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CASE NOTES

CONSTITUTIONAL LAW—CONGRESSIONAL DISTRICTING —"ONE MAN-ONE VOTE" DEMANDS NEAR MATHEMATICAL PRECISION

On January 4, 1965, a three-judge federal district court determined that the 1961 Missouri Congressional Districting Act was unconstitutional, but deferred granting judicial relief until the Missouri Legislature had "an opportunity to deal with the problem."[1] Thereafter, the Missouri General Assembly passed the 1965 Congressional Redistricting Act. When subjected to judicial scrutiny, this Act was also found to be constitutionally void.[2] In 1967, the General Assembly enacted yet another redistricting act.[3] Based on 1960 United States census figures, the ten congressional districts created by the 1967 Act ranged from 13,542 people (3.13 per cent) above the mean population to 12,260 people (2.83 per cent) below the mean.[4] The district court, one judge dissenting, ruled that the

1. Preisler v. Secretary of State of Missouri, 238 F. Supp. 187, 191 (W.D. Mo. 1965) [hereinafter cited as *Preisler* I]. The 1961 Act was declared unconstitutional on the basis of Wesberry v. Sanders, 376 U.S. 1 (1964): Article I, § 2 of the Constitution requires "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8. *See also* text at n.10-11.

2. Preisler v. Secretary of State of Missouri, 257 F. Supp. 953 (W.D. Mo. 1966) [hereinafter cited as *Preisler* II], *aff'd per curiam sub. nom.*, Kirkpatrick v. Preisler, 385 U.S. 450 (1967) [hereinafter cited as *Kirkpatrick* I].

3. 1967 Congressional Redistricting Act, Mo. STAT. ANN. tit. 9, § 128.202-.305 (Supp. 1968).

4. Implementing the "one man-one vote" standard has given birth to the use of two mathematical tests to measure deviations. The first is the population-variance ratio, *i.e.*, the ratio between the most populous district and the least populous district. A perfectly districted state would have a population-variance ratio of one-to-one. The second test measures deviations from the representational norm. Total population is divided by the total number of legislators to derive the "ideal" district. Given this figure, it is then possible to compute for each district the percentage deviation from the ideal district population. Consequently, plus and minus maximum percentage deviations can be reported and also the average percentage deviation can be computed. *See generally* DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 452-55 (1968); Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 13; Clem, *Problems of Measuring and Achieving Equality of Representation in State Legislatures*, 42 NEB. L. REV. 622 (1963); Note, 79 HARV. L. REV. 1226, 1250-1251 (1966); Note, 4 HOUST. L. REV. 577, 578-79 (1966).

1967 Act was also unconstitutional because it did not comply with the "as nearly as practicable" standard of article 1, § 2 of the Constitution.[5] On appeal, the United States Supreme Court affirmed, holding that the "as nearly as practicable" rule requires that the state not only "make a good-faith effort to achieve precise mathematical equality," but also that any remaining population disparities, "no matter how small," be justified. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (hereinafter cited as *Kirkpatrick* II).

This decision is significant because it represents the Supreme Court's most recent effort to formulate guidelines defining the "as nearly as practicable" standard. The purpose of this casenote is to analyze *Kirkpatrick* II in light of relevant case law, to critically evaluate the guidelines it establishes, and to demonstrate how it represents an extension of the trend toward rigid interpretation of the "one man-one vote" doctrine.

The necessary starting point for a discussion of congressional districting issues is the "one man-one vote" concept. This principle is based upon the premise that the right of suffrage is so fundamental in a democratic society that dilution of that franchise is as improper as denying it altogether.[6] To prevent a state from overweighting, or diluting, the votes of some of its citizens, the Supreme Court has ruled that once a state has determined the boundaries of its voting districts, " all who participate in the election are to have an equal vote."[7] In other words, when qualified citizens exercise their right of franchise, each vote must be given as much weight as any other vote. As a corollary, equality of voting strength is to be achieved by requiring the states to draw election districts that contain identical numbers of people. Thus, "one man-one vote" requires that states implement the equal-population district principle.

Less than two years after its momentous decision in *Baker v. Carr*,[8] the Supreme Court applied the "one man-one vote" principle to congres-

5. Preisler v. Secretary of State of Missouri, 279 F. Supp. 952 (W.D. Mo. 1967) [hereinafter cited as *Preisler* III]. *See* Wesberry, *supra* note 1.

6. *See* Reynolds v. Sims, 377 U.S. 533, 555, 567-68 (1964); Wesberry v. Sanders, *supra* note 1, at 7; Gray v. Sanders, 372 U.S. 368, 380 (1963); and Baker v. Carr, 369 U.S. 186, 242 (1962).

7. Gray v. Sanders, *supra* note 6, at 379. *See generally*, DIXON, *supra* note 4, at 172-77; and MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 83-9 (1965).

