Pennsylvania,[77] and Ohio,[78] although California redistricting opponents were ultimately successful in overturning the plan at the polls and the Pennsylvania plaintiffs may well succeed after the Supreme Court's decision in the New Jersey case.[79]

California opponents of the redistricting plan filed petitions for a June,

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[71] *See supra* note 30.

[72] Doulin v. White, 533 F. Supp. 450 (E.D. Ark. 1982).

[73] Flanagan v. Gillmor, No. C-2-82-173, slip op. at 26 (S.D. Ohio Jan. 30, 1984). The court's order requiring the legislature to develop a new plan for the 1984 elections was stayed on February 16, 1984. *See also infra* note 78 and accompanying text.

[74] Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982).

[75] *Id.* at 571. The use of a registered voter base was also unconstitutional because it led to deviations of 3.0%, a figure that was avoidable if census data were used. *Id. Cf.* DuBois v. City of College Park, 283 Md. 676, 447 A.2d 838 (1982) (city analogized its exclusion of transient students in councilmanic reapportionment base to Hawaii's now-invalid practice of excluding its transient military population in the reapportionment base), *cert. denied,* ___ U.S. ___, 103 S. Ct. 787 (1983).

[76] Assembly of California v. Deukmejian, 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297, *cert. denied,* 456 U.S. 941 (1982).

[77] In re Pennsylvania Cong. Dist. Reapportionment Cases, 535 F. Supp. 191 (M.D. Penn. 1982).

[78] The challenge to the Ohio redistricting based on race discrimination was dismissed. *See* Flanagan v. Gillmor, 561 F. Supp. 36 (S.D. Ohio 1982). However the challenge on grounds of excess population deviations was successful. *See supra* note 73 and accompanying text.

[79] Karcher v. Daggett, ___ U.S. ___, 103 S. Ct. 2653 (1983). The New Jersey challenge is fully discussed *infra* text accompanying notes 129-51.

1982 referendum on the redistricting and reapportionment statutes.[80] The referendum repealing the congressional districts subsequently passed, 3,226,333 (64.6%) to 1,764,981 (35.4%), and California's congressional districts were re-drawn by the legislature for the 1984 elections.[81]

The court denied plaintiffs' motion to delay the Pennsylvania[82] congressional elections without addressing the constitutionality of the plan.[83] However, since the Supreme Court affirmed the invalidation of the New Jersey plan, the Pennsylvania districts may eventually be found unconstitutional on grounds of deviation from population equality. The .3993% deviation in Pennsylvania was quite close to the .6984% deviation struck down in New Jersey.

B. *Challenges to State Legislative Districts*

Challenges to state legislative districts were based on different grounds than attacks on congressional districts. Challenges were based primarily upon population deviations or geographic considerations, accounting for ten challenges each. Partisan gerrymandering or racial discrimination accounted for only six challenges. Surprisingly, courts were asked to break political stalemates in only two states, Minnesota and Wisconsin.[84]

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[80] Although the California Supreme Court placed the referendum on the ballot despite technical objections to the petitions, the court held that since the referendum would be on the same primary ballot as the congressional elections, the challenged districts would be used for the 1982 elections. Assembly of California v. Deukmejian, 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297, *cert. denied*, 456 U.S. 941 (1982). *See also* In re Initiative Petition No. 317, 648 P.2d 1207 (Okla. 1982) (initiative challenging Oklahoma congressional redistricting placed on ballot despite technical objections to petitions).

[81] One Republican assemblyman filed petitions for a referendum on these re-drawn districts, but the California Supreme Court held that the state's long-maintained policy of decennial reapportionment meant that only one initiative would be allowed per decade. USA Today, Sept. 16, 1983, at A4.

[82] In re Pennsylvania Cong. Dist. Reapportionment Cases, 535 F. Supp. 191 (M.D. Penn. 1982).

[83] Significantly, the trial court relied on Justice Brennan's stay of execution order in the New Jersey case where the population deviation was .6984%. Karcher v. Daggett, __ U.S. __, 102 S. Ct. 1298 (1983). The court reasoned that if there were a "fair prospect of reversal" in the New Jersey case, then the likelihood plaintiffs would demonstrate that a .3993% population deviation was impermissible did not outweigh the costs in delaying the congressional election.

[84] By comparison, note that congressional redistricting was deadlocked in five states. *See supra* text accompanying notes 50-55. The difference could be that many state legislatures either reapportion themselves or delegate this duty to a bi-partisan commission with a tie-breaking member. For an excellent summary of state constitutional provisions for reapportionment, see Note, *Apportionment in North Dakota: The Saga of Continuing Controversy*, 57 N.D.L. Rev. 447, 472-73 nn.190-99 (1981). *See infra* text accompanying notes 109-28 for a discussion of other challenges.

1.   Population Deviations

Reapportionment in Round III bore out Justice Brennan's observation in *White v. Regester*[85] that a line for the acceptability of deviations in state legislative reapportionment had apparently been drawn at 10%. Lower courts in Round III held plans with deviations lower than that figure valid and generally invalidated plans with deviations greater than 10%. Plaintiffs successfully challenged population deviations of 94% in New Mexico,[86] 88% in Rhode Island,[87] 26.3% in Virginia,[88] and deviations of 43.18% (Senate) and 16.04% (House) that resulted from Hawaii's use of registered voters rather than total population for its reapportionment base.[89]

In addition, a Michigan formula which used both area and population was struck down, although the plan subsequently drawn by a special master created population deviations of 16.26% (House) and 16.36% (Senate).[90]

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[85]   412 U.S. 755, 777 (1973). *See supra* note 37.

[86]   Sanchez v. King, 550 F. Supp. 13 (D.N.M.), *aff'd*, ___ U.S. ___, 103 S. Ct. 32 (1982) (mem.). New Mexico constructed legislative districts by combining election precincts. Because these precincts crossed census block and enumeration district lines, the state then computed the population of these precincts on a "total votes cast" formula which yielded impermissibly high population deviations.

[87]   Farnum v. Burns, 548 F. Supp. 769 (D.R.I. 1982). The Rhode Island Supreme Court, in Licht v. Quattrochi, 82-0259 (R.I. July 7, 1982), struck down the 1982 legislative plan, leaving the previous 1974 reapportionment in place. However, the 1980 census showed that the 1974 districts had a maximum population deviation of 88%. The district court enjoined the 1982 elections "until such time as a constitutionally permissible apportionment plan is devised." 548 F. Supp. at 775.

[88]   Cosner v. Dalton, 522 F. Supp. 350 (E.D. Va. 1981). The Virginia plan used "floater" districts. An additional legislative seat is created that "floats" over two or more underlying districts so as to equalize the district populations. The population deviations of floater districts can be computed either by the "traditional House" method, which computes deviations by considering the floater district as a whole, or by the "shared floater" method, where deviations are measured for each underlying district individually. The "traditional House" method yielded a population deviation of 26.63%. The "shared floater" method yielded a population deviation of 27.72%. The re-drawn plan survived challenges based on geographic considerations. *See infra* text accompanying notes 96-104.

