One Man-One Vote: In Pursuit Of an Elusive Ideal

BY ROLAND E. WALKER, JR.*

Introduction

The long line of Supreme Court decisions treating districting as a nonjusticiable political question rested primarily upon the Court's inability or reluctance to select and justify the crucial value upon which a judicially manageable standard might be predicated for the evaluation of controversies arising from the districting process.[1] In *Baker v. Carr*[2] the Supreme Court chose such a crucial value, and in so doing, made a fundamental decision concerning the political philosophy of democracy in America. The Court made clear that the nature of representation should be such that one person's vote is weighed as heavily as another's. Implementation of the one man-one vote[3] ideal in districting commanded numerical population[4] equality among districts. Yet, in a se-

* Member, California bar.

1. The terminology used herein is generally self-explanatory. For the purposes of this paper, however, one crucial definitional distinction must be drawn. The term "apportionment" is used exclusively in reference to the process whereby seats in the House of Representatives are allocated to the states. "Districting" refers to the actual drafting of district lines on a map. Judicial decisions have created no analog to House apportionment for the states. Thus, in the state legislative situation only "districting" can occur. In contrast, the House situation involves both "apportionment" and "districting."

In the interests of consistency and simplicity, an effort has been made to minimize the use of the terms "reapportionment" and "redistricting" in lieu of "apportionment" and "districting." The first two terms are used by the author only where they significantly clarify the discussion. They have been left in the texts of quotations taken from decisions, however.

Lastly, it should be noted that throughout the course of this article the author employs the terms "single-member district" and "multi-member district." These terms refer respectively to districts which elect either one or more than one representative.

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

3. This term, coined by the Supreme Court, has been used throughout this article solely for purposes of conformity, in lieu of the more accurate term "one person-one vote."

4. The term "population" is used herein as a shorthand manner of expressing a more complex philosophical question, namely, who should be enumerated for purposes of establishing numerical equality among districts?

ries of cases subsequent to *Baker*, the Supreme Court has compromised its choice of the one man-one vote ideal. In both House of Representatives and state legislative districting, the Court has not required absolute numerical population equality among districts, and in state legislative districting it has permitted unjustified deviations of up to ten percent. Further, the Court has allowed states to assert various interests to justify even greater deviations from the ideal.

Compromise of the ideal has created serious problems. The Court's standards for deciding which state interests justify a particular deviation from the ideal have lacked manageability and rigor. Because any deviation from absolute numerical population equality raises a claim of gerrymandering, a flood of litigation has ensued. Various racial, ethnic, religious, economic, and political interest groups have claimed that an otherwise valid districting is in fact a gerrymander that unconstitutionally dilutes their voting strength as groups.[5] These suits involve arduous problems of fact-finding and application of vague judicial standards. Such problems are much more difficult than those involved in applying the standard of numerical population equality to districts. These problems also closely resemble those that, until *Colegrove v. Green*,[6] had caused the Court to treat districting as a nonjusticiable political question.

This article examines judicial activity in legislative districting, the genesis of the one man-one vote ideal, and its subsequent interpretation and implementation. The article suggests that the Supreme Court should have adopted a standard that would more nearly realize the ideal recognized in *Baker*. The article proposes such a standard and argues in favor of its adoption.

I. Judicial Activity in the Districting of the House of Representatives and State Legislatures

A. The Emergence of the One Man-One Vote Doctrine

Until the year 1962 it was the exception rather than the rule that individual voters exercised the same amount of influence in the electoral process. Situations abounded in which one district electing the same number of representatives as another had a population of up to 425 times more than the other district.[7] Courts allowed deviations

5. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); Wright v. Rockefeller, 376 U.S. 52 (1964); Ince v. Rockefeller, 290 F. Supp. 878 (S.D.N.Y. 1968).

6. 328 U.S. 549 (1946).

7. *See* Gaffney v. Cummings, 412 U.S. 735, 744 n.9 (1973).

from numerical equality on the basis of a wide range of such considerations as: economic, topographical, and geographical concerns; industrial, agricultural, and recreational activities; and numerous other regional characteristics.[8] This situation was condemned in the landmark case of *Baker v. Carr*,[9] in which the Supreme Court signaled the advent of the one man-one vote doctrine. Much judicial, legislative, and executive agitation has accompanied the doctrine's subsequent interpretation. The seeds from which *Baker* sprung had been planted in *Colegrove v. Green*,[10] in which the Court considered the claim that Illinois' method of creating congressional districts violated the equal protection clause of the Fourteenth Amendment because the districts lacked compactness of territory and approximate equality of population. In a 4-3 decision the Court affirmed dismissal of the suit for want of equity powers, but its method of analysis was to become important when *Baker* arose. In considering the questions of justiciability, standing, and equity jurisdiction, a majority of justices (three dissenters and one who filed a separate concurring opinion) found the claim to be a justiciable, nonpolitical question, based on the Court's decision in *Smiley v. Holm*.[11] The same majority also found that the plaintiffs had standing to sue because, according to Justice Black, they had alleged facts to show that they had been injured as individuals.[12]

On the critical issue of equity jurisdiction, however, Justice Rutledge, in a separate concurrence, voted with three other justices to dismiss the case, not because the Court lacked subject matter jurisdiction, but rather because it preferred not to exercise its jurisdiction. In Justice Rutledge's words the Court had a duty

> to avoid decision upon grave constitutional questions, especially when this may bring [the Court's] function into clash with the political departments of the Government, if any tenable alternative ground for disposition of the controversy is presented.[13]

The *Colegrove* plaintiffs failed, therefore, to win their appeal despite their assertions that: (a) the Illinois state legislature had the duty to create congressional districts in the state with territorial compactness and approximate population equality; (b) the state legislature itself was elected from districts very similar to the contested House districts; and

8. *See, e.g.*, Lund v. Mathas, 145 So. 2d 871 (Fla. 1962). *See also* Clark v. Carter, 218 F. Supp. 448 (E.D. Ky. 1963).
9. 369 U.S. 186 (1962).
10. 328 U.S. 549 (1946).
11. 285 U.S. 355 (1932).
12. 328 U.S. at 568 (Black, J., dissenting).
13. *Id.* at 564 (Rutledge, J., concurring in the result).

(c) the issues of state and House districting were so interdependent that it was in the self-interest of the state legislators to perpetuate the inequitable state and federal districting schemes.[14]

Baker arose under circumstances which suggested even more strongly that relative equality in voting power for all the citizens of a state was, and would continue to be, denied by their elected representatives. The asserted claim was similar to that in *Colegrove*: the plaintiffs argued that the repeated refusal of a majority of the Tennessee state legislature to redistrict was actuated by self-interest.[15] Tennessee apparently had no provision for initiative and referendum; the only remaining practical avenue for relief was the federal courts.[16]

On certiorari the Supreme Court held that the Court possessed jurisdiction, that the cause of action was justiciable, and that the appellants had standing. Examining the issue of justiciability, Justice Brennan, writing for the majority, first surveyed the history of nonjusticiable political questions and extracted a list of salient characteristics.[17] After satisfying themselves that the present case exhibited none of these characteristics, the majority bridged the logical gap between the conclusion in *Colegrove* that appellants' equal protection challenge to a federal districting scheme was not justiciable and the conclusion in *Baker* that a challenge to state legislative districting presented a justiciable controversy. Thus Justice Brennan declared that "the duty asserted can be judicially identified and its breach judicially determined and . . . protection for the right asserted can be judicially molded."[18]

14. *Id.* at 567 (Black, J., dissenting). *See also* Wright v. Rockefeller, 376 U.S. 52, 54 n.2 (1964).

15. 369 U.S. at 258-59 (Clark, J., concurring). In some states the question has been raised whether a state legislature may constitutionally redistrict itself. *See, e.g.*, Legislature v. Reinecke, 6 Cal. 3d 595, 492 P.2d 385, 99 Cal. Rptr. 481 (1972). *See also* Baker v. Carr, 369 U.S. 186, 254 (1962) (Clark, J., concurring), in which Justice Clark's remarks concerning the "root of the trouble" in *Baker* imply the existence of a federal constitutional issue concerning the competency of a state legislature to redistrict itself.

16. 369 U.S. at 258-59 (Clark, J., concurring). *See also* Stout v. Hendricks, 228 F. Supp. 568, 573 (S.D. Ind. 1964).

17. "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217.

18. *Id.* at 198.