8. Baker v. Carr, *supra* note 6. Prior to *Baker*, it was widely believed that federal courts would not review individual voter complaints about congressional malapportionment. This negative view stemmed from the Supreme Court's four-to-three dismissal in *Colegrove v. Green*, 328 U.S. 549 (1946), of a suit challenging the constitutionality of the Illinois Congressional Redistricting Act. The Court's majority opinion was internally ambiguous in suggesting both a total lack of juris-

sional districting disputes. In *Wesberry v. Sanders*,[9] the Court invalidated the congressional districting plan enacted by the Georgia Legislature because it grossly discriminated against the voters in the largest districts. Mr. Justice Black, speaking for the majority, concluded that the command of article 1, § 2 of the Constitution, that "Representatives . . . be . . . chosen by the People of the Several States . . .," construed in its historical context, means "that as nearly as is practicable one man's vote in

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diction (exclusive constitutional commitment of congressional districting to Congress) and a theory of nonjusticiability (judicial self-restraint in entering the "political thicket"). Whatever the meaning of *Colegrove*, the case stood as an insurmountable hurdle to reapportionment suits for over fourteen years.

The first harbinger of change was *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), wherein the Supreme Court unanimously declared unconstitutional an Alabama state law redefining the city boundaries of Tuskegee so as to place all but four or five of the city's Negro voters outside the city limits, without removing a single white voter. While the *Gomillion* decision rested solely on the fifteenth amendment's mandate that neither state nor federal governments may restrict voting rights on the grounds of race, the Court's willingness to act in the Tuskegee case did suggest that it might reconsider the *Colegrove* principle, and in fact it did so in *Baker v. Carr*, *supra* note 6.

In *Baker*, the plaintiffs attacked Tennessee's legislative apportionment on the grounds that inequality in voting districts caused by the failure of the Tennessee legislature to reapportion resulted in a denial to plaintiffs of rights guaranteed by the fourteenth amendment. Mr. Justice Brennan, speaking for the Court, found that claims of population inequality among election districts are within the jurisdiction of the federal courts; that the issues are justiciable; and that individual voters have standing to raise the issues. While *Baker* involved a state legislative reapportionment case, it was clear that the Court's majority opinion left "standing no generally applicable objection to . . . federal judicial intervention in congressional districting cases." Neal, Baker v. Carr: *Politics in Search of Law*, 1962 SUP. CT. REV. 252, 326; *accord*, Mitchell, *Judicial Self-Restraint: Political Questions and Malapportionment*, 39 WASH. L. REV. 761, 774 (1964); Murphy, *Congressional Redistricting, October Term, 1963*, 16 MAINE L. REV. 1, 8-9 (1964).

9. Wesberry v. Sanders, *supra* note 1. In *Wesberry*, the Supreme Court made more explicit the point on which after *Baker* there should have been no doubt. Neither *Colegrove* nor any other decision could be read to deny federal courts jurisdiction or justiciability of cases challenging state-imposed imbalance in congressional election districts. Mr. Justice Black, speaking for the Court, stated: "[W]e made it clear in Baker that nothing in the language of [article 1, § 4 of the Constitution] gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction. . . . [The lower court's dismissal] can no more be justified on the ground of 'want of equity' than on the ground of 'nonjusticiability.'" Wesberry v. Sanders, *supra* note 1, at 6-7. Thus, in *Wesberry* the Supreme Court clearly overruled *Colegrove v. Green* and held that congressional districting disputes are susceptible of judicial determination. *See generally* DIXON, *supra* note 4, at 182-95; HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 122-29 (rev. ed. 1964); MCKAY, *supra* note 7, at 89-98; Carpenter, Wesberry v. Sanders: *A Case of Oversimplification*, 9 VILL. L. REV. 415 (1964); Murphy, *supra* note 8; Note, 32 GEO. WASH. L. REV. 1076 (1964).

a congressional election is to be worth as much as another's."[10] Furthermore, Mr. Justice Black's analysis of the history of the Constitution also "reveals that . . . it was *population* which was to be the basis of the House of Representatives."[11] Thus was established the proposition that "one man-one vote" requires the congressional districts within a state to be of equal population "as nearly as is practicable."