For an excellent discussion of *Cosner*, see Parker, *The Virginia Legislative Reapportionment Case: Reapportionment Issues of the 1980's*, 5 GEO. MASON U.L. REV. 1 (1982); Note, *The Reapportionment Dilemma: Lessons from the "Virginia Experience,"* 68 VA. L. REV. 541 (1982).

[89]   Travis v. King, 552 F. Supp. 1200 (D. Hawaii 1982).

[90]   In re Apportionment of State Legislature, 413 Mich. 149, 207, 321 N.W.2d 565, 609 (1982) (supplemental case discussing special master's report). The court held that the invalid formula which weighted land area as 20% of the formula was "inextricably linked" with the reapportionment commission's functions. Thus, when the formula fell, the commission could not survive. 413 Mich. 96, 138, 321 N.W.2d 565, 582, *appeal dismissed sub nom.* Kleiner v. Sanderson, ___ U.S. ___, 103 S. Ct. 201 (1982).

See Barber, Partisan Bias and Incumbent Protection in Legislative Redistricting (Sept. 1, 1983) (unpublished manuscript): "The Commission had never in its 19 years of existence

Reapportionment plans with smaller population deviations survived challenges. Population deviations upheld as constitutional were 13.74% in New Hampshire,[91] 10.94% in Montana,[92] 8.36% in Connecticut,[93] 5.34% in Oregon,[94] and 2.81% in Pennsylvania.[95]

2. Geographic Considerations

Many states have constitutional or statutory requirements setting forth geographic considerations to be followed in reapportionment, such as compactness requirements or prohibitions against splitting political subdivision boundaries with district lines.[96] Courts can evaluate reapportionment plans on these objective criteria. Therefore authorities seem to adhere closely to the standards so that their efforts will not be invalidated. Challenges on grounds of violating geographic considerations were successful only in Alaska, Idaho and Illinois.

While the Alaska challengers were not successful in attacking the state's exclusion of non-resident military personnel and their dependents from the apportionment base,[97] they were able to convince the Alaska Supreme Court that the Governor erred in drawing district boundaries.[98]

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performed its function." *Id.* at 21.

The Michigan experience lends credence to another of Justice Brennan's warnings: "[t]o consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality." Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969). The Michigan state legislative district variances are too close to the 16% variance approved by the Court in Mahan v. Howell, 410 U.S. 315 (1973), to be merely coincidental. Michigan's congressional districts, on the other hand, have achieved precise equality. The districts vary by only one person. If the state's population was evenly divisible by the number of districts there would be no variation at all.

[91] Bayer v. Gardner, 540 F. Supp. 624 (D.N.H. 1982). New Hampshire's House of Representatives, the largest in the nation at 400 members, are elected from "floterial" districts, in which some districts elect more than one member so as to equalize population differences. The deviations in New Hampshire came about because the state did not cross county boundaries in drawing the districts. This method won the court's approval, however, because the State Representatives in each county comprise the County Convention, the legislative body for New Hampshire's counties. *Id.* at 630 n.10.

[92] McBride v. Mahoney, 573 F. Supp. 913 (D. Mont. 1983).

[93] Logan v. O'Neill, 187 Conn. 721, 448 A.2d 1306 (1982).

[94] McCall v. Legislative Assembly, 219 Or. 663, 634 P.2d 223 (1981).

[95] In re Apportionment Plan for Pennsylvania Gen. Assembly, 497 Pa. 425, 442 A.2d 661 (1981). The largest deviation among the plans upheld was in Wyoming (89%). *See infra* text accompanying notes 152-63.

[96] Constitutional or statutory provisions include requirements of contiguity (31 states), compactness (23 states) and original jurisdiction over the validity of reapportionment plans vested in the highest court of the state (16 states). *See* Dodge & McCauley, *supra* note 6, at 546-47 n.95.

[97] *See infra* text accompanying notes 109-28.

[98] Carpenter v. Hammond, No. 6728 (Alaska July 22, 1983). The Alaska Constitution provides that districts "shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area." *Id.* slip op. at 27 (citing

The court found that one community was improperly included in a district where there was no "significant social and economic interaction" between the various communities.[99]

In Idaho the state supreme court[100] upheld the trial court's determination that the reapportionment plan violated the state's constitutional prohibition against splitting county boundaries. The trial court then "dramatically" reshaped the districts and increased the number of Senators and Representatives in order to reduce the population deviations that would result from a plan which kept county boundaries intact.[101]

In only one state was a plan altered solely because it violated the rule of compactness. In Illinois, the state supreme court re-drew boundaries for a senate district that stretched 125 miles,[102] a violation of the compactness provisions of the Illinois Constitution.

Other challenges based on compactness or splitting political sub-divisions were unsuccessful. The Arkansas challenge[103] to a plan that split counties was defeated because the Board of Apportionment split county lines so as to achieve population equality among the districts. Similarly, in Connecticut, plaintiffs challenging the state's plan as violating the "town integrity" principle of the state constitution were not successful despite presenting a plan that contained lower deviations than the state plan.[104]

3. Gerrymandering and Racial Discrimination

The Arizona and Illinois challenges were the only reapportionment cases to alter a plan on grounds of racial gerrymandering. Arizona's plan failed to win approval of the Attorney General under the Voting Rights

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ALASKA CONST. art. VI, § 6).

[99] *Id.* slip op. at 32. Several Vermont towns challenged the state's reapportionment on similar grounds but the case was dismissed by the Vermont Supreme Court. *Challenges to Districts Dismissed*, Rutland Daily Herald, Aug. 19, 1982, at 1.

[100] Hellar v. Cenarrusa, 104 Idaho 858, 664 P.2d 765 (1983).

[101] *Judge reshaped Idaho's political boundaries*, Lewiston Morning Tribune, Aug. 21, 1983, at 1A.

[102] Schrage v. State Bd. of Elections, 88 Ill. 2d 87, 430 N.E.2d 483 (1981). A federal court challenge on grounds of non-compliance with geographic standards was unsuccessful. However, the plaintiff succeeded on grounds of dilution of minority voting strength in the Chicago area. The court adopted a settlement agreement, re-drawing boundaries in the Chicago area. Rybicki v. State Bd. of Elections, 574 F. Supp. 1082, 1147, 1161 (N.D. Ill. 1983).

[103] Wells v. White, 274 Ark. 197, 623 S.W.2d 187 (1981).