Obviously, the Court felt it had identified and chosen some judicially manageable standards. But because the district court had not reached the merits of the case, the Court refrained from articulating any specific standard. Instead, the various separate opinions made different suggestions. Both the concurring opinion of Justice Douglas and the dissenting opinion of Justice Harlan found in the majority opinion a suggestion that state legislatures must be structured to reflect with approximate equality the voice of every voter.[19]

It is asserted here that the Court in *Baker* selected a judicially manageable standard: each person's vote must be given equal weight. However, because the Court verbalized its rule of law in such a manner as to require only an approximation instead of an exact achievement of the ideal, the Court was perhaps unknowingly setting the stage for a plunge back into the thicket of chaotic standards from which it had just seemed to emerge.[20]

B. The Standard in House of Representatives Districting

Article I, section 2, clause 1 of the United States Constitution provides:

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

In *Wesberry v. Sanders*[21] the Supreme Court ruled that the first clause of the above quotation meant that as nearly as practicable, one person's vote in a congressional election is to be worth as much as another's.[22] The Court elucidated this standard in *Kirkpatrick v. Preisler*[23] where it invalidated a districting plan with an average deviation of 1.6 percent

19. *Id.* at 245 (Douglas, J., concurring); *id.* at 332 (Harlan, J., dissenting).

20. *See* United Jewish Organizations v. Wilson, 510 F.2d 512, 525 (2d Cir. 1975). In *Wilson*, the court of appeals seems to suggest not only that the Supreme Court's decisions in the dozen years after *Baker* have again hamstrung the judiciary with the justiciability issue, but that as a result, the appellate courts should not have to confront the task of deciding in the first instance whether or not a particular controversy is justiciable.

21. 376 U.S. 1 (1964).

22. *Id.* at 7-8, 18. *See also* Preisler v. Secretary of State, 279 F. Supp. 952, 985 (W.D. Mo. 1967), *aff'd sub nom.* Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Act of Aug. 8, 1911, PUB. L. No. 62-5, ch. 5, § 3, 37 Stat. 14.

23. 394 U.S. 526 (1969). This case was the third in a series of successful efforts by Preisler to have Missouri redistricting acts declared unconstitutional. Preisler v. Secretary of State, 238 F. Supp. 187 (W.D. Mo. 1965) (1961 act); Preisler v. Secretary of State, 257 F. Supp. 953 (W.D. Mo. 1966), *aff'd sub nom.* Kirkpatrick v. Preisler,

from the ideal district.[24] Justice Brennan, writing for the Court, stated:

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the "as nearly as practicable" standard. The whole thrust of the "as nearly as practicable" approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case.[25]

A major reason for rejection of the de minimis approach was the Court's inability to ascertain any nonarbitrary way to pick a cutoff point where population variances would become de minimis. The Court feared that "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable."[26]

Following *Wesberry*, the Court affirmed per curiam a Missouri district court's determination that the establishment of districts that comply with the one man-one vote rule could only be done by considering population per se.[27] *Kirkpatrick* reaffirmed this rule and articulated the following rationale:

> [To] accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people.[28]

Courts have favored districting schemes that create relatively compact, contiguous,[29] and symmetrical districts and have placed the burden upon states to justify the creation of districts that deviate significantly from that standard.[30] This preference may reflect the value judgment that, generally, enough interests are related to geography in such a way that the creation of compact, contiguous, and symmetrical districts will assure that those interests can be safeguarded through the use of the ballot. It may also derive from a former statutory provision

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385 U.S. 450 (1967) (1965 act); Preisler v. Secretary of State, 279 F. Supp. 952 (W.D. Mo. 1967), *aff'd sub nom.*, Kilpatrick v. Preisler, 394 U.S. 526 (1969) (1967 act).

24. *Id.* at 528-29.

25. *Id.* at 530.

26. *Id.* at 531.

27. Connor v. Johnson, 386 U.S. 483 (1967).

28. 394 U.S. at 533. *See also id.* at 537 n.2 (Fortas, J., concurring).

29. Although the word "contiguous" actually means "adjoining" or "adjacent to," in districting and apportionment cases the courts use it to mean "unitary" districts.

30. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); Wells v. Rockefeller, 273 F. Supp. 984, 990 (S.D.N.Y. 1967).

that required districts drawn for House election purposes to be "composed of a contiguous and compact territory."[31]

Practice has shown that implementation of the *Wesberry-Kirkpatrick* standard is possible. Districting in Michigan following the 1970 federal decennial census provides one example.[32] There the hypothetical ideal district contained 467,543 people. In the plan adopted, the average deviation from the ideal was two persons. Three districts had exactly the ideal number of people and only two districts deviated from this number by as much as four persons. The sum of the deviations from the ideal for the nineteen districts was merely forty-seven people. The ratio of the number of people in the largest district to that in the smallest was 1.000026 to 1.[33] Furthermore, the districts were fully contiguous and reasonably compact.[34]

Even though the *Wesberry-Kirkpatrick* standard may be a workable one in practice, there are disturbing indications that the Supreme Court may soon retreat from that standard for House districting. The first signs of discontent appeared in the dissenting opinion of Justice White in *Kirkpatrick*.[35] Expressing a preference for a 10-15 percent variation acceptable as de minimis, instead of the zero variation ideal of the majority, he argued:

> Either standard will prevent a minority of the population or a minority party from consistently controlling the state legislature or a congressional delegation, and both are powerful forces toward equalizing voter influence on legislative performance.[36]

Justice White's contention that both standards are powerful forces toward equalizing voter influence on legislative performance is valid, but it is also true that the zero variation approach is more powerful and decisive. In a close election for a House member from one district the difference between the district with lines drawn according to a zero deviation and the same district with lines drawn according to an acceptable 10-15 percent deviation could be determinative of the election. Furthermore, Justice White's standard could lead to a situation in which

31. Act of Aug. 8, 1911, PUB. L. No. 62-5, ch. 5, § 3, 37 Stat. 14.

32. Dunnell v. Austin, 344 F. Supp. 210 (E.D. Mich. 1972). *See also* United Jewish Organizations v. Wilson, 510 F.2d 512, 521 (2d Cir. 1975). There, in a state legislative districting context, a redistricting for Kings County resulted in all seven assembly districts having the ideal size of exactly 120,768 persons and in all senate districts varying from ideal size by no more than one person.

33. 344 F. Supp. at 214.

34. *Id.* at 215.

35. 394 U.S. at 553 (White, J., dissenting in a companion case, Wells v. Rockefeller, 394 U.S. 542 (1964).

36. *Id.* at 555.

a minority of the voters controlled the majority of a state or federal legislative body. Each House district elects only one House member; under Justice White's proposal, however, it is entirely possible for one district to contain over 15 percent more people than another district. All other factors being equal, the ballots of voters in the first district would have less weight than those of the voters of the second district.

Indications of a possible retreat from *Kirkpatrick* surfaced in 1973 in the case of *White v. Weiser*.[37] Texas sought to justify deviations from ideal district size by asserting an interest in "constituency-representative relations," i.e., the maintenance of the existing incumbent-constituency relationship and the preservation of incumbent congressmen's seniority.[38] The Court was faced with three proposals for House districting in Texas. The first plan, which was the one Texas had adopted, resulted in an average deviation from the ideal district of .745 percent, and a maximum deviation of 2.43 percent above and 1.7 percent below the ideal. The Court rejected this plan outright because the other two plans made it clear that these percentage deviations were not unavoidable.[39] The second, Plan B, which the Court adopted, came closest to achieving ideal population equality while it simultaneously advanced the state's interest in protecting the incumbent-constituency relationship.[40] Plan C, based solely on population, established districts more compact and contiguous than those contemplated by the other plans and had a percentage deviation only slightly greater than Plan B.[41] According to the Court, however, this third plan would have a political impact very different from the others and would therefore frustrate the state's goal.[42]

Weiser is consistent with *Wesberry* and *Kirkpatrick* insofar as the Court selected the plan that came closest to achieving the goal of precise mathematical equality. Yet the opinion suggests that the preference for Plan B, which protected the state's interest in constituency-representative relations, over Plan C, which created entirely new districts, was not really based on numbers. In language that may well provide an opportunity for the eventual emasculation of the *Wesberry-Kirkpatrick* rule, Justice White wrote for the Court:

37. 412 U.S. 783 (1973).
38. *Id.* at 791.
39. *Id.* at 790-91.
40. *Id.* at 786. Plan B was a derivative of the first plan but created districts with a total maximum deviation of .149%.
41. *Id.* at 785-88. The total percentage deviation for Plan C was .284%.
42. *Id.* at 796.