Beyond declaring that districts must be as equal in population as practicable, the Supreme Court's *Wesberry* decision failed to set down precise standards.[12] In *Reynolds v. Sims*,[13] the Court, for the first time, attempted

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10. Wesberry v. Sanders, *supra* note 1, at 7-8 (emphasis added). The phrase "as nearly as practicable" is a constitutional standard well established in law, rather than one recently introduced into the political language of America by the United States Supreme Court. In 1872, Congress directed that all congressional districts within a state should contain "as nearly as practicable an equal number of inhabitants." Act of Feb. 2, 1872, c. 11, § 2, 17 Stat. 28 (1872). The same provision appears in the Congressional Apportionment Acts of: (a) 1882, (Act of Feb. 25, 1882, c. 20 § 3, 22 Stat. 5,6); (b) 1891 (Act of Feb. 7, 1891, c. 116, § 3, 4, 26 Stat. 735, 736); (c) 1901 (Act of Jan. 16, 1901, c. 93, § 3, 4, 31 Stat. 733, 734); and (d) 1911 (Act of Aug. 8, 1911, c. 5, § 3, 37 Stat. 13, 14). The provision was deleted by the Apportionment Act of 1929 (Act of June 18, 1929, 46 Stat. 21). Almost twenty-five years later, President Truman recommended that Congress deal with congressional malapportionment by requiring that districts "contain as nearly as practicable the same number of individuals." Message from the President of the United States, H. R. Doc. No. 36, 82d Cong. 1st Sess. (Jan. 9, 1951). Thus, for more than ninety years the phrase "as nearly as practicable" has been a part of the language of congressional districting. *See generally* Cellar, *Congressional Apportionment—Past, Present, and Future*, 17 LAW & CONTEMP. PROB. 268 (1952).

11. Wesberry v. Sanders, *supra* note 1, at 8-9. Mr. Justice Harlan does an effective job of demolishing Mr. Justice Black's historical argument by establishing that the latter's historical facts prove nothing more than that it was intended that representation of a state in the lower house of Congress should be determined on a population basis as distinguished from the Senate where each state was to have two representatives regardless of population. Wesberry v. Sanders, *supra* note 1, at 26-42. For further criticism of Mr. Justice Black's historical argument *see* Carpenter, *supra* note 9, at 417-19 (1964); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 135-36; Note, 32 GEO. WASH. L. REV. 1076, 1095-1096 (1964).

12. Wesberry v. Sanders, *supra* note 1, at 21, n.4. *Accord*, Grills v. Branigin, 255 F. Supp. 155, 157 (S.D. Ind. 1966), *rev'd per curiam sub. nom.*, Duddelston v. Grills, 385 U.S. 455 (1967); Bush v. Martin, 251 F. Supp. 484, 518 (S.D. Tex. 1966) (Noel J., concurring in part and dissenting in part); and Calkins v. Hare, 228 F. Supp. 824, 831-32 (E.D. Mich. 1964) (O'Sullivan J., concurring in part and dissenting in part).

13. Reynolds v. Sims, *supra* note 6. Decided the same day as *Reynolds* were: WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Committee For Fair Representation v. Tawes, 377 U.S. 656 (1964); Roman v. Sincock, 377 U.S. 695 (1964); and Lucas v. Forty-Fourth General Assembly of the State of Colorado, 377 U.S. 713 (1964). For a general discussion of the reapportionment decisions *see* DIXON, *supra* note 4, at 261-89; MCKAY, *supra* note 7, at 99-145; Auerbach, *supra* note 4; Carroll, *The Legislative Apportionment Cases*, 16 SYRACUSE L. REV. 55

to establish guidelines defining the "as nearly as practicable" standard. Chief Justice Warren, writing for the majority, stated: "We determined [in *Wesberry*] that the constitutional test for the validity of congressional districting schemes was one of *substantial equality of population* among the various districts."[14] Moreover, the Court recognized that some minor population deviations among intra-state voting districts were permissible so long as they resulted from the use of political subdivision lines, or other logical division lines, in the drawing of coherent districts.[15] The constitutional wisdom in permitting deviations from the mathematical ideal, if such lines were used in creating districts, was stated as follows: "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[16] Hence, under the *Wesberry-Reynolds* formulation, the phrase "as nearly as practicable" meant that congressional districts within a state were to be substantially equal in population; minor population variances among districts were acceptable if they resulted from the use of political subdivision, natural, or historical boundary lines.[17]

With no better guidelines than this, it is not surprising that state legislatures moved in opposite directions in the period between 1964 and 1966. On the one hand, a large number of state legislatures chose to construct their congressional districts along political subdivision lines, permitting some population variances so long as they were not excessive.[18] For example, in *Bush v. Martin* a three-judge federal district court ruled that a maximum deviation from the ideal of ten to fifteen per cent (plus or minus)

(1964); Cassin, *Reapportionment: The Problem That Will Not Go Away*, 3 HOUST. L. REV. 310 (1966); Note, 79 HARV. L. REV. 1226 (1966); Note, 33 U. CIN. L. REV. 483 (1964).

14. Reynolds v. Sims, *supra* note 6, at 559 (emphasis added).

15. Reynolds v. Sims, *supra* note 6, at 578.

16. Reynolds v. Sims, *supra* note 6, at 578-79.

17. *See* Bush v. Martin, *supra* note 12, at 510-11; Meeks v. Avery, 251 F. Supp. 245, 252 (D. Kans. 1966); Moore v. Moore, 246 F. Supp. 578, 582 (S.D. Ala. 1965); Silver v. Reagan, 62 Cal. Reptr. 424, 428, 432 P.2d 26, 30 (1967); People v. Kerner, 33 Ill. 2d 460, 462, 211 N.E.2d 736, 737 (1965); Jones v. Falcey, 48 N.J. 25, 40, 222 A.2d 101, 109 (1966); Wilkins v. Davis, 205 Va. 803, 809, 139 S.E.2d 849, 855 (1965).