[104] Logan v. O'Neill, 187 Conn. 721, 448 A.2d 1306 (1982). *See also* Cline v. Robb, 548 F. Supp. 128 (E.D. Va. 1982) (approved re-drawn districts over objections to the split-up of county boundaries); In re Reapportionment of Colorado Gen. Assembly, 647 P.2d 191 (Colo. 1982) (approved commission's split of county lines in 1982 reapportionment, but revised apportionment on other grounds). Challenges regarding compactness were also unsuccessful in New York and Florida. *See* In re Apportionment Law, 414 So. 2d 1040 (Fla. 1982); Bay Ridge Community Council v. Carey, 115 Misc. 2d 433, 454 N.Y.S.2d 186 (1982).

Act, since it divided the San Carlos Apache tribe (population 8,000) into three congressional and three legislative districts, thereby diluting the voting strength of the tribe.[105]

Challenges alleging unconstitutional gerrymandering were defeated on procedural grounds, as in Arkansas,[106] for lack of proof of discriminatory intent, as in Florida and Virginia,[107] or for raising a "non-justiciable issue," as in New York.[108]

4. Other Challenges

a. *Exclusion of Non-residents*

The presence of large numbers of non-residents in their respective states led Alaska and Hawaii to exclude non-residents from the apportionment base. Alaska did so in a more methodical and constitutionally acceptable manner.[109] The Alaska Supreme Court held that the exclusion of non-resident military members and dependents did not violate the equal protection guarantee.[110]

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[105] Goddard v. Babbitt, 536 F. Supp. 538, 543 (D. Ariz. 1982). The parties stipulated to changes that returned the tribe to one district. *See also* Klahr v. Williams, 399 F. Supp. 922 (D. Ariz. 1972) (invalidated attempt to split Navajo reservation into three legislative districts). The Illinois challenge was also successful. *See supra* note 102.

[106] Arkansas plaintiffs were unsuccessful because their challenge went to the composition of only one of the state's 35 state senatorial districts, and did not challenge the entire plan as required under state law. Bizzell v. White, 279 Ark. 511, 625 S.W.2d 528 (1981).

[107] Florida plaintiffs were successful in overturning the state senatorial election schedule but did not succeed in challenging the plan on racial or partisan gerrymandering grounds. *See infra* note 113. The plaintiffs did not show a "purposefully discriminatory dilution . . . of freedom to vote." In re Apportionment Law, 414 So. 2d 1040, 1052 (Fla. 1982). *Accord*, Cosner v. Dalton, 522 F. Supp. 350 (E.D. Va. 1981). The plan "affirmatively shows provisions which will substantially increase the opportunity for minority participation in the political processes. . . ." 414 So. 2d at 1052. One of the districts "challenged for dilution of Hispanic population is sixty percent Hispanic." *Id.* at 1052 n.8.

[108] The New York plan was challenged for violating the requirements of compact, contiguous and convenient districts, but the New York trial court held that plaintiffs raised a "non-justiciable issue" in alleging a partisan gerrymander. Bay Ridge Community Council v. Carey, 115 Misc. 2d 433, 437, 454 N.Y.S.2d 186, 191 (1982). As a current version of the "political thicket," the New York court suggested that invalidating reapportionments for partisan gerrymandering would require courts to "enter a hopeless morass." *Id.*

[109] The state surveyed a sample of military personnel in the state. Respondents who answered that they were registered to vote in Alaska, considered Alaska their home, or intended to make Alaska their home were considered residents. The results of the survey determined "non-resident population coefficients" for the areas surrounding military bases, accounting for 7.83% of the state's population. Carpenter v. Hammond, No. 6728, slip op. at 4-7 (Alaska July 22, 1983).

[110] "We think it clear that a state has a legitimate interest in limiting its apportionment base to bona fide residents." *Id.* slip op. at 24. The court relied upon its analysis of the state's policy eight years before in Groh v. Egan, 526 P.2d 863 (Alaska 1974), where the court held that the state's policy of excluding military transients was "not offensive to notions of equal protection" as a "rational state policy." *Id.* at 25.

On the other hand, the Hawaii plan was struck down because of the use of registered voters rather than census population figures as the population base for reapportionment.[111] Hawaii did not meet the standard of showing a close approximation of the reapportionment plan to one using total population, because the plan contained population deviations of up to 43.18%, and was thus invalid.

b. Staggered Elections

The scheduling of staggered senatorial elections was a significant issue in challenges in several states that elect half of the Senate every two years. Half of the senatorial seats are filled by incumbents elected in districts that are no longer equal in population after the results of the decennial census, despite the fact that they were originally elected to four-year terms from validly apportioned districts. Courts in Colorado,[112] Florida,[113] and Oregon[114] redesigned plans to avoid such a dilemma. However the Wisconsin court reached an opposite result.[115] Legislatures can re-

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[111] Travis v. King, 552 F. Supp. 554 (D. Hawaii 1982). During Round I, the Supreme Court held in Burns v. Richardson, 384 U.S. 73 (1965), that while Hawaii could not use registered voters as the *intended* apportionment base, the state could use a registered voter base if it "produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population base." *Id.* at 93.

[112] The Colorado Supreme Court objected to the schedule for senatorial elections where two incumbent senators lived in one district and no senators lived in an adjacent district as violating "constitutional guarantees of legislative representation." In re Reapportionment of Colorado Gen. Assembly, 647 P.2d 191, 198 (Colo. 1982). This schedule also violated constitutional provisions for recall of senators, as the senator assigned to the district would have no identifiable constituency. *Id.* at 199.

Upon review of the plan developed by the Reapportionment Commission on remand, the court concluded that the commission "substantially re-drew boundaries" and the new boundaries violated the Colorado constitutional requirement of compactness and keeping intact communities of interest. *Id.* at 210.

[113] The Florida Supreme Court held that "since the geographic boundaries of all senate districts have been changed by this [1982] apportionment plan then elections must be held in 1982 for all senate districts." In re Apportionment Law, 414 So. 2d 1040, 1045 (Fla. 1982). The court examined Florida's extensive history of reapportionment litigation and concluded that truncated terms for Senators were "vary familiar" to the 1967 legislature that framed the reapportionment rules in the wake of the Florida litigation. *Id.* at 1049. For examples of Florida's previous reapportionment litigation, see Swann v. Adams (Swann V), 263 F. Supp. 225 (S.D. Fla. 1967); Swann v. Adams (Swann IV), 258 F. Supp. 819 (S.D. Fla.), *rev'd*, 385 U.S. 440 (1965); Swann v. Adams (Swann III), 258 F. Supp. 819 (S.D. Fla.), *rev'd*, 383 U.S. 210 (1965); Swann v. Adams (Swann II), 214 F. Supp. 811 (S.D. Fla.), *rev'd*, 378 U.S. 553 (1963); Swann·v. Adams (Swann I), 208 F. Supp. 316 (S.D. Fla. 1962).