> We do not disparage [the constituency-representative relations] interest. We have, in the context of state reapportionment, said that the fact that "district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." . . . But we need not decide whether this state interest is sufficient to justify the deviations at issue here, for Plan B admittedly serves this purpose as well as S. B. 1 while adhering more closely to population equality.[43]

C. The Standard in State Legislative Districting

In *Reynolds v. Sims*[44] the Supreme Court laid the groundwork for the creation of separate standards for House and state legislative districting with the following words:

> Somewhat more flexibility may . . . be constitutionally permissible with respect to state legislative apportionment than in congressional districting. . . .
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> . . . .
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> So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[45]

The Court relied on the *Reynolds* language in *Mahan v. Howell*[46] to establish a standard for state legislative districting less stringent than that commanded by *Wesberry*. With regard to state legislative districting, the Court reiterated the *Reynolds* argument:

> [T]he overriding objective in reapportionment must be "*substantial* equality of population among the various districts, so that the vote of any citizen is *approximately* equal in weight to that of any other citizen in the State."[47]

The Court warned, however, that the state's policy advanced to justify disparity in district population, "however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality."[48] In *Mahan* the Court sustained a state legislative districting scheme that would not have met the *Wesberry-Kirkpatrick* standard. It found that Virginia's objective of preserving the integrity of political subdivision lines in one house of its bicameral legislature was valid since its

43. *Id.* at 791-92 (citation omitted).
44. 377 U.S. 533 (1964).
45. *Id.* at 578-79.
46. 410 U.S. 315 (1973).
47. *Id.* at 322 (emphasis added).
48. *Id.* at 326.

policy was to insure that the other house was responsive to the voters.[49] Furthermore, the Court found that in this case the asserted state interest was sufficiently strong to justify district population disparities of the size and quality that had been found to exist.[50] But in doing so, the Court assumed a disputed fact—that the maximum deviation from ideal between two districts was only 16.4 percent.[51]

Faced with a similar situation in *Gaffney v. Cummings*,[52] however, the Court adopted a different approach. Here the facts showed a maximum deviation of 7.83 percent among the districts for the state house of representatives and a 1.81 percent variation in the state senate districts. Average variations allowed for the house and senate were 1.9 percent and .45 percent respectively.[53] In light of these statistics and the asserted state interest in the preservation of the political balance of power between Democrats and Republicans,[54] the Court ruled that a prima facie case of invidious discrimination under the Fourteenth Amendment had not been made.[55] Moreover, the Court stated that the preservation of the political status quo was a justifiable state interest because politics and political considerations were inseparable from apportionment and districting.[56]

In *White v. Regester*,[57] a companion case to *Gaffney*, the Court assumed, without ever making an express finding, that the deviation from the ideal between the two districts was only 9.9 percent, when it might have been as much as 30 percent. Here too, the Court found no prima facie case of invidious discrimination.[58] Justice Brennan, concurring in part and dissenting in part, attempted to find some logical consistency in the Court's opinions. He wrote:

> [T]he Court today sets aside the District Court's decision, reasoning, as in [*Gaffney*], that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in *Abate v. Mundt* . . . where we held that a total deviation of 11.9% must be justified by the State, one can reasonably surmise that a line

49. *Id.* at 325-28.
50. *Id.* at 328-39.
51. *Id.* at 319 n.6.
52. 412 U.S. 735 (1973).
53. *Id.* at 750.
54. *Id.* at 752.
55. *Id.* at 740-41.
56. *Id.* at 752-53.
57. 412 U.S. 755 (1973).
58. *Id.* at 762-63 n.6.

> 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.[59]

The first-ten-percent-is-free approach is contrary to the *Reynolds* view that in state legislative districting cases some deviations from the equal population principle are constitutionally permissible as long as they "are based on legitimate considerations incident to the effectuation of a rational state policy . . . ."[60] It is also inconsistent with *Kirkpatrick*'s concern that "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable."[61] With regard to deviations that must be justified by the state—those in excess of 10 percent—the standard is equally permissive. The *Mahan* decision leaves the door open for a sufficiently strong state interest to justify variances in excess of 16.4 percent.[62] And the Court has given no indication of establishing a ceiling on maximum deviation—that point at which any state interest, however strong, would "emasculate the goal of substantial equality."[63]

The rationale for a more relaxed implementation of the one man -one vote ideal in state legislative districting is not entirely persuasive. The Court in *Mahan* took the position that because both houses of a bicameral state legislature can be districted substantially on a population basis, more flexibility is permissible with respect to state legislative districting than House districting.[64] But simply noting that the one man-one vote ideal can be approximated in both houses of a bicameral state legislature, while it can be approximated in only one body of the United States Congress, does not explain how the constitutionally mandated ideal is satisfied by different standards of implementation. The federal government, with its rules governing representation in the House and the Senate, is a product of compromise. Explicit constitutional provisions, which protect the federal-state balance of power, limit the degree to which the one man-one vote ideal can be achieved in these national legislative bodies. The federalism inherent in the creation of Congress is unique and without an analogue on the state level. The states of the

59. *Id.* at 776-77 (Brennan, J., concurring in part and dissenting in part) (citation omitted).

60. Reynolds v. Sims, 377 U.S. 533, 579 (1964).

61. Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

62. In *Mahan*, Virginia argued that its policy of maintaining the integrity of political subdivisions justified the divergences. 410 U.S. at 325-26.

63. *Id.* at 326.

64. *Id.* at 320-25.

United States are considered sovereign entities, but counties and towns are mere *instrumentalities* of the state.[65]

To require only a showing that a state's justification is rational in order to permit deviations above 10 percent is to create a rule that is too flexible and thus is prone to abuse. Two cases, previously mentioned, suggest the kind of rational justifications that will suffice. In *Gaffney v. Cummings*[66] the Court argued that politics and political considerations are inseparable from apportionment and districting.[67] Accepting for the moment the validity of this argument, it does not necessarily follow that preservation of the political status quo is an interest to which the Court should defer. As the lower court in *Gaffney* stated: "No legislative or constitutional enactment provides any basis for [the preservation of the political status quo] or authorizes it."[68] Such a justification seems even more suspect when it is recognized that preservation of the status quo effectively dampens minority representation when a third political party of substantial size is formed. In *Mahan v. Howell*[69] the Court validated another state interest—Virginia's interest in preserving its political subdivisions.[70] Closer inspection, however, shows that this interest was not one which found its basis in state legislative or judicial expressions. Article II, section 6 of the revised Virginia Constitution sets up the "as nearly as practicable" standard for its state legislative districting. It omits any mention of a state interest in political subdivisions *qua* political subdivisions or in preserving the integrity of county lines.[71] Furthermore, an investigation of the historical origins of Article II, section 6 shows that equality of district population, not representation of political subdivisions, was the Commonwealth's pre-eminent goal:

> "There is no reason to make any distinction between General Assembly and congressional apportionment. For this reason, the pro-

65. *See* Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907). For a thorough statement of the arguments against holding the so-called federal analogy applicable to state legislative districting matters see MCKAY, REAPPORTIONMENT AND THE FEDERAL ANALOGY (National Municipal League pamphlet 1962); McKay, *The Federal Analogy and State Apportionment Standards*, 38 NOTRE DAME LAW. 487 (1963). *See also* Merrill, *Blazes for a Trail Through the Thicket of Reapportionment*, 16 OKLA. L. REV. 59, 67-70 (1963).

66. 412 U.S. 735 (1973).

67. *Id.* at 752-53.

68. Cummings v. Meskill, 341 F. Supp. 139, 150 (D. Conn. 1972), *rev'd sub nom.* Gaffney v. Cummings, 412 U.S. 735 (1973).

69. 410 U.S. 315 (1973).

70. *Id.* at 325-28.

71. *See id.* at 317 n.1 (opinion of the Court); 345 (Brennan, J., concurring in part and dissenting in part).

> posed section [Article II, § 6] combines the provisions of sections 43 and 55 so that a common set of principles applies to apportionment of legislative seats and congressional seats."[72]

Judicial deference to a state interest that was not asserted in the state's primary expressions of priorities, namely the state constitution and legislative enactments, is disturbing in a country in which the right to vote is one of the most fundamental rights of a citizen.[73] It would seem that a right that is paramount because it protects all other rights and liberties would receive more zealous judicial protection.

The *Mahan* dissenters argued strongly for a test requiring a specific factual showing of compelling necessity for substantial deviations from the ideal state legislative districts.[74]

> While the State may have a broader range of interests to which it can point in attempting to justify a failure to achieve precise equality in the context of [state] legislative apportionment, it by no means follows that the State is subject to a lighter burden of proof or that the controlling constitutional standard is in any sense distinguishable.[75]

In this case the dissent would have required a showing on the record of the need for county representation, and how such representation could be provided to small counties in a multi-county district.[76] Further, the dissent would have demanded: (a) a precise elucidation of the rationale behind the assertion that the integrity of county boundaries must be preserved for reasons associated with local legislation; (b) a fact-finding as to the proportion of the legislature's total business which consisted of local legislation; and (c) a showing of how the more stringent district court plan at issue would materially affect the treat-

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72. *Id.* at 346 n.9 (Brennan, J., concurring in part and dissenting in part) (*quoting* COMMISSION ON CONSTITUTIONAL REVISION, REPORT ON THE CONSTITUTION OF VIRGINIA 117 (1969)).