18. *See, e.g.*, ALA. CODE tit. 17, § 425 (Supp. 1967); COLO. REV. STAT. § 28-1-1 (1966); IDAHO CODE c. 19, §§ 34-1902 to -1903 (Supp. 1967); ILL. REV. STAT. c. 46 § 156 f.1 (1967); KY. REV. STAT. § 120.070 (Supp. 1966); ORE. REV. STAT. tit. 23, § 250.290(1) (1967); S.C. CODE ANN. c. 9, § 23-554 (Supp. 1968); S.D. CODE § 1-3-1 (1968); UTAH CODE ANN. § 20-10-3 (1965); VA. CODE c. 1, § 24-3 (1969); REV. CODE OF WASH. §§ 29.68.012-.067 (Supp. 1968); W. VA. CODE ANN. § 1-2-3 (Supp. 1969). *See generally Congressional Redistricting: Redistricting Action Reviewed State-by-State For The Years 1960-1966*, CONGRESSIONAL QUARTERLY, Vol. XXIV, pp. 2004-139, Sept. 16, 1966.

was justified by a Texas legislative policy of *respecting* political subdivision lines.[19] On the other hand, a small number of state legislatures sought to achieve near-absolute mathematical equality among its districts by *disregarding*, whenever necessary, political subdivision lines.[20] In Michigan, for example, the state legislature cut across county lines in twelve of nineteen congressional districts to achieve a plan with a maximum deviation from the average of 2.1 per cent.[21] Contrasting the above two approaches leads to one conclusion: while the near-absolute equality theory produces plans with smaller population disparities, it also enhances the opportunity for unfair districting practices by giving reapportioners *carte blanche* to ignore traditional boundary lines.

Nevertheless, a trend toward adopting the near-absolute equality approach began to develop. In *Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes*, a three-judge district court, after holding unconstitutional the 1965 Maryland Congressional Redistricting Act, prescribed its own scheme, which allowed a difference of 9,973 between the population of the largest and smallest district.[22] The most outstanding feature of the court plan was the splitting of Baltimore County among four separate districts, Anne Arundel County among three districts, and little Howard County between two districts.[23] On May 31, 1966, the Supreme Court upheld the Maryland district court's plan.[24] The Courts' affirmance in *Tawes* clearly established the constitutionality of ignoring traditional political subdivisions in congressional districting cases. As Chief Justice Weintraub of the New Jersey Supreme Court has pointed out: "[once] the lines of political subdivisions are ignored, there is no apparent reason for not achieving mathematical equality."[25] Hence, the *Tawes* decision represents the first clear indication that the Supreme Court was on

19. Bush v. Martin, *supra* note 12, at 511. *Accord*, Moore v. Moore, *supra* note 17, at 582-83; Grills v. Branigin, *supra* note 12, at 158; Silver v. Reagan, *supra* note 17, at 428, 432 P.2d at 30. Several state reapportionment cases have also held that a ten to fifteen per cent maximum deviation (plus or minus) from the ideal complies with the Supreme Court's guidelines. Yancey v. Faubus, 251 F. Supp. 998 (E.D. Ark. 1965), *aff'd per curiam sub. nom.*, Crawford County Bar Assoc. v. Faubus, 383 U.S. 271 (1966); and Toombs v. Fortson, 241 F. Supp. 65 (N.D. Ga. 1965), *aff'd per curiam*, 384 U.S. 210 (1966). *But see* Reynolds v. Sims, *supra* note 6, at 578; and Roman v. Sincock, *supra* note 13, at 710.

20. KANS. STAT. ANN. §§ 4-121 to -126 (Supp. 1968); MD. ANN. CODE Art. 33, § 159 (1967); MICH. STAT. ANN. c. 17, § 4.24(1) (1969); OKLA. STAT. ANN. tit. 14, § 3 (Supp. 1967).

21. MICH. STAT. ANN. c. 17, § 4.24(1) (1969).

22. 253 F. Supp. 731 (D. Md. 1966).

23. *Id.* at 735-37.

24. Alton v. Tawes, 384 U.S. 315 (1966).

25. Jones v. Falcey, *supra* note 17, at 37, 222 A.2d at 108.

the verge of adopting a more rigid mathematical equality standard in the area of congressional districting.