[114] The Oregon reapportionment plan was invalid for failing to assign an identifiable senator to a district that would not have had a senatorial election from 1978 to 1982. *See* McCall v. Legislative Assembly, 291 Or. 663, 634 P.2d 223 (1981). The plan as amended was subsequently approved. *See* Cargo v. Paulus, 291 Or. 772, 635 P.2d 367 (1981).

[115] Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982). A three-judge federal panel rejected Democratic plaintiffs' challenge to a court-ordered plan providing for some State Senate districts where no election would be held until 1984. Plain-

solve this problem by adopting truncated terms for one-half of the senate districts, or by electing all of the Senators at the same time.

c. *Reapportionment Deadlocks*

Deadlocks in the political process resulted in court-ordered reapportionment plans in Wisconsin and Minnesota. Following the failure of the Minnesota legislature to adopt a reapportionment plan, a three-judge federal court implemented its own reapportionment scheme. The standards used by the court in developing its plan included that "all districts be single-member, be compact, be contiguous, preserve the voting strength of minority populations, respect boundaries of political subdivisions, and contain a given degree of population equality."[116]

However, the concurring judge pointed out that following the initial drawing of the boundaries the court noted the residence of incumbents and made minor adjustments in a number of districts to preserve "political fairness" and permit continued constituency-legislator relations. He believed that "any use of incumbent residency was inappropriate under the circumstances."[117]

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tiffs' contention, the court stated, "is a house of cards that collapses when exposed to even the gentlest breeze of cursory analysis," since each district would have an identifiable senator during the two years when half the Senate was elected under the 1972 districts. *Id.* at 659.

The Wisconsin case arose out of the legislature's inability to adopt a reapportionment plan that would survive the Governor's veto. Plaintiffs sought a declaratory judgment that the 1972 legislative boundaries were unconstitutional after the 1980 census. The plaintiffs also asked for the imposition of a court-ordered plan. *Id.* at 672.

The existing 1972 boundaries yielded, according to the 1980 census, impermissible population deviations of 49.8% for the State Senate and 62.4% for the State House. The 1980 plan adopted by the legislature (but vetoed by the Governor) contained deviations of 6.02%, but the court held that "after reviewing [the legislative plan], we conclude that it is one of the worst efforts before us and . . . has no redeeming value." *Id.* at 637.

Plans submitted by Democratic plaintiffs and Republican intervenors ranged in population deviations from 2.83% to 10.11%. The court recognized that the Wisconsin Constitution called for "compact and contiguous" districts, but held that "[a]lthough important, the requirement of compactness is clearly subservient to the overall goal of population equality." *Id.* at 634.

Since none of the plans submitted by the parties adhered to the objective of population equality and compactness, the court drew its own plan. The court attempted to preserve county boundaries and developed a plan with a population deviation of 1.74%. *Id.* at 637. The court did not consider partisan advantage. "At no time in the drawing of this plan did we consider where any incumbent legislator resides or whether our plan would inure to the political benefit of any one person or party." *Id.* at 638. Ohio, for example, uses a system which "phases in" the new senate districts. The Board responsible for reapportionment assigns half of the incumbent senators to the districts not coming up for election. OHIO CONST. art. XI, § 12.

[116] LaComb v. Growe, 541 F. Supp. 160, 167 (D. Minn. 1982). For a discussion of the deadlock in Wisconsin, see *supra* note 115.

[117] 541 F. Supp. at 167.

d. Multi-member Districts

In South Dakota, plaintiffs challenged reapportionment claiming that creation of several multi-member districts diluted the voting strength of single-member district voters.[118] In granting the state's motion for summary judgment[119] the court relied upon the Supreme Court's decision in *Forston v. Dorsey*,[120] where Georgia plaintiffs unsuccessfully challenged the state's policy of electing Senators from multi-member districts in the state's seven most populous counties as diluting the votes of the multi-member district voters.

e. Attorney General Objections

Late objections by the United States Attorney General to plans in two states led the respective district courts to implement plans not unlike the ones objected to by the Attorney General. In Alabama, the Attorney General approved reapportionment for sixty of the state's sixty-seven counties, but stated that evaluation could not be completed for the remaining counties in the limited time before the election season began.[121]

Plaintiffs and defendants were asked to provide proposed modifications to the legislature's plan, but the court later concluded that it too did not have enough time to consider the modifications.[122] Instead, the court accepted modifications for one county as suggested by the plaintiffs, and ordered interim implementation of the rest of the legislative enactment.[123]

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[118] O'Connor v. Kundert, No. 81-41-05 (D.S.D. Feb. 12, 1982).

[119] *Id.* slip op. at 2.

[120] 379 U.S. 433 (1965). The Court held that creation of some multi-member districts did not violate equal protection per se, but did not specifically address the question of vote dilution in single-member districts. *Id.* at 438-39. *Accord* City of Mobile v. Bolden, 446 U.S. 55, 65 (1980). Multi-member district plaintiffs maintained that their votes are diluted because while they might be able to elect a representative in a single-member district, when outnumbered by voters from other parts of the multi-member district, it is mathematically impossible to elect their own representative. Single-member district voters contended that their votes are diluted because they can elect only one representative, while multi-member district voters can elect several representatives. Single-member district voters would argue that the multi-member district voters are the constituents of several legislators and therefore wield significantly more power in the legislative process. On the other hand, multi-member district plaintiffs have charged that because minority groups represent a much smaller part of the multi-member district population a legislator can politically afford to be insensitive to the needs of the minority. *See, e.g.*, Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272 (1982).

[121] Burton v. Hobbie, 543 F. Supp. 235, 237 (M.D. Ala. 1982), *aff'd*, ___ U.S. ___, 102 S. Ct. 286 (1982) (mem.).

[122] "This Court is unwilling to impose a modification on the legislative plan . . . which would require the Court to ignore the approved legislative enactment in some twenty-six counties" since modifications in the objectionable districts would have a ripple effect in adjoining counties. 543 F. Supp. at 237.

[123] *Id.* at 239.

The case in Texas was quite similar to Alabama's challenge. The 1981 Texas legislative reapportionment did not survive either the legislative process or pre-clearance approval by the Attorney General. The Senate reapportionment was vetoed by the Governor, and the House reapportionment bill was objected to by the Attorney General. In Texas, when no legislatively enacted plan is in effect, the reapportionment is done by the Legislative Reapportionment Board (L.R.B.), consisting of five state officeholders.[124]

The Department of Justice entered objections to portions of the L.R.B. plan, although it later withdrew many of these objections. Plaintiffs then filed an action seeking a declaratory judgment that the L.R.B. plan was unconstitutional and a court-ordered reapportionment plan in time for the 1982 Texas elections.[125]

The three-judge federal court adopted the L.R.B. plan with some modifications proposed by hispanic plaintiffs. Because no plan had achieved pre-clearance approval from the Department of Justice, the court perceived its role as quite limited:

> Our job is to fill the legal hiatus . . . in a situation in which there has been no adjudication by any court that the LRB plans are in any respect constitutionally infirm and in which the great majority of the Senate and House districts provided for by those plans have, as a practical matter, been pre-cleared under the Voting Rights Act.[126]

Thus, despite the Attorney General's objections, reapportionment plans were given at least temporary effect in two states. In order to avoid the use of objectionable reapportionment plans in the future, states should submit plans to the Justice Department in a timely manner. The Attorney General should also streamline evaluation procedures.