73. For nearly one hundred years in numerous factual and legal contexts the rights an individual possesses with regard to the exercise of the franchise have been highly valued. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 138 (1970) (opinion of Douglas, J.); Gray v. Sanders, 372 U.S. 368 (1963); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Terry v. Adams, 345 U.S. 461 (1953); United States v. Saylor, 322 U.S. 385 (1944); Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299, 315 (1941); Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); United States v. Mosley, 238 U.S. 383 (1915); Guinn v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884); *Ex parte* Siebold, 100 U.S. 371 (1879).

74. 410 U.S. 315, 338 (1973) (Brennan, J., concurring in part and dissenting in part).

75. *Id.* at 341.

76. *Id.* at 350.

ment of local legislation.[77] Absent this kind of proof the dissent believed the Court was making certain unwarranted assumptions: (a) that a significant number of issues have an impact solely upon one particular county; (b) that this impact is distributed evenly throughout that county; (c) that issues affecting only the county itself are of predominant concern to county voters; and (d) that effective representation is supplied even where the affected county (in a multi-county district) composes only a small percentage of voters in the district.[78]

The state interest most commonly asserted in order to justify deviation from the ideal, as in *Mahan*, is the need to preserve the boundaries of traditional governmental units. But as the dissent in *Mahan* suggested, this interest is not a particularly compelling one. A state legislature is a governmental body established to serve many purposes. Its powers and functions are comprehensive and pervasive; a state legislature is not designed merely to consider the needs of a few select groups of citizens. Each citizen should stand in the same relation to his legislature. Moreover, the composition and jurisdiction of governmental units change frequently over time.[79]

The argument is frequently raised that the ability to experiment with innovative forms of government is worthwhile and should be retained by the states.[80] But should such experimentation be allowed at the cost of debasing a citizen's vote?

While numerous state interests may be found to justify deviations in excess of 10 percent, some minimal limitations will remain. The Court has held that *Wesberry* demands, as a fundamental principle of representative democracy, "equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."[81] Nor will state legislative districting based on considerations of transportation, communication, or geography be viewed favorably.[82]

D. Group Gerrymander Claims

A rising tide of group gerrymander claims[83] accompanied the

77. 410 U.S. *passim.*

78. *Id.* at 348-49.

79. This author argues in a forthcoming publication that state legislative districting should occur no less frequently than at ten year intervals.

80. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 490 (1968) (Harlan, J., dissenting).

81. Reynolds v. Sims, 377 U.S. 533, 560-61 (1964).

82. *Id.* at 580.

83. A group gerrymander claim is an allegation that a district has been drawn in

adoption of the flexible standard in state legislative districting and necessitated the development of judicial techniques by which these claims could be evaluated. Group gerrymander claims raise problems of who may represent the group, what groups may be represented, and what the group must show in order to obtain relief.

Courts in group gerrymander claim cases have rarely questioned the credentials of individuals who allege that they belong to the interest group they purport to represent. Generally, they have assumed that the plaintiffs have the requisite personal stake in the outcome of the controversy to satisfy requirements of standing.[84] This approach creates no problem in the simple gerrymander case, where the only allegation is numerical inequality, because the remedy is relatively clear. Districts will be redrawn in order to meet the present standard of substantial numerical population equality. But when the controversy is not simply one of how many people are in a district, but instead one of how many people of a particular identification are in a district, the appropriate remedy is somewhat less clear and the identity of the group representatives becomes, therefore, somewhat more important. Presumably, the plaintiffs will desire more effective representation and will advocate the adoption of a particular plan that takes into account group interests, be they racial, ethnic, religious, economic, or political. Not infrequently, however, an ideological clash within the interest group occurs over what constitutes more effective legislative representation and, consequently, over which plan the group, as a whole, prefers.[85]

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such a way as unfairly to further a certain group's interests.

84. *See, e.g.*, Cousins v. City Council, 466 F.2d 830, 845 (7th Cir. 1972) [hereinafter cited as *Cousins I*], *cert. denied*, 409 U.S. 893 (1972), *remanded*, 361 F. Supp. 530 (N.D. Ill. 1973), 503 F.2d 912 (7th Cir. 1974) [hereinafter cited as *Cousins II*]. In a group gerrymander claim case where the standard of numerical population equality among districts has been satisfied, standing cannot be predicated upon dilution of the worth of an individual vote; it can only be predicated upon dilution of the cumulative voting strength of the particular interest group. Thus it would seem that a class action would be more appropriate than a suit brought by individuals on their own behalf.

In the *Cousins* case, the district court seemed to agree. It dismissed motions for class actions on the ground that the plaintiffs were unable to show that their claims were typical of the class they purported to represent. Then the court found that the plaintiffs, as individuals, lacked standing because none of them claimed the injury or impairment of an individual right such as dilution of one's vote. 322 F. Supp. 428, 430-31, 434-35 (N.D. Ill. 1971). However, on appeal the Seventh Circuit ruled that the class action device was not essential here, citing Flast v. Cohen, 392 U.S. 83 (1968), and held that plaintiffs, suing as individuals, not as representatives of a class, had sufficient standing because they were individual members of the groups allegedly discriminated against. *Cousins I*, 466 F.2d at 845.

85. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); Ince v. Rockefeller, 290 F. Supp. 878 (S.D.N.Y. 1968) (where black plaintiffs claimed racial gerrymandering and

In addition to determining whether certain plaintiffs adequately represent the interests of the group, courts must also decide which groups have standing to claim unconstitutional dilutions of their voting strength. The Supreme Court has been more willing to grant standing in cases involving gerrymandering of multi-member districts than in those involving single-member districts. In multi-member district cases the Court has granted standing to racial and ethnic minorities[86] as well as to the poor[87] to challenge districting schemes as violative of the equal protection clause of the Fourteenth Amendment. Moreover, the Court has hinted that it might also grant standing to political groups.[88] So far, in cases involving gerrymandering of a single-member district the Court has granted standing to blacks and Puerto Ricans who alleged infringement of Fourteenth and Fifteenth Amendment rights.[89]

When more than one group seeks protection of its voting rights, a simultaneous grant of standing to groups with conflicting interests could render unmanageable present judicial standards with respect to districting. One possible way to avoid this conflict would be to construct a hierarchy in which claims of certain interest groups would carry more weight than claims of others. Such a construction would require making innumerable value judgments concerning these interest groups, however, an activity that has traditionally been beyond the role and competence of the judiciary. Furthermore, it would be impossible for courts to identify all of the competing interest groups at one time because interest groups form and dissolve as the political climate

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sought the creation of districts that would insure black representation). *Cf.* Wright v. Rockefeller, 376 U.S. 52, 57-58 (1964) (where black plaintiffs sought to eliminate nearly all-black districts on the ground that these districts were too "safe" and that redistricting along nonracial lines would lead to black control of more legislative seats).

86. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973).

87. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971).

88. *See* Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

89. Wright v. Rockefeller, 376 U.S. 52 (1964). *See also* Reynolds v. Sims, 377 U.S. 533, 560-61 (1964) (districting based on sex, place of residence, economic status, income, and occupation may be actionable); Gray v. Sanders, 372 U.S. 368, 379 (1963). These cases involved districting that was numerically unequal, however. *But cf.* United Jewish Organizations v. Wilson, 510 F.2d 512 (2d Cir. 1975) (involving a group gerrymander claim stemming from implementation of certain provisions of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* 1965)). The Second Circuit ruled that blacks, Puerto Ricans, and whites had standing under the Fourteenth and Fifteenth Amendments, but the Hasidim, a religious sect, did not. *Id.* at 520-22. In the same case, in an apparently unreviewable administrative determination interpreting the Voting Rights Act as it implements the Fifteenth Amendment, the United States Attorney General allegedly decreed that blacks, Puerto Ricans, Indians, and chicanos, but not whites, have standing to sue. *Id.* at 518, 519.

changes. Finally, even if a viable hierarchy could be constructed it would be unlikely that a districting scheme could be drawn to satisfy everyone.

1. What Must the Plaintiff Prove: Purpose or Effect or Both?

Wright v. Rockefeller[90] was the first Supreme Court case involving a single-member district group gerrymander claim where the districting scheme met the numerical population equality standard. While the majority opinion expressed the belief that neither group gerrymandering purpose nor effect had been proven,[91] it spoke only in terms of an insufficient finding of racial motivation. Because the gerrymander claim was dismissed, the majority opinion was interpreted as requiring the petitioner to prove purposeful gerrymandering, although the Court failed to state explicitly a constitutional standard upon which claims could be based. In his dissent Justice Goldberg contended that, at least in this case, requiring proof of purposeful action was tantamount to prohibiting any future claim, because the districting bill had been recommended and submitted to the state legislature one day and passed and signed by the governor the next without any public hearings or published debates.[92]

In group gerrymander claims centering around multi-member districting, the standard adopted has been more complex and difficult to

90. 376 U.S. 52 (1964).