In a series of state legislative and congressional districting decisions early in 1967, the Supreme Court reevaluated its interpretation of the "one man-one vote" principle. The leading case was *Swann v. Adams*,[26] wherein the Supreme Court nullifed Florida's reapportionment statute, which was, on arithmetic grounds, one of the more equitable plans in the nation. The Court, speaking through Mr. Justice White, stated the new guidelines thusly:

> *De minimis* deviations are unavoidable, but variations of 30% among senate and 40% among house districts can hardly be deemed *de minimis*, and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on an acceptable state policy.[27]

From this statement the basic burden of proof emerged: except for *de minimis* population variances, all deviations from the districting norm must be justified by the state on some rationally permissible principle.

The *Swann* decision is significant because it did not make absolute mathematical equality the rule in *state* reapportionment cases. Mr. Justice White's opinion for the majority stated that there were two possible legal excuses for variances from the equal-population principle. First, deviations could be justified by the implementation of an "acceptable state policy," such as maintaining the integrity of political subdivisions, providing for compact districts of contiguous territory and recognizing natural or historical boundary lines.[28] Secondly, *Swann* recognized that the *de minimis* doctrine applied to state reapportionment cases.[29]

The legal phrase *"de minimis non curat lex"* means, "[t]he law does not care for, or take notice of, very small or trifling matters."[30] In several lower court decisions, the phrase *de minimis* has been used to explain

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26. 385 U.S. 440 (1967).

27. *Id.* at 444. According to Dean McKay, by the end of 1967 the reapportionment plans in more than thirty states appeared to satisfy the *Swann* guidelines. MCKAY, REAPPORTIONMENT REAPPRAISED 14 (1968).

28. *Supra* note 26, at 444.

29. *Supra* note 26, at 444. The first Supreme Court case to mention the phrase *de minimis* was *Baker v. Carr*. Mr. Justice Harlan's dissenting opinion in *Baker* suggested that the variances in the 1901 Tennessee state apportionment were only *de minimis* from an apportionment formula established by the Tennessee Constitution. Mr. Justice Clark countered by stating that Mr. Justice Harlan's efforts to justify variances by referring to "such generalities as . . . '*de minimis*' departures [are shown by] even a casual glance at the present apportionment picture . . . to be entirely fanciful." Baker v. Carr, *supra* note 6, at 258. In *Swann* Mr. Justice White apparently adopts Mr. Justice Harlan's position that the *de minimis* doctrine justifies population variances.

30. BLACK'S LAW DICTIONARY 482 (4th ed. 1951).

minor departures from the mathematical ideal.[31] A Nebraska federal court has succinctly stated the applicable rule: "[I]f the deviations are minor, that in itself may be a justification for any plan."[32] The *Swann* opinion adopts the same position, holding that if the deviations are of a *de minimis* nature, the plan should be judicially approved. Hence, in state reapportionment cases, population deviations could be justified by two considerations—the doctrine of *de minimis* deviation *or* the effectuation of an acceptable state policy.

On the same day as the *Swann* decision, the Supreme Court summarily disposed of two congressional districting cases. The Court's brief *per curiam* decisions in *Duddleston v. Grills*[33] and *Kirkpatrick v. Preisler* (*Kirkpatrick* I)[34] indicated the importance of *Swann* in *congressional* districting. In *Grills*, an Indiana district court ruled that a 1.2 to 1 population variance ratio and a 12.8 per cent maximum deviation from the norm did not render the 1965 Indiana districting plan constitutionally invalid.[35] On appeal, the Supreme Court vacated the lower court judgment and remanded for further consideration in light of *Swann*, *Wesberry* and *Reynolds*.[36] By simply citing the *Swann* ruling as authority, the Supreme Court indicated that proponents of any districting plan had the burden of justifying deviations from equality.[37] Left unanswered was the question of what factors would excuse population deviations among intra-state districts. Did the *Swann* state reapportionment factors—"acceptable state policy" or "*de minimis*"—apply to population variances in congressional redistricting?

While some lower courts[38] construed the reversal in *Grills* to mean

31. Exon v. Tiemann, 279 F. Supp. 609, 612 (D. Neb. 1968); Kilgarlin v. Martin, 252 F. Supp. 404, 414 (S.D. Tex. 1966), *rev'd per curiam sub. nom.*, Kilgarlin v. Hill, 386 U.S. 120 (1967); Preisler II, *supra* note 2, at 973; Calkins v. Hare, *supra* note 12, at 829.

32. Exon v. Tiemann, *supra* note 31, at 612.

33. 385 U.S. 455 (1967).

34. Kirkpatrick I, *supra* note 2.

35. Grills v. Branigin, *supra* note 12, at 158-59.

36. *Supra* note 33.