C.   *The Supreme Court Enters Round III*

The United States Supreme Court entered Round III with *Karcher v. Daggett*,[127] invalidating New Jersey's congressional districts, and *Brown*

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[124] Terrazas v. Clements, 537 F. Supp. 514, 517 n.1 (N.D. Tex. 1982). After extensive public hearings the L.R.B. adopted a reapportionment plan for both Houses of the legislature. Attorney General Mark White transmitted the plan to the Department of Justice with his conclusions that the plan violated neither the Constitution nor the Voting Rights Act. However, the Secretary of State also sent the plan to the Department of Justice, but with his comment that the plan had received some merited objections. *Id.* at 520. Partisan politics no doubt played a role in the two letters to the Justice Department. The Secretary of State was a Republican appointed by then-Governor Clements. Clements was defeated for re-election by Attorney General White, a Democrat.

[125] Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex. 1982).

[126] *Id.* at 548.

[127] ___ U.S. ___, 103 S. Ct. 2653 (1983).

v. Thomson,[128] upholding Wyoming's legislative districts. Decided on the same day, these decisions have not answered the remaining issues of the one person-one vote rule. These decisions do, however, indicate that there will no doubt be a Round IV as legislators and lower federal courts continue to struggle with the implementation of one person-one vote. Both cases were decided by a five to four vote. Justice O'Connor voted in *Karcher* to invalidate New Jersey's congressional districts, but voted with the *Karcher* minority to uphold Wyoming's legislative districts in *Brown*. Justice Stevens' concurrence and Justice Powell's dissent in *Karcher*, noteworthy for the questions of gerrymandering they raise, also help to muddy the redistricting waters.

1. *Karcher v. Daggett*

In the New Jersey case[129] the legislature enacted[130] a redistricting plan[131] containing a raw total deviation of 3,764 persons, or .6984% of the target district.[132]

The district court held that the .6984% population deviation "was not unavoidable,"[133] and not a good faith effort[134] to achieve population equality. The court also rejected the state's contention that the equal population standard is satisfied "when the population variation is less than the statistical imprecision of the Census."[135]

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[128] ___ U.S. ___, 103 S. Ct. 2690 (1983).

[129] At the district court, Daggett v. Kimmelman, 535 F. Supp. 978 (D.N.J. 1982).

[130] The 199th legislature passed two redistricting bills. The first was vetoed by the Governor, and the second was repealed by the 200th legislature and replaced by the plan that was challenged. ___ U.S. ___, 103 S. Ct. at 2657. Assemblyman Jackman was the Speaker of the 199th legislature and Assemblyman Karcher is the Speaker of the 200th legislature.

[131] Democratic Governor Brendan Byrne signed the reapportionment bill on the day that he left office and shortly before his Republican successor assumed the position.

[132] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CONGRESSIONAL DISTRICTS OF THE 98TH CONG. (pre-publication tables) (1982). A plan developed by Professor Ernest Roeck of Rutgers University containing deviations of .3250% had been introduced, and other plans with deviations from .0923% to .4515% were also under consideration. Daggett v. Kimmelman, 535 F. Supp. 978, 982 (D.N.J. 1982). The Roeck plan evoked what one of the district court judges called a "remarkable" letter from Speaker Jackman. According to Jackman, Roeck's plan was "little more than an academic statement of *your* views of the desired outcome." Disavowing use of "scientifically developed blueprints," Jackman noted that "establishing standards for redistricting without recognition of the political process may deny the very real political nature of apportionment." *Id.* at 983.

[133] 535 F. Supp. at 983.

[134] *Compare* Flanagan v. Gillmor, No. C-2-82-173, slip op. at 13 (S.D. Ohio Jan. 30, 1984) ("good faith" is a term of art in congressional redistricting cases).

[135] 535 F. Supp. at 983. Although there was some evidence that the New Jersey legislature intended to avoid diluting minority voting strength, the district court held that there was no causal relationship between this goal and the population deviations of the plan, since the districts with a high minority population were the districts containing the high deviations. *Id.*

Judge Gibbons, the dissenter in the district court, noted that while the blatant partisan-

On appeal to the Supreme Court, Justice Brennan, writing for the majority,[136] rejected the state's argument that the variances did not exceed a de minimis level. "[T]here are no *de minimis* populations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification."[137] Argument that the plan was acceptable because its deviations did not exceed the "inevitable statistical imprecision of census figures"[138] was "little more than an attempt to present an attractive *de minimis* line with a patina of scientific authority."[139]

The availability of other plans with lower deviations meant only that the burden of proof shifted to the state to prove that the deviations were necessary to achieve some legitimate state objective,[140] a burden that New Jersey failed to meet. The only justification advanced by the state involved the protection of minority voting strength, and the Court was convinced that the trial court did not err in finding that there was no causal relationship between this interest and the deviations of the reapportionment plan.[141]

2. Equal Protection and Gerrymandering: Stevens and Powell

Rather than grounding the decision in *Karcher* on Article I, section 2, Justice Stevens believed that the equal protection clause of the fourteenth amendment protected the voting strength of both racial minorities and cognizable political groups, and he developed valid standards for determining when such fourteenth amendment rights have been violated. Noting that the equal protection clause has been used to provide protection against diluting minority voting rights, Justice Stevens stated that "as long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well. . . . Judicial preoccupation with the goal of perfect popu-

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ship of the New Jersey redistricting "leaves me, as a citizen of New Jersey, disturbed, . . . none of my concerns as a citizen are relevant to the standards I must apply as a judge." *Id.* at 985. He asserted that the population deviations in the New Jersey plan did not exceed de minimis levels since there was no showing of illegal discrimination. "Republican members of the House of Representatives are not, at least to date, considered to be members of a discrete and insular minority." *Id.*

[136] Joined by Justices Marshall, Blackmun, Stevens and O'Connor.

[137] ___ U.S. ___, 103 S. Ct. at 2660.

[138] *See, e.g.*, Young v. Klutznick, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd*, 652 F.2d 617 (6th Cir.), *cert. denied*, 455 U.S. 939 (1981).

[139] ___ U.S. ___, 103 S. Ct. at 2661.

[140] *Id.* at ___, 103 S. Ct. at 2663-65. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries" and even some partisan political considerations, according to Justice Brennan. *Id.* at ___, 103 S. Ct. at 2663. Given the invalidation of relatively small variances, however, it is difficult to see how any deviations can be justified. The question of how large a deviation may be justified remains unanswered.