91. *Id.* at 56.

92. *Id.* at 73-74 (Goldberg, J., dissenting). *Cf. Cousins I*, 466 F.2d 830, 845 (7th Cir. 1972); Cousins II, 503 F.2d 912 (7th Cir. 1974).

In *Cousins II*, the Seventh Circuit applied the purposeful activity test to a local legislative districting case. This test, although simply formulated, was rather complex in its application. "Purposeful minimization of the voting strength of a minority racial or ethnic group is the sort of conduct proof of which is unlikely to be direct or specific. A finding that the challenged districting reflects such discrimination must usually rest on inferences from circumstances. One approach, where such a claim is made is to compare the number of black majority wards in the challenged map with another map which might equally reasonably [?] be drawn, but with more such wards, and assess whether the difference is more probably explained by a purpose to discriminate than by legitimate considerations." 503 F.2d at 914 n.1 (query added).

Furthermore, in *Cousins I* the Seventh Circuit, emphasizing that the effect of the lower court opinion was to dispose of claims of infringement of fundamental rights, felt it had the duty to review independently the factual findings of the case. 466 F.2d at 837 n.5. The Supreme Court had done so without comment in previous cases. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971). Curiously, however, in at least two cases the Court did not explicitly state that it had made an independent factual determination concerning the maximum deviation from ideal population equality between two districts where such a determination was critical to the outcome of the case. *See* Mahan v. Howell, 410 U.S. 315 (1973); White v. Reg-

administer. In *Whitcomb v. Chavis*[93] the Court agreed that " 'there was no basis for asserting that the legislative districts in Indiana were *designed* to dilute the vote of minorities.' "[94] The majority opinion went on to emphasize that a prerequisite to any gerrymander claim involving a multi-member district is a clear showing that that district either in concept or in operation diluted or cancelled the voting strength of racial groups.[95] In a separate opinion, Justice Douglas took a different tack. He argued that the crucial factor should be not the intent of the legislature in creating districts but rather the invidious effects caused by the legislature's exercise of its inherent power.[96]

In effect, the majority in *Whitcomb* required a showing that the plaintiffs' group had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.[97] Careful analysis of *Whitcomb* and *White v. Regester*[98] reveals that the Court developed a set of nine factors upon which it would rely in assessing any multi-district gerrymandering claim:

(a) Is there a history of discrimination against the minority group, especially with respect to voting registration and voting?

(b) Does the minority group have less opportunity than do other groups to participate in the political processes?

(c) Does the group presently contain a less than average percentage of registered voters?

(d) Have members of the group been given the opportunity to elect the prospective candidate of their choice?

(e) Have members of the group been able to meaningfully participate in the activities of the party of their choice?

(f) Have members of the group been fairly represented when legislative candidates were chosen and not routinely excluded from the slates of both major parties?

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ester, 412 U.S. 755 (1973). *See generally* Zimmer v. McKeithen, 485 F.2d 1297, 1309-11, 1314-15 (5th Cir. 1973) (Coleman, J., and Clark, J., dissenting); Beer v. United States, 374 F. Supp. 363, 369-70 n. 26, 370-71 n.33, 386, 388-99 (D.D.C. 1974).

93. 403 U.S. 124 (1971).

94. *Id.* at 149 (*quoting* Brief of Appellees 28-29; emphasis added).

95. *Id.* at 141-44. Note, however, that the voting cases that allegedly have used the discriminatory effect test, *e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960), and Lane v. Wilson, 307 U.S. 268 (1939), were actually discriminatory purpose cases.

96. 403 U.S. at 177 (Douglas, J., concurring in part and dissenting in part).

97. *Id.* at 149.

98. 412 U.S. 755 (1973).

(g) Do extant characteristics of the primary electoral system lend themselves to discriminatory uses?

(h) Does the minority group have to overcome any language or cultural barriers in order to participate effectively in the electoral process?

(i) Does the group have any special housing, employment, or income characteristics and, if so, do these create obstacles to effective political participation which those regulating access to the means of participation have exploited in a discriminatory manner?[99]

In sum, although yet in its infancy, this test mandates an exceedingly tedious and complex fact-finding "representing . . . a blend of history and an intensely local appraisal of the *design* and *impact* of the . . . multimember district in the light of past and present reality, political and otherwise."[100]

2. The Burden of Proof: Incidence and Effect

In single-district group gerrymander claims beginning with *Wright,* the courts have presumed state statutes to be constitutional and have placed the burden of proof on the plaintiff to controvert effectively that assumption, regardless of whether or not the gerrymandering in question was alleged to further racial discrimination.[101]

In his dissent in *Wright,* Justice Goldberg argued that certain factors lead to an inference of racial discrimination in districting that raises a rebuttable presumption of unconstitutionality. The state must assume the burden of going forward and introducing rebuttal evidence; however, the presumption would not shift the ultimate burden of proof.[102] In *Cousins v. City Council*[103] the court rejected the application of the strict scrutiny doctrine developed in Fourteenth Amendment equal protection cases wherein it is the state which must prove that its challenged ordinance is narrowly drafted so as to further some overridingly legitimate objective that could not be effectuated by less stringent alternatives.[104]

99. *Id., passim*; 403 U.S. 149-55.

100. 412 U.S. at 769-70 (emphasis added). *See also* United Jewish Organizations v. Wilson, 510 F.2d 512, 523 (2d Cir. 1975).

101. *See, e.g.,* Kilgarlin v. Hill, 386 U.S. 120, 121 (1967), *aff'g in part per curiam* 252 F. Supp. 404, 434-41 (S.D. Tex. 1966); Wright v. Rockefeller, 376 U.S. 52 (1964).

102. Wright v. Rockefeller, 376 U.S. 52, 73 (1964) (Goldberg, J., dissenting).

103. 503 F.2d 912 (1974).

104. *Id.* at 922.

Whether the plaintiffs must prove their case merely by a "preponderance of the evidence" standard or by a more stringent "clear and convincing evidence" standard is still uncertain.[105] In multi-member district cases where gerrymandering is alleged, the plaintiff bears the burden of proof; however, in *White v. Regester*,[106] the district court employed a preponderance of the evidence standard which the Supreme Court let stand without comment.[107]

II. Re-emerging from the "Thicket"?: A Proposed Tripartite Standard for Districting

A. Difficulties with the Present Standard

With *Baker v. Carr*[108] the Supreme Court seemed to have hacked its way out of the political question thicket in which it had struggled for so long. For a court to remove a subject matter area from the nonjusticiable political question arena it must be able to set forth a standard that it values and can implement in a manageable manner.[109] In *Baker* the Supreme Court selected numerical population equality among districts as its standard. The Court still values this standard highly. It is apparent from the subsequent history of apportionment-districting cases, however, that the Court has had difficulty in implementing this standard. First, the Court did not require absolute adherence to its chosen pre-eminent value of numerical population equality in any districting, federal or state.[110] Second, it permitted even more deviation from the ideal in state legislative districting by labelling any deviation of less than 10 percent de minimis and allowing further deviations to be justified by the simple assertion of allegedly decisive state interests.[111]

In each case the Court is, in effect, balancing a quantifiable measure of deviation from the one man-one vote ideal against a state interest that can only be measured qualitatively. Precisely because the former variable lends itself readily to quantification and the latter does not, problems of comparative analysis arise. For example, if in state *A* a deviation from the ideal of 12 percent is justified by assertion of state

105. *See, e.g., id.* at 924.
106. 412 U.S. 755 (1973).
107. Graves v. Barnes, 343 F. Supp. 704, 735 (W.D. Tex. 1972), *aff'd in part sub nom.* White v. Regester, 412 U.S. 755 (1973).
108. 369 U.S. 186 (1962).
109. See note 17 *supra.*
110. See text accompanying notes 35-43 *supra.*
111. See text accompanying notes 52-63 *supra.*

interest X of magnitude K, what magnitude of state interest X is required to justify a deviation from the ideal of 16 percent in state B? How is magnitude measured? If a state asserts several distinct interests, how are these to be cumulated into one variable of a certain magnitude? By allowing deviations from the ideal the Court has embarked upon a fact-finding foray that is unnecessarily complex and chaotic. The problem is exacerbated by the fact that under today's standards for state legislative districting the state may justify any deviation by asserting merely a rational rather than a compelling interest for its action. Allowing justification of deviations and applying only minimal scrutiny creates excessive flexibility in judicial decision making.