37. *Supra* note 37. *Accord,* Preisler III, *supra* note 5, at 960; Wells v. Rockefeller, 273 F. Supp. 984, 989 (S.D. N.Y. 1967), *aff'd per curiam*, 389 U.S. 421 (1967) [hereinafter cited as *Wells* I]; Maryland Citizens Committee For Fair Congressional Districting, Inc. v. Tawes, *supra* note 22, at 733; Drum v. Seawell, 250 F. Supp. 922, 924 (M.D. N.C. 1966); Drum v. Seawell, 249 F. Supp. 877, 880 (M.D. N.C. 1965), *aff'd per curiam*, 383 U.S. 831 (1966); Calkins v. Hare, *supra* note 12, at 827; Jones v. Falcey, *supra* note 17, at 37, 222 A.2d at 109.

38. Dinis v. Volpe, 264 F. Supp. 425, 430 (D. Mass. 1967), *aff'd per curiam,* 389 U.S. 570 (1968) (dictum); Exon v. Tiemann, *supra* note 31, at 612; Preisler

that the acceptable state policy considerations established in *Swann* were applicable to congressional districting cases, the true answer was to be found in *Preisler v. Secretary of State of Missouri* (*Preisler II*). In that case, the Supreme Court sustained a federal district court decision invalidating a Missouri congressional districting plan in which the maximum deviation from the mean was only 9.9 per cent.[39] The opinion of Judge John W. Oliver was especially perceptive. He interpreted the Supreme Court's rulings subsequent to *Wesberry* as holding that "*population alone is the sole standard for congressional representation.*"[40] In responding to the contention that the population discrepancies did not exceed 9.9 per cent, Judge Oliver refused " 'to be drawn into a sterile controversy over averages and percentages,' "[41] since "the constitutional right of equal representation may [not] be but slightly, and therefore permissibly, abridged."[42] He concluded by stating that "any variation above that permitted by a fair application of the doctrine of *de minimus*, factually supported, must be held to be an abridgment of rights guaranteed by . . . the Constitution."[43] Thus, in place of the substantial equality formulation enunciated in *Reynolds*, the new guideline established by the Court's *per curiam* affirmances in *Tawes* and *Preisler* II seemed to be that the state must achieve bare population equality among its voting districts, subject only to *de minimis* deviations.

Even though *Swann* and *Preisler* II present conflicting views as to the applicability of non-population factors, a comparison of these cases reveals that both employed the same test: review of suggested alternative plans as a means of testing compliance with the equal-population principle. In each of the cases the complaining parties had either themselves suggested, or could point to, an alternative plan not adopted by the legislature under which deviations would have been minimized.[44] In *Swann*, the Supreme Court commented on the significance of alternative plans:

III, *supra* note 5, at 1009 n. 4 (Matthes J., dissenting); Wells I, *supra* note 37, at 989 (dictum); Silver v. Reagan, *supra* note 17, at 428, 432 P.2d at 30.

39. Preisler II, *supra* note 2. It is little wonder that the Court's per curiam affirmances in *Wells* I, *supra* note 37, and *Kirkpatrick* I, *supra* note 2, led to considerable judicial confusion. As Mr. Justice Harlan stated in his dissenting opinion in *Wells* I: "All this has the effect of leaving the state legislatures, the lower courts, and even Congress without meaningful guidance." *Supra* note 37, at 423.

40. *Supra* note 2, at 973 (emphasis added); *accord*, Connor v. Johnson, 279 F. Supp. 619, 623 (S.D. Miss. 1967), *aff'd per curiam on other grounds*, 386 U.S. 483 (1967); Calkins v. Hare, *supra* note 12, at 829; Meeks v. Anderson, 229 F. Supp. 271, 273 (D. Kan. 1964).

41. *Supra* note 2, at 974; *accord*, Calkins v. Hare, *supra* note 12, at 828.

42. *Supra* note 2, at 974.

43. *Supra* note 2, at 976.

44. Swann v. Adams, *supra* note 26, at 445; Preisler II, *supra* note 2, at 963.

> [I]t seems quite obvious that the State could have come much closer to providing districts of equal population than it did. The appellants themselves placed before the court their own plan which revealed much smaller variations between the districts than did the plan approved by the District Court.[45]

The Missouri District Court in *Preisler v. Secretary of State of Missouri* (*Preisler* III) elaborated on this proposition:

> The standard "as nearly as practicable" means . . . if plans before a court establish that more equal districting was obtainable than that which was adopted, then obviously the plan enacted . . . does not meet the constitutional command.[46]

In other words, if the population variances within a plan can be reduced, then the plan is unconstitutional. Thus, as Professor Dixon stated, "a new maxim of 'constitutional equity' is born: *That which may be made more equal is not equal.*"[47]