[141] *Id.* at ___, 103 S. Ct. at 2664.

lation equality is an inadequate method of judging the constitutionality of an apportionment plan."[142]

"A significant adverse impact upon a defined political group," according to Justice Stevens, would shift the task of justification of a gerrymander to the state. Plaintiffs must first prove that they belonged to a "politically salient class . . . and that in the relevant district or districts or in the State as a whole, their proportionate voting influence has been adversely affected by the challenged scheme."[143]

Plaintiffs could establish the unconstitutionality of a gerrymander in at least four ways. First, the presence of population inequalities would be sufficient to establish gerrymandering. Second, irregular district shapes would require the state to explain its departure from district compactness. Third, splitting established political boundaries could be another basis for making a prima facie showing of gerrymandering. Finally, Justice Stevens also offered a procedural standard:

> If the process for formulating and adopting a plan excluded divergent viewpoints, openly reflected the use of partisan criteria, and provided no explanation of the reasons for selecting one plan over another it would seem appropriate to conclude that the adversely affected plaintiff group is entitled to have the majority explain its action.[144]

Justice White[145] in dissent construed the Court's decision as an "unreasonable insistence on an unattainable perfection in the equalizing of congressional districts."[146] Justice White believes that a "more sensible approach" would be to adopt the less restrictive approach used in state

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[142] *Id.* at ___, 103 S. Ct. at 2670 (Stevens, J., concurring).

[143] *Id.* at ___, 103 S. Ct. at 2672. *See also* Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277 (1976).

[144] ___ U.S. at ___, 103 S. Ct. at 2674. Justice Stevens believed that these standards were met in the New Jersey case. The New Jersey plan produced districts of "uncouth and bizarre" shapes and "wantonly disregard[ed] county boundaries." *Id.* at ___, 103 S. Ct. at 2676. Furthermore, the plan was designed by the Democratic legislative majority and signed into law one day before the inauguration of a Republican Governor. What Judge Gibbons called the "harshly partisan tone" of Speaker Jackman's letter characterized the entire reapportionment process and apparently would be a prima facie showing of unconstitutional gerrymandering under Justice Stevens' procedural standard. *Id.*

[145] Joined by The Chief Justice and Justices Powell and Rehnquist.

[146] ___ U.S. at ___, 103 S. Ct. at 2678 (White, J., dissenting). Justice White viewed deviations below one percent as statistically insignificant because such deviations fall below the level of precision of the census and are overcome by the variances between districts in the number of eligible voters, eligible voters who actually register, and the number of registered voters who actually vote. *Id.* at ___, 103 S. Ct. at 2681. *See supra* note 44. However, mathematical perfection has been achieved in Michigan. *See supra* note 90. Advances in computer technology now places perfection within reach of most states. *See, e.g.,* Engstrom, *supra* note 5.

legislative reapportionment cases. Although "not wedded to a precise fig-
ure . . . a 5% cutoff appear[ed] reasonable" to Justice White.[147]

Justice Powell, while joining the dissent as to population deviations,
was "prepared to entertain constitutional challenges to partisan gerry-
mandering that reache[d] the level of discrimination described by Justice
Stevens."[148] Thus, four Justices[149] agreed that New Jersey's population
deviated from de minimis standards. Two Justices[150] would entertain ger-
rymandering challenges, and three Justices[151] would hold that population
deviations of less than .7% do not exceed de minimis standards. It is
clear from *Karcher* that even de minimis deviations from equality will be
struck down. However, the Court has deferred discussion of what devia-
tions may be justified, whether a total population base makes sense using
admittedly imperfect census data, and issues of gerrymandering, to an-
other round of one person-one vote cases.

3. *Brown v. Thomson*

Brown v. Thomson,[152] decided the same day as *Karcher*, dealt with the
1981 apportionment of Wyoming's House of Representatives. Wyoming
has traditionally allocated at least one Representative to each of its
twenty-eight counties. This scheme gave Niobara County, the state's
smallest, one Representative even though its population of 2,924 was less
than half of the target population of 7,337 persons per district.

Chief Justice Burger, Justices Rehnquist, Stevens and O'Connor joined
Justice Powell's opinion upholding the constitutionality of the Wyoming
reapportionment plan. Two factors accounted for the majority's decision.
First, Wyoming's policy of granting at least one Representative per
county was applied in a manner "free from any taint of arbitrariness or
discrimination,"[153] since it had been followed for years and applied con-
sistently throughout the state.[154]

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[147] __ U.S. at __, 103 S. Ct. at 2686.

[148] *Id.* at __, 103 S. Ct. at 2689.

[149] Justices Blackmun, Brennan, Marshall and O'Connor.

[150] Justices Stevens and Powell.

[151] Justices Burger, White and Rehnquist. On remand New Jersey was unable to adopt a
new redistricting plan by the district court's deadline, so the 3-judge panel ordered imple-
mentation of a new plan for the 1984 congressional elections with a maximum deviation of
only 25 persons. Moreover, the court-ordered districts were more compact than the earlier
legislative plan, and altered districts apparently gerrymandered in favor of Democratic in-
cumbents. The Supreme Court denied an application for a stay in a memorandum opinion,
with Justice Stevens concurring and Justice Brennan, joined by Justice White and Marshall,
dissenting. *Karcher v. Daggett*, __ U.S. __, 104 S. Ct. 1692 (1984).

[152] __ U.S. __, 103 S. Ct. 2690 (1983).

[153] *Id.* at __, 103 S. Ct. at 2696 (quoting Roman v. Sinock, 377 U.S. 695, 710 (1964)).

[154] "In short, this case presents an unusually strong example of an apportionment plan
the population variations of which are entirely the result of the consistent and nondiscrimi-
natory application of a legitimate state policy." *Id.* at __, 103 S. Ct. at 2697.

The Court used mathematical legerdemain to conclude that the issue in *Brown* was not the 89% maximum deviation of the Wyoming plan with the additional district given to Niobara County, but rather "whether Wyoming's policy of preserving county boundaries justified the additional deviations from population equality"[155] of 23%. This figure represents the difference between a plan with a Niobara County district and a plan without the additional district for Niobara County.[156]

Justice O'Connor's concurring opinion made explicit this distinction between the 89% *total* deviation in Wyoming and the 23% *additional* deviation caused by the grant of a seat to Niobara County. Justice O'Connor found this 23% figure within the "flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities."[157] However, Justice O'Connor expressed "the gravest doubts that a statewide legislative plan with an 89% maximum deviation could survive constitutional scrutiny."[158]

Justice Brennan's dissenting opinion stated that the Court's opinion was "empty of likely precedental value,"[159] because it focused only on the *marginal* effect of the Niobara County representative, and not at the whole Wyoming reapportionment plan.[160] Justice Brennan and the other dissenters[161] would have found the Wyoming plan unconstitutional regardless of the Niobara County Representative or the large deviations in the rest of the apportionment plan.[162] Justice Brennan concluded by noting that while Justice O'Connor had "grave doubts" of the constitutionality of a plan with an 89% maximum deviation, "the Court today holds that just such a plan does survive constitutional scrutiny."[163]

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[155] *Id.* at ___, 103 S. Ct. at 2698.