To ensure the protection of Fourteenth Amendment rights in certain areas, courts necessarily must formulate broad flexible standards. However, in the case of apportionment-districting, where the Supreme Court originally had the foresight to adopt the one man-one vote doctrine (itself an inherently quantitative standard) flexibility is not required, and indeed is detrimental to the attainment of the ideal.

B. The Proposed Standard

The author proposes a tripartite standard that will eliminate the difficulties confronting the courts in districting cases:

(a) Above all else, absolute numerical population equality among districts is required;

(b) All districts must be fully compact; and

(c) All multi-member districts are per se unconstitutional.

The proposed standard involves a greater exercise of judicial power at the expense of legislative power, and a greater exercise of federal power at the expense of state power than does the present Supreme Court standard. But this difference is justifiable in view of the proposal's advantages. First, it is not disconsonant with the Court's original aim that the overriding goal in apportionment-districting be that one person's vote is worth as much as another's. Second, the proposed standard reaches beyond the Court's present standard to approximate more closely the ideal of one man-one vote. On a theoretical level one may assert that the history of apportionment-districting has brought to light no state interest adequate to justify the over- and underweighting of votes that must result whenever any deviation from the ideal district size is deemed justified.[112] On a practical level, the

112. See text accompanying notes 64-82 *supra.*

proposed tripartite standard is inherently more administrable. It is asserted that the proposed test is better able to identify and reflect the fine line between a standard that is impossible to achieve and a standard that is impossible to administer.

1. Drawing the Districts

Absolute satisfaction of the one man-one vote ideal is a standard that is at once easily administrable and possible to achieve. The author suspects that this standard by itself, however, would leave too much flexibility available for discriminatory use by gerrymanderers. Consequently, to tighten the standard, a second requirement is necessary: the districts must be fully compact and contiguous. Admittedly, this prong of the tripartite test is the least administrable of the three. But it is more administrable than attempting to assess what weight should be given to the interests asserted by a state and a plaintiff group through a lengthy analysis of the factual record underlying a gerrymandering complaint.

A cursory inspection of a districting plan provides only a small measure of assistance. But a more rigorous standard for compactness and contiguity can be readily established. The most compact and contiguous two-dimensional geometric figure is a circle; it also has the quantitative virtue of being able to encompass more area than any other two-dimensional figure with a perimeter of equal length. Furthermore, given a pair of two-dimensional fields, each with a uniform population density, but with densities of different magnitudes, and given the requirement of drawing a circle in each field that will encompass a defined number of people, the circle drawn in the low-density field will be larger than that drawn in the high-density field.

From these postulates the author would propose the following procedure and standard for compactness and contiguity. After determination of the overall population of the area to be districted and after calculation of the ideal district size, identification of the one point in the whole area with the highest density should be made.[113] Using that point as the focus, a circle should be drawn that will encompass the ideal district population.[114] After identifying the point of highest

113. The author suggests that individual census tracts be used as the basic unit of measurement for identifying the "point" of highest density. Thus the focus for the first circle to be drawn would be the geographic center of the census tract with the highest population density in the area to be districted.

114. For example, one should begin with a small circle and expand it while simultaneously keeping a running total of the population of all census tracts which lie totally

density remaining outside the first circle, this second point becomes the focus for a second circle,[115] which again must contain an ideal district population.[116] This process continues until all districts are drawn. In practice, achievement of the ideal district population, especially in the latter stages of districting, will necessitate a substantial compromise of the ideal for compactness and contiguity; however, consistent with the overall standard, this compromise should be minimized.

Working from the postulate that given a certain amount of area to be encompassed, the figure with the smallest perimeter accomplishing this task will be a circle, one should be able to develop a quantitative measure of compactness and contiguity. At least one two-part test comes to mind, which would be a highly manageable judicial standard. First, the goal would be to minimize the total number of miles of district boundary lines. Then, assuming that two proposed plans had the same total number of miles of district boundary lines, one would apply a second standard that would value a districting in which a graph of the total number of miles (at that stage of districting) of district boundary lines showed a smooth, upward progression as successive districts were drawn.

Note that with this particular implementation of the compactness and contiguity requirement geographic accessibility is greater in high-density areas, such as urban areas, where persons are perhaps less likely to possess individual means of transportation, and less in low-density areas, such as rural areas, where owning a car is a virtual necessity.

History demonstrates that although a federal statutory requirement of compact and contiguous congressional districts did exist[117] and the absence of compactness and contiguity has been relevant in establishing discriminatory intent or effect,[118] courts have not recognized a federal constitutional right to districts that are compact and contiguous. But

within the circle or which are intersected by the perimeter of the circle. When this running total exceeds the ideal district population, stop expanding the circle. Next, begin to approximate more closely both a perfect circle and the ideal district population by selectively paring parts of certain census tracts (*e.g.*, enumeration districts) which lie outside the perimeter of the circle. Continue this process, using progressively smaller subparts of census tracts, as necessary, until record data is used and at last a circle of ideal district population is achieved.

115. Note that due to the contours of the area to be districted, it may not be possible to draw a complete circle.

116. *Cf. Cousins I*, 466 F.2d 830, 836 (7th Cir. 1972).

117. See note 31 and accompanying text *supra*.

118. Reynolds v. Sims, 377 U.S. 533, 580 (1964). *See* Baker v. Carr, 369 U.S. 186 (1962); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960); *Cousins I*, 466 F.2d 830, 833-34 (7th Cir. 1972) *cert. denied*, 409 U.S. 893 (1972).

the proposed standard concerns the utility of requiring compact and contiguous districts in addition to, not at the expense of, the achievement of the one man-one vote ideal.

It is axiomatic that the districting process will affect the worth of voters' ballots. It would seem undeniable that in any such dispute before a court or governmental body charged with the task of districting, the reviewing body should not limit itself solely to the plans submitted by the parties to the controversy, but should encourage the presentation of plans by all affected citizens during a limited time, well publicized in advance. The reviewing body could then select the one plan most consonant with the proposed tripartite standard. Such a public hearing was used in *David v. Cahill.*[119] Possibly a court would, in a particular case, be overwhelmed with multiple plans submitted by numerous persons. But this argument does not carry much weight in view of the cruciality and relative infrequency of the districting decisions.

2. *Abolition of Multi-Member Districts*

Finally, in order to define an easily administrable standard so as to render the consideration of state interests and claims of gerrymandering along interest group lines unnecessary, multi-member districts should be declared unconstitutional per se. The Supreme Court has ruled that state legislative multi-member districts are not unconstitutional per se, and has upheld their constitutionality absent a showing of discriminatory impact.[120] Congress, however, has twice invalidated congressional multi-member districts: from 1842 until 1929 and from 1967 to the present.[121]

What are the arguments in favor of the use of single-member districts? The argument most frequently advanced is that the legislator elected will better represent the group interest that elected him. At the worst, the legislator may ignore opposing interests. This possibility is a fact of political life, but such partisan behavior is encouraged by permitting multi-member districts. Single-member districts are much

119. 342 F. Supp. 463, 465 (D.N.J. 1972). *Cf.* Chavis v. Whitcomb, 307 F. Supp. 1362, 1364 (S.D. Ind. 1969); Baker v. Carr, 222 F. Supp. 684, 694 (M.D. Tenn. 1963). *But see* White v. Weiser, 412 U.S. 783, 793 n.13 (1973). *See also* Ince v. Rockefeller, 290 F. Supp. 878, 882-83 (S.D.N.Y. 1968).

120. Fortson v. Dorsey, 379 U.S. 433, 438-39 (1965).

121. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491. The substance of this restriction was continued in I Rev. Stat. of 1873, title I ch. II, § 13, pp. 13-14 and in apportionment-districting legislation until 1929. After an absence of thirty-eight years, the restriction was re-enacted in 2 U.S.C. § 2C (1967).

more likely to result in representation for smaller interest groups than are multi-member districts. Thus, the effect of multi-member districts, in terms of interest group power, is that the winning group has more representation and the losing groups have less representation than if only single-member districts existed.[122]

One may be rightfully skeptical of the view that the undivided allegiance of one legislator in a single-member district is preferable to the partial allegiance of eight legislators in a multi-member district. The Supreme Court, however, has assumed a partial allegiance where there may be no allegiance at all, *i.e.*, where it is unnecessary for any of the legislators in a multi-member district to be accessible and responsive to a particular interest group.[123]

C. The Proposed Standard As Compared to the Voting Rights Act

The proposed standard has the value of closely approximating the one man-one vote ideal. It avoids the need to consider the various (and frequently ex post facto) state interests put forth to justify deviations from the one man-one vote ideal. Additionally, the tripartite standard is so rigorous as to preclude districting along interest group lines, and therefore eliminates the need to entertain group gerrymander claims. This standard not only has the virtue of administrability, but also the virtue of complying with one of the most deep-seated political ideals of American democracy: that voting rights are pre-eminently individual, personal rights. To entertain a successful group gerrymander claim is to construct a judicial remedy along group interest lines. Such consideration of special group interests is antithetical to our American form of government and should be avoided if at all possible.[124]

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122. Whitcomb v. Chavis, 403 U.S. 124, 154 (1971). Taken to its logical extreme, this argument supports the need for control over the size (and, derivatively, the number) of state legislative districts so as to preclude the submersion of the voting power of smaller special interest groups by the creation of fewer districts of high population. *See* Minnesota State Senate v. Beens, 406 U.S. 187 (1972) (per curiam); *cf.* Chapman v. Meier, 420 U.S. 1 (1975); Klahr v. Goddard, 250 F. Supp. 537, 541 (D. Ariz. 1966). If the state legislature has exclusive power to change the number of state legislative districts, such control is probably not necessary. It is unlikely that many legislators would voluntarily vote to reduce the number of state legislative districts because, in effect, they would be voting themselves out of a job. Of course, if by initiative or referendum the number of these districts could be reduced, there would be a stronger argument for control. In most states, however, this reduction would require a state constitutional amendment for which a super-majority vote would be required.