In *Kilgarlin v. Hill*,[48] decided late in 1967, the Supreme Court continued to tighten the arithmetic equality principle. A three-judge district court had upheld a Texas reapportionment plan even though there was a maximum deviation of 14.84 per cent. In sustaining the plan the lower court attempted to create an elaborate burden of proof formula. According to the Texas court, *de minimis* variations were considered to be constitutionally permissible; per se variations were held to be constitutionally void; and all cases in the middle area of the mathematical scale would be constitutionally permissible unless the plaintiff was able to "negate the existence of any state of facts which would sustain the constitutionality of the legislation."[49] The Supreme Court reversed, holding that the burden of proof rule established by *Swann* was controlling.[50] The Court did not even discuss the elaborate lower court formulation that included *de minimis* as a conceptual part of its involved theory of percentage and ratio justification. Consequently, the Court's reversal in *Kilgarlin* was at least an implicit rejection of any notion that the *de minimis* doctrine could be converted into an independent justification of population disparities.[51]

Apart from its repudiation of the *de minimis* doctrine, *Kilgarlin* is im-

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45. *Supra* note 26, at 445; *accord*, Dinis v. Volpe, *supra* note 38, at 428-29; Bush v. Martin, *supra* note 12, at 509; Baker v. Clement, 247 F. Supp. 886, 896 (M.D. Tenn. 1965); Paulson v. Meier, 246 F. Supp. 36, 41, 44 (D. N. Dak. 1965); League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357, 360-61 (D. Neb. 1965); Koziol v. Burkhardt, 51 N.J. 412, 416, 241 A.2d 451, 453 (1968); Jones v. Falcey, *supra* note 17, at 37, 222 A.2d at 107-08.

46. Preisler III, *supra* note 5, at 990.

47. DIXON, *supra* note 4, at 447 (1968) (emphasis added).

48. 386 U.S. 120 (1967).

49. Kilgarlin v. Martin, *supra* note 31, at 414.

50. *Supra* note 48, at 122.

51. Preisler III, *supra* note 5, at 964; *see* DIXON, *supra* note 4, at 449.

portant for another reason. In *Kilgarlin* the district court also attempted to justify the state plan as the product of "a bona fide attempt to conform to the state policy requiring legislative apportionment plans to respect county boundaries wherever possible."[52] The Supreme Court rejected the district court's contention, stating that since state policy permitted cutting of some county lines to avoid "undue" population deviations, it was incumbent on the state to show why a few more should not be cut to further reduce population variances.[53] The thought expressed in this proposition had significant implications in the area of congressional districting.

In *Tawes* the Supreme Court recognized the propriety of cutting some political subdivision lines to reduce population disparities among congressional districts.[54] Under the *Kilgarlin* approach the burden was on the state to explain why more subdivision lines could not have been cut to further reduce the population variances. Since *Swann* required the state to adopt the most mathematically precise plan possible, an existing statute would have to be declared unconstitutional whenever a plan was placed in evidence before a court which showed more equal districting was possible by disregarding a few more subdivision lines. The *Tawes-Swann-Kilgarlin* approach, if carried to its logical conclusion, could lead to only one result: the state would have to ignore all county, township, ward and precinct lines in attempting to achieve near-absolute mathematical equality among districts. As a Kansas district court has stated: "[U]nder a plan of reapportionment which ignores political subdivision lines, it is not permissible to deviate from the equal population *principle*."[55] The implications of *Kilgarlin* erased any further doubt that the Court was headed toward an absolute mathematical equality rule.

The Supreme Court's 1968 reapportionment decisions were a further extension of its increasingly rigid interpretation of the "one man-one vote" principle. In *Dinis v. Volpe*[56] the Supreme Court affirmed, *per curiam*, a Massachusetts district court decision voiding a congressional districting plan with maximum deviations of plus 11.7 per cent and minus 12.4 per cent.[57] The opinion of Judge Woodbury was of extreme importance because it previewed the legal rationale for rejecting the *de minimis* doctrine as a justification for population variances. Judge Woodbury recognized

52. *Supra* note 48, at 122-23.

53. *Supra* note 48, at 123.

54. 253 F. Supp. 731 (D. Md. 1966), *aff'd per curiam sub nom.*, Alton v. Tawes, 384 U.S. 315 (1966).

55. Long v. Docking, 282 F. Supp. 256, 258 (D. Kan. 1968).

56. 389 U.S. 570 (1968).

57. Dinis v. Volpe, *supra* note 38, at 431.

that figures are essential in determining whether population variances are *de minimis*, or excessive. However, districting disputes are not to be decided "by application of any mathematical formula."[58] The proper approach is to determine whether the districting plan meets the standard of practicability, with reference to the specific situation present in the state involved.[59] Measured by this guideline, Judge Woodbury found that the Massachusetts statute was unconstitutional. His ruling was based on the fact that two other plans in evidence before the Court showed it was possible to provide districts more nearly equal in population.[60] Therefore, the aim in congressional districting is not to establish rigid mathematical standards (equality within a certain fixed percentage), but to construct districts as nearly of equal population *as is possible.*

The events in Massachusetts following the district court's decision are worthy of comment. Forced to redistrict by the *Dinis* ruling, the state legislature enacted a congressional districting plan which ignored county lines completely to secure a measure of equality in which the maximum deviation was only 1.1 per cent, and the population of the most populous district exceeded that of the least populous by only 8,717, a difference of 2.1 per cent.[61] Interestingly enough, the remarkable degree of equality achieved in Massachusetts did not involve sacrifice of all political subdivision lines as district boundaries. The more important town and city lines were respected.[62] The Massachussets' districting plan is significant because it showed that state legislatures had shifted from a policy of cutting some political subdivision lines to one of disregarding all but the most important lines.