[156] The Court concluded that Wyoming did not violate the fourteenth amendment in permitting Niobara County to have its own representative because "the grant of a representative to Niobara County [was] not a significant cause of the population deviations . . . ." *Id.*

[157] *Id.* at ___, 103 S. Ct. at 2699 (O'Connor, J., concurring).

[158] *Id.* at ___, 103 S. Ct. at 2700.

[159] *Id.* (Brennan, J., dissenting).

[160] Justice Brennan observed that "at least plaintiffs will henceforth know better than to exercise moderation or restraint in mounting constitutional attacks on state apportionment statutes, lest they forfeit their small claim by omitting to assert a big one. . . . This Court is not bound by a referendum of the League of Women Voters." *Id.* at ___, 103 S. Ct. at 2700, 2705.

[161] Justices White, Marshall and Blackmun also comprised part of the majority in *Karcher*.

[162] ___ U.S. at ___, 103 S. Ct. at 2701. Justice Brennan noted that even the 16% *average* deviation in the plan exceeded deviations struck down in other apportionment cases. *Id. See supra* text accompanying notes 9-43.

[163] ___ U.S. at ___, 103 S. Ct. at 2705.

IV. CONCLUSIONS AND RECOMMENDATIONS: REMAINING ISSUES AND SOLUTIONS

Round III of redistricting and reapportionment settled few of the remaining questions about the standards of the one person-one vote rule. The appropriateness of precise equality of population in congressional redistricting is a significant but apparently unresolved question. The issue of the size and content of acceptable justifications for population deviations also remains unresolved. Miscellaneous problems remain, but are overshadowed by the issue of equipopulous gerrymandering, an issue that the Supreme Court has left for the next round of redisticting and reapportionment.

A.   *Precise Population Equality and Deviations*

The goal of one person-one vote cases was to make one person's vote in an election equal to another's, but there are a number of problems associated with using precise population equality as the standard for achieving this goal. First, the mathematics of apportioning[164] seats in the House of Representatives to the states indicate that the standard in congressional elections is that one person's vote is worth[165] the same as another's *in*

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[164] For an interesting discussion of the problems of apportioning whole numbers among states when population entitles a state to a fraction of a Representative, see L. SCHMECKEBEIR, CONGRESSIONAL APPORTIONMENT (1976).

[165] Table 2 indicates the distribution of the "target" or mean population of congressional districts by size of each state's population. As population size increases, the target population for the states moves closer together. This distribution, which looks more like an oil can than the "normal" bell-shaped curve, is described as a leptokurtic curve. D. HARNETT, INTRODUCTION TO STATISTICAL METHODS 101-02 (1970).

Although the Constitution's guarantee of one representative per state leads to a distribution closer to the goal of population equality than a normal curve, these target populations would be held invalid if they represented the populations of congressional districts in the same state. The largest congressional district, South Dakota's only district, contains 690,768 persons. The smallest congressional district, Montana's second, contains 376,629, a difference of 313,690, or a 72.4% variance.

State Population

```
25,000,000 +|
             |
             |                           A
             |
             |
22,500,000 +|
             |
             |
             |
             |
20,000,000 +|
             |
             |
             |
             |
17,500,000 +|                           A
             |
             |
             |
             |
15,000,000 +|                           A
             |
             |
             |
             |
12,500,000 +|
             |                           A
             |                           A
             |                           A
10,000,000 +|                           A
             |                           A
             |
             |
             |
 7,500,000 +|                           A
             |
             |
             |                         A  BAA
 5,000,000 +|                           A   A
             |                         BAB
             |                           A     A
             |                  AA  A B
 2,500,000 +|               A     A  A   A     A
             |                      A     A
             |         A      BAA    A              A
             |     AB        AA     A         A       A       A
         0 +|_+_____+_____+_____+_____+_____+_____+
           375000   425000   475000    525000   575000   625000   625000
                  Population of Average Congressional District
              Legend: A = 1 Observation,  B = 2 Observations
```

State Population

```
25,000,000 +
           .
           .... + ....... + ....... + ....... A
           .
22,500,000 +
           .
           .
           .
20,000,000 +
           .
           .
           .
17,500,000 +...+ ....... + ....... + ....... A
           .
           .
           .
15,000,000 + ..
           .... + ....... + ....... + ....... A
           . ⚌
           .
12,500,000 .
           .... + ....... + ....... + ....... A
           .... + ....... + ....... + ...... A
           .... + ....... + ....... + ...... A
10,000,000 .... + ....... + ....... + ...... A
           .... + ....... + ....... + ...... A
           .
 7,500,000 +...+ ....... + ....... + ....... A
           .
           .
           .... + ....... + ....... + ...... A .. BAA
 5,000,000 .... + ....... + ....... + ....... A .. A
           .... + ....... + ....... + ..... BAB
           .... + ....... + ....... + ....... A .... A
           .... + ....... + ....... +AA.. A. B
 2,500,000 .... + ....... + ......: A.... A.. A.. A... A
           .... + ....... + ....... + . A..... A
           .... + ....... +A...... BAA..... + ..... A
           .... + .. AB... + ..... AA+ ..... A. + ..... + .. A... + ... A... + ... A
        0 +
             +        ++        +         +         +         +         +
          375000   425000   475000   525000   575000   625000   675000
```

other congressional districts in the same state. Second, *votes* are not equalized by using total population as the redistricting base. If *votes* are to be equalized, it would make more sense to use voting age population or actual numbers of voters as the apportionment base.[166] Third, due to the imprecision of the census, districts that were indicated as equipopulous will not actually have the same population. Furthermore, rapid demographic changes ensure that districts will not longer be equal after only a few years of population mobility.[167]

Given all of these problems of mathematics, does it make sense to use a standard of precise census-based total population equality in congressional districts? The *Karcher* Court answered this question in the affirmative. Total population is the required base, according to the Court, because of the command that Representatives "be elected by the People." The worth of a vote depends on the number of citizens represented by the elected official. Since the Court has established a strict mathematical standard for congressional redistricting, the sensible course of action for legislatures and other redistricting authorities would be to draw districts containing equal numbers of people.[168]

B.   *Miscellaneous Problems*

1.   Deadlocks

Although the courts have consistently held that redistricting and reapportionment are tasks for the state legislatures,[169] deadlocks in the political process have led to judicially-imposed reapportionments in several states.[170] States should resolve this problem by implementing a system[171]

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS OF POPULATION AND HOUSING: 1980 (pre-publication tables) (1982) (source of data).