123. Whitcomb v. Chavis, 403 U.S. 124, 154 (1971).

124. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Quite recently, however, in *United Jewish Organizations v. Wilson*,[125] the Second Circuit upheld a state legislative districting constructed with the use of racial quotas. Furthermore, far from being a reflection of the will of the people, or even a remedial plan to correct gerrymandering along interest group lines, this districting resulted from New York's failure to comply with the Voting Rights Act[126] and was therefore imposed under color of law. In *Wilson*, the federal attorney general refused to approve a New York districting plan which failed to create state congressional and senatorial districts with a nonwhite majority of sixty-five percent or more. The state legislature capitulated to this demand. Members of the Hasidim brought suit in federal district court under the Fourteenth Amendment alleging that discriminatory policies were part and parcel of the resultant redistricting scheme. The trial judge dismissed the complaint and the Second Circuit affirmed. It held that there was no discriminatory intent or effect shown despite the fact that the attorney general, although denying any responsibility or support for racial quotas,[127] nevertheless admitted that his approval of the districting plan was contingent upon a guarantee to nonwhite voters of a "viable majority" or a "realistic opportunity for minorities to elect a candidate of their choice."[128] Furthermore, the Second Circuit concluded that districting along racial lines was not unconstitutional per se, especially where the state had already run afoul of the Voting Rights Act, the purpose of which is to cure invidious discrimination. And since the act dealt with color and race, it was both necessary and appropriate that any corrective action under it do the same.[129]

One problem with this ruling, of course, is that the Voting Rights Act "trigger mechanism" is overinclusive; that is, it is entirely possible that a political subdivision could be subjected to the severe scrutiny and regulation of the act even though it is free of any taint of discriminatory purpose or effect. This unfortunate situation could result, for example, in a district where overall voter apathy or severe weather conditions resulted in a less than fifty percent turnout of all persons of voting age in the presidential election of 1964 or of 1968.[130]

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125. 510 F.2d 512 (2d Cir. 1975).

126. 42 U.S.C. § 1973b(a) (1965). This section requires a state to submit to any change in its voting regulations or procedures federal authorities deem necessary for ten years, subject to judicial review in federal court.

127. 510 F.2d at 527 (Frankel, J., dissenting).

128. *Id.* at 514.

129. *Id.* at 525.

130. *See* Burns v. Richardson, 384 U.S. 73, 96-97 (1966); Ellis v. Mayor of Baltimore, 352 F.2d 123, 130 (4th Cir. 1965).

In the present context, however, the major concern with the Voting Rights Act is that because its purpose is to enforce the Fifteenth Amendment, any districting remedies constructed under its provisions will undoubtedly be phrased in race or color interest group terms—terms which, as previously argued, are constitutionally disfavored. Furthermore, the *Wilson* case illustrates the fact that where the affected political subdivision, whether legitimately guilty of discrimination or not, seeks either administrative or judicial approval of its districting plan, there is a substantial chance that the plan which results from this process will contain interest group quotas.

Certainly, the constitutionality of such a result is questionable. In addition, the argument against this result is compelling. In effect, the Voting Rights Act, without any finding of discriminatory intent or effect, subjects state legislation to review by a federal administrative body or a single federal judicial tribunal where the outcome in districting situations has a dangerous tendency to be cast in terms of group interest quotas.[131] Such a procedure is unnecessary when discrimination in voting rights based on race or color can be foreclosed through the use of means that are less restrictive, are more effective, and completely preclude the temptation of thinking along interest group lines. With respect to districting, the proposed tripartite standard performs precisely this function. This standard involves a use of federal power that is less extreme, less discretionary, and better defined than is involved in the Voting Rights Act. In addition, the tripartite standard avoids the possibility, however latent, of the use of quotas. Thus, should this standard be adopted in districting, there would be no need to have any districting reviewed under the Voting Rights Act, thus precluding a situation such as that presented in *Wilson*.

131. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 595-97 (1969) (Black, J., dissenting). This objection is especially tenable where such judicial review is unavailable. Under section five of the Voting Rights Act, 42 U.S.C. § 1973c (1965), the "State or political subdivision" may institute an action only in the United States District Court for the District of Columbia seeking a declaratory judgment that the change in "voting qualification or prerequisite to voting, or standard, practice or procedure" has no discriminatory purpose or effect. In *Wilson*, however, no such action was brought because of time pressures concerning the upcoming primary elections. After the New York Attorney General decided not to sue on behalf of the state, individual assemblymen from one of the affected counties sought a declaratory judgment in the United States District Court for the District of Columbia. They were summarily dismissed for lack of standing. Griffith v. United States, Civil No. 74-648 (D.D.C. May 3, 1974) (unreported). Presumably, a similar fate would have befallen the *Wilson* plaintiffs.

But cf. Beer v. United States, 374 F. Supp. 363, 367 n.2 (D.D.C. 1974). In this Voting Rights Act declaratory judgment action standing was granted to the six members

D. How Should Departures from the One Man-One Vote Ideal Be Measured?

To date, the following numerical measures of departure from the one man-one vote standard have appeared in the texts of various judicial decisions: (1) the smallest percentage of people that can elect a majority of the representative body;[132] (2) the maximum deviation from ideal between two districts, expressed both in terms of percentage and absolute numbers of persons;[133] (3) the average deviation from ideal, expressed in both these terms;[134] (4) the median deviation from ideal, expressed in both these terms;[135] (5) various percentages of the total number of districts within certain percentage deviations from the ideal;[136] and (6) the ratio of the number of persons in the largest district to the number of persons in the smallest district.[137] How have courts viewed the relative importance of these measures? In *David v. Cahill*,[138] the district court found that the criterion of paramount importance in fixing congressional districts was the minimum population deviation among districts.[139] In *White v. Regester*,[140] a state legislative districting case, Justice Brennan noted: "The total spread of deviation —a figure deemed relevant in each of our earlier decisions—was 7.83%."[141]

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of the seven-member New Orleans City Council who brought suit on the ground that they represented the city of New Orleans, the political subdivision in question.

In *Wilson*, 510 F.2d at 520 n.15, the Second Circuit indicated its agreement with the *Griffith* decision, citing Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969). *Allen*, however, specifically treats only the right of a private litigant to seek a declaratory judgment that a new state enactment is subject to section five of the Voting Rights Act; it does not answer the question posed in *Griffith*. Neither does Apache County v. United States, 256 F. Supp. 903, 906 (D.D.C. 1966), which allows private parties to intervene only at the discretion of the court in a Voting Rights Act declaratory judgment action brought by a state or political subdivision. *Apache* treated only private party intervention in opposition to the Attorney General's acquiescence in the declaratory judgment; one rationale behind permitting such intervention is to insure some degree of adversity. Thus, in *Wilson*, since no challange was brought by the state or one of its subdivisions, there was no opportunity for the plaintiffs to gain intervention; whether or not they would have been able to intervene as parties in favor of entry of the declaratory judgment is another matter.

132. *See, e.g.*, Cummings v. Meskill, 341 F. Supp. 139, 142 (D. Conn. 1972).

133. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 750 (1973).

134. *Id.*

135. *Id.* at 737. *See also* Cummings v. Meskill, 341 F. Supp. 139, 142 (D. Conn. 1972).

136. *See, e.g.*, Mahan v. Howell, 410 U.S. 315, 319 (1973).

137. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 737 n.2 (1973).

138. 342 F. Supp. 463 (D.N.J. 1972).

139. *Id.* at 469.

140. 412 U.S. 755 (1973).

141. *Id.* at 774 (Brennan, J., concurring in part and dissenting in part).

There has been opposition to such a simplistic measure, however. The district court in the *Kirkpatrick* case warned that the constitutional right of equal congressional representation could not be even slightly abridged, since percentage figures and ratio numbers make unexplained and substantial population deviations and variations look smaller.[142] These words of caution concerning the ability of quantifiers to express reality was followed up in *Kilgarlin v. Martin*,[143] in which the Texas district court said that in determining the significance of a population variance, neither maximum range of deviation, individual differences in deviation between particular districts, nor population variance ratios, taken alone, should be deemed conclusive.[144] Most recently, in *White v. Regester*,[145] Justice Brennan argued in dissent:

> By establishing an arbitrary cutoff point expressed in terms of total percentage variance from the constitutional ideal, the Court fails to recognize that percentage figures tend to hide the total number of persons affected by unequal weighting of votes. . . . "The percentage deviation figures are only a shorthand method of expressing the 'loss,' dilution, or disproportionate weighting of votes. Just as the Court in *Reynolds* concluded that legislators represent people, not trees or cows, so we would emphasize that legislators represent people, not percentages of people."[146]

Thus, there seems to be a continuing uncertainty over the best method of measuring departures from the one man-one vote ideal. The author would argue that this problem can be solved using three numerical measures.

The first is the smallest percentage of people that can elect a majority of the representative body. This is probably the simplest measure of the value of majoritarianism, because its use will be an adequate indicator of how likely and frequently it will be that a minority could rule a majority.[147] Actually this measure is of utility only in the state legislative districting area because of the nature of the House of Representatives reapportionment procedure and its use of the "method of equal proportions."[148]

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142. Preisler v. Secretary of State, 257 F. Supp. 953, 974 (W.D. Mo. 1966), *aff'd sub nom.* Kirkpatrick v. Preisler, 385 U.S. 450 (1967). See note 23 *supra.*

143. 252 F. Supp. 404 (S.D. Tex. 1966), *rev'd and remanded in part*, 386 U.S. 120 (1967).

144. *Id.* at 428.

145. 412 U.S. 755 (1973).

146. *Id.* at 781-82. (Brennan, J., concurring in part and dissenting in part, *quoting* Graves v. Barnes, 343 F. Supp. 704, 713 n.5 (W.D. Tex. 1972)).

147. *See* Lucas v. Forty-Fourth Gen'l Assembly, 377 U.S. 713 (1964).

148. 2 U.S.C. § 2b (1941).

The second measure is calculated by taking each individual district in the districting plan under consideration, multiplying its percentage deviation from ideal district size by the numbers of persons within the district, and thus creating a measure of "person-deviations" for each district. These "person-deviation" values are totaled over all districts, then divided by the total number of districts so as to give the average "person-deviation" per district.[149] This measure speaks to an overall, pervasive, generalized dilution of the one man-one vote standard.

The third measure results from: (1) identifying the two districts most disparate in population size; (2) for each district, multiplying the percentage deviation from ideal by the number of persons within the district; and (3) summing these two "person-deviation" values and dividing by a factor of two, thus giving a maximum "person-deviation" disparity.[150] In contrast to the previous measure, which speaks to a generalized societal interest, this measure is directed toward highlighting the ultimate possible degree of dilution of any individual's vote, which, after all, has been called an "individual and personal" right.[151]

Accordingly, absent the establishment of a constitutional requirement of exact satisfaction of numerical population equality among districts under the proposed tripartite standard, it would seem advisable for the Court to set individual ceilings for each of these three critical measures, and to hold unconstitutional any plan that violated any one of the three.

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149. An example might help at this point. Suppose you wish to divide Region *Q* into four districts (*A1* through *A4*) each having a population as close as possible to an ideal size of 5000 people. Suppose further that 19,250 people actually live in Region *Q*. Make district *A1* your ideal "control group" district containing exactly 5000 people. Drawing nearly equivalent circles, you discover districts *A2* through *A4* will respectively contain 4750, 4300, and 5200 people. Thus, districts *A2* through *A4* will respectively measure 95%, 86%, and 104% of the ideal district size and exhibit deviation of 5%, 14%, and 4%. Multiply these deviations by the number of people in each respective district. For example, in district *A2* .05 x 4750 yields 237.5 which is the "person-deviation per district" measure. The figures for *A3* and *A4* are 602 and 208. The sum of these figures is 1047.5. Divide this number by four (total number of districts). The result is 261.88 or the "average person-deviation per district" measure.

150. Assume the same facts stipulated in note 149 *supra*. As noted, *A3* will have 4300 people; *A4* will have 5200. These two districts therefore exhibit the largest numerical discrepancy. The "person-deviation per district" measures for *A3* and *A4* are respectively 602 and 208. The sum of these figures is 810. Dividing this result by two yields the value 405. This is the "maximum person-deviation disparity" measure and is slightly more than 1½ times the "average person-deviation per district" measure calculated in note 149 *supra*. Of course, this ratio will differ depending upon the degree of discrepancy between the most dense and least dense districts.

151. Reynolds v. Sims, 377 U.S. 533, 561 (1964).

Conclusion

Can the worth of one person's vote ever be the same as the worth of any other person's vote? Can the one man-one vote ideal become a reality?

Historically, the districting bodies of the respective states have been hostile to the ideal. The explanation for this hostility exposes the root of the apportionment-districting problem: it is the Catch-22 situation that was presented to the Court in *Baker*, that of political self-interest. In most states, districting is the task of the state legislature. Frequently, state legislators believe that in order to maximize their chances for re-election they must preserve the constituency that elected them (which means preserving past district boundary lines), and preserve the constituencies and district boundary lines of those House of Representative members with whom they are politically aligned. Furthermore, the legislators most interested in preserving past constituencies and boundaries are those who have been re-elected several times and who thus have come to regard their old districts as very safe. Unfortunately, these legislators often are, by virtue of their seniority, among the most influential and powerful in the legislature. They frequently have a decisive effect upon the passage or defeat of districting legislation. Naturally, this unhealthy situation leads to the conclusion that districting should be the task of a body upon whom the impact of the political exigencies of the moment is minimal.[152] In the alternative, present districting bodies could be allowed to retain these functions, but they should be given a set of constitutional guidelines that would effectively filter out political or other (*e.g.*, racial) considerations that are irrelevant. The proposed tripartite standard for districting is designed precisely to achieve this goal.

In addition, not only do numerous policy considerations dictate the conclusion that remedies involving conscious consideration of various group interests should be avoided if at all possible, but there is the further problem of the ability to make accurate generalizations about group behavioral responses. Group interest consideration depends on the assumption that all or many members of a particular interest group will vote exactly alike upon a panoply of unrelated issues.[153] Only to the degree that such group behavior can be validly predicted can the

152. *See Cousins I, supra* note 84, 466 F.2d at 847 (Stevens, J., dissenting).

153. *See* United Jewish Organizations v. Wilson, 510 F.2d 512, 519 (2d Cir. 1975); Zimmer v. McKeithen, 485 F.2d 1297, 1310 (5th Cir. 1973) (Coleman, J., dissenting in part); *Cousins I*, 466 F.2d at 850-51 (7th Cir. 1972) (Stevens, J., dissenting).

particular interest group be vulnerable to a gerrymander,[154] and can a remedial districting be responsive to the "wrong" done. Because the proposed tripartite standard for districting precludes group gerrymanders and because the degree of identical voting on the part of special interest group members varies significantly with many other variables, it is asserted that under the proposed standard any attempt by the judiciary to take into account special interest groups is not only unnecessary, but ill-advised.

The only two factors not taken into consideration by this tripartite standard are the element of chance[155] and patterns of residential housing.[156] It is possible, but unlikely, that persons would so strongly identify with a particular special interest that, at the expense of all other considerations, they would change their residences to one particular geographic area in an attempt to create a district dedicated to the advancement of that interest. If this possibility is in fact significant, it should not act as a deterrent to adoption of the proposed standard because any subsequent decline in the perceived need to assert the particular group interest will necessarily result in a corresponding relaxation of residential concentration of that interest. Shifts in residential housing patterns with time have never been totally predictable.[157] The proposed tripartite standard, however, would make the districting process more predictable and defensible.

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154. *Cousins I*, 466 F.2d at 850-51 (Stevens, J., dissenting).

155. Remember that districting must recur every decade; a particular interest group's good or bad luck, *i.e.*, a districting which by chance maximized or minimized their voting power, would last, at most, until the next districting. It is probable, however, that shifting residential patterns would alter the degree of "goodness" or "badness" over the course of the decade.

156. United Jewish Organizations v. Wilson, 510 F.2d 512, 519 (2d Cir. 1975).

157. Furthermore, the breakdown of patterns of housing segregation is being facilitated by social legislation. *See* Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (1968).