[166] While use of a registered voter base may be permissible, it is allowed only if it results in a distribution not substantially different than that yielded by the use of a total population base. *See* Burns v. Richardson, 353 U.S. 573 (1965). The theory behind this rule is that legislators represent citizens, not just voters or voting-age citizens. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

[167] Since there is no way to accurately estimate the census undercounts or population mobility within small geographic areas, the argument that these factors limit the utility of census data was expressly rejected by *Karcher. See supra* notes 138, 139 and accompanying text.

[168] Advances in computer technology make it possible to draw an almost infinite number of equipopulous district plans. The addition of other non-population criteria, such as partisan voting data, political sub-division boundaries, compactness requirements, or other demographic data, reduces the number of possible plans, but it is still feasible to produce equipopulous districts. *See* Sheth & Hess, *Multiple Criteria in Political Redistricting*, 2 RUTGERS J. OF COMPUTERS & LAW 44 (1971).

[169] *See, e.g.*, Connor v. Finch, 431 U.S. 407, 416 (1977).

[170] *See supra* text accompanying notes 50-55, 76-84.

[171] *See, e.g.*, Rybicki v. State Bd. of Elections, 574 F. Supp. 1082 (N.D. Ill. 1983) (describing the Illinois requirement for the selection by lot of a tie-breaking member of the reappor-

for breaking deadlocks, such as adopting bipartisan reapportionment authorities with a tie-breaking member.

2. Staggered Elections

Challenges to staggered senatorial election calendars were successful in several states in Round III,[172] suggesting that this issue will continue to be significant in future reapportionments. In an electoral system where half of the State Senate is elected every two years, some of the other half of the Senators completing their terms will have been elected by districts that are, after the decennial census, unequal in population. Inevitably, at least some segment of the population will not be able to elect a State Senator for at least six years.[173]

The simple solution to this dilemma is to change the election calendar so that all of the post-reapportionment districts will be effective immediately. This result can be accompanied by truncating the terms of some of the incumbent Senators, electing some of the new Senators for half-terms, or electing all Senators at the same time.

3. Attorney General Pre-clearance

While pre-clearance of reapportionment plans by the Attorney General has been at least somewhat effective in eliminating illegal discrimination, the Round III experience suggests that delays in the pre-clearance process led to delays in implementing valid reapportionment plans in several states.[174] States should submit plans to the Department of Justice in a timely manner, and the Attorney General should speed up consideration of state redistricting and reapportionment plans.[175]

D. *Equipopulous Gerrymandering*

The establishment of population equality as an overriding criteria for evaluating redistricting and reapportionment plans has "sacrificed at the altar of population equality" traditional anti-gerrymandering requirements of compactness and respect of boundaries of political subdivisions.[176] This enables the map maker to achieve constitutional respecta-

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tionment commission).

[172] *See supra* text accompanying notes 109-26.

[173] As an example, district A voters may have elected a State Senator in 1978. In a 1981 reapportionment plan, a small portion of the district A voters might be placed in district B, where an incumbent Senator was elected in 1980, and is not scheduled for an election until 1984. Thus, six years will pass until these district A voters now in district B will have an opportunity to vote for a State Senator.

[174] *See supra* note 58.

[175] *See supra* text accompanying notes 109-28.

[176] Engstrom, *supra* note 5, at 210. Professor Engstrom notes that the Court has construed the one person-one vote cases as "primarily a suffrage matter" which is easily quanti-

bility for a gerrymandering simply by meeting equal population requirements.

Gerrymandering has been described as the "thorniest nettle in the political thicket,"[177] and "an extremely difficult adjudication problem"[178] because of the difficulties inherent in developing adequate standards for evaluating districting plans.[179] Gerrymandering is nonetheless violative of the equal protection clause as an invidious dilution of the voting rights of individuals.[180] The enactment of objective anti-gerrymandering criteria to supplement the equal protection requirement would allow courts to evaluate districting arrangements along lines other than simple adherence to population equality.[181] Congress and state legislatures should adopt objective and verifiable districting criteria so that the judiciary can effectively evaluate districting plans and implement the notions of political fairness underlying the Supreme Court's one person-one vote rule.

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fiable, leading the Court to push to the periphery issues of *qualitative* representation, i.e., gerrymandering. Engstrom, *Id.* at 192. *See also* Gaffney v. Cummings, 412 U.S. 735 (1973) (Connecticut legislative apportionment plan held unconstitutional due to excessive population deviations).

While the emphasis on population equality as an overriding consideration has been successful in eliminating the gross malapportionments of the 1960's, it has not improved the lot of gerrymandering victims. Moreover, it leads plaintiffs to raise challenges on grounds other than their true political motives. Plaintiffs challenge districting plans for minor variations in population and "do not care a hoot about numbers or county lines. . . . These are simply ploys for arguing in favor of one's own politically preferred plan, while pretending to be concerned only with 'neutral' considerations." Dixon, *Computers and Redistricting: A Plea for Realism*, 2 RUTGERS J. OF COMPUTERS & LAW 15, 18-19 (1971).

[177] R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 491 (1968).

[178] Engstrom, *supra* note 5, at 217.

[179] *See* Note, *Gerrymandering and One Man, One Vote*, 46 N.Y.U. L. REV. 879 (1971).

[180] Gerrymandering has been defined as "being a lot like pornography. You know it when you see it, but it's awfully hard to define." *Hearings on H.R. 8953 and Related Proposals on Congressional Districting before Subcomm. No. 5 of the House Comm. on the Judiciary, 92d Cong., 1st Sess.* 98 (1971) (statement by Representative (now court of appeals Judge) Abner Mikva).

There are, however, objective measures of gerrymandering, although none of them are totally satisfactory. *See* Beckstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121 (1978); Niemi & Deegan, *A Theory of Political Districting*, 72 AM. POL. SCI. REV. 304 (1978); Kaiser, *An Objective Method for Establishing Legislative Districts*, 10 MIDWEST J. OF POL. SCI. 200; Schwartzberg, *Reapportionment, Gerrymandering and the Notion of Compactness*, 50 MINN. L. REV. 443 (1966); Note, *Constitutional Challenges to Gerrymanders*, 45 U. CHI. L. REV. 845 (1978).

[181] Anti-gerrymandering criteria would supplement, not supplant, equal-population requirements. While addition of compactness or political sub-division requirements might be only one more hurdle for the gerrymanderer to overcome, adherence to the doctrine of compactness and to political sub-division boundaries necessarily limit the number of possibilities for gerrymandering. Without some kind of anti-gerrymandering requirements, a computer can produce infinite combinations of equipopulous districts to dilute voting strengths of selected groups while fulfilling the equal population mandate.