On April 1, 1968, in *Avery v. Midland County*[63] the Supreme Court ruled that the equal-population principle applies to units of local government. The circumstances under which the Court took jurisdiction indicated that it was on the verge of rejecting any non-population factor that might

58. Dinis v. Volpe, *supra* note 38, at 429.

59. Dinis v. Volpe, *supra* note 38, at 429.

60. Dinis v. Volpe, *supra* note 38, at 429; *see* authorities cited *supra* note 45.

61. MASS. GEN. LAWS ANN. c. 57, § 1 (Supp. 1969). Other states that adopted an approach of cutting political subdivision lines are: Ohio, OHIO REV. CODE ANN. § 3521.01 (Supp. 1968); and Tennessee, TENN. CODE ANN. c. 5, § 2-502 (Supp. 1968).

62. MASS. GEN. LAWS ANN. c. 57, § 1 (Supp. 1969).

63. 390 U.S. 474 (1968). *See generally* Dixon, *Local Representation: Constitutional Mandates and Apportionment Options*, 36 GEO. WASH. L. REV. 693 (1968); Martin, *The Supreme Court and Local Reapportionment: The Second Phase*, 21 BAYLOR L. REV. 5 (1969); McKay, *Reapportionment and Local Government*, 36 GEO. WASH. L. REV. 713 (1968); Sentell, Avery v. Midland County: *Reapportionment and Local Government Revisited*, 3 GA. L. REV. 110 (1968).

provide permissible grounds for deviating from a standard of strict population equality. In *Avery*, the Texas Supreme Court ruled that the Commissioner's Court of Midland County was so apportioned as to violate the requirements of the Texas and United States Constitutions.[64] However, the Texas court further stated that population need not be the sole basis of apportionment, and such factors as the "number of qualified voters, land areas, geography, miles of county roads and taxable values"[65] could be considered in drawing district lines.

Arguably, there was an adequate state ground for the Texas Supreme Court's decision and it was clear that a new plan of apportionment would be drawn. Assuming that this was the case, it appears that the Supreme Court granted *certiorari* to deny the Texas Court's assertion that factors other than population could be considered in a new districting scheme. Justice Fortas' dissenting opinion accurately evaluated the majority's position:

> The Court . . . now plunges to adjudication of the case . . . in midstream, apparently because it rejects any result that might emerge which deviates from the literal thrust of one man, one vote.[66]

Hence, in *Avery* the Court determined that units of local government with general powers over a particular area must be apportioned on the basis of strict population equality.

Any conjecture that the strict population equality standard prescribed in *Avery* applied only to local governmental units was laid to rest in *Kirkpatrick v. Preisler* (*Kirkpatrick* II)[67] and the *Wells v. Rockefeller* (*Wells* II) case.[68] In *Kirkpatrick* II, Missouri's primary argument was that the variances created by the 1967 Missouri districting act are so small they "should be considered *de minimis* and for that reason to satisfy the 'as

64. Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966).

65. *Id.* at 428.

66. *Supra* note 63, at 496 (Fortas J., dissenting).

67. 394 U.S. 526 (1969), *rehearing denied*, 395 U.S. 917 (1969).

68. 394 U.S. 542 (1969) [hereinafter cited as *Wells* II]. New York's 1968 congressional districting statute was attacked on the grounds that it failed to comply with the "as nearly as practicable" standard. The heart of the New York districting scheme lay in the decision by the state legislature to treat seven sections of the state as homogeneous regions and divide each of these regions into districts of virtually identical population. However, on a state-wide basis New York's forty-one congressional districts ranged from 26,556 people (6.488 per cent) above the mean to 27,047 people (6.608 per cent) below the mean. The Supreme Court, relying on *Kirkpatrick* II ruled that the New York plan was unconstitutional because the objective in congressional districting is "to equalize population in all districts of the State and is not satisfied by equalizing population only within defined substates." *Id.* at 546.

nearly as practicable' limitation."[69] Mr. Justice Brennan, speaking for the Court, rejected Missouri's *de minimis* argument, holding that there is no "fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard."[70] Having disposed of the *de minimis* doctrine, Mr. Justice Brennan proceeded to define "one man-one vote" to mean that the state must make "a good-faith effort to achieve *precise mathematical equality*"[71] of population among the congressional districts within a state.

However, in *Kirkpatrick* II, as in *Wesberry* and *Reynolds*, the Supreme Court recognized that " 'it may not be possible [for the States] to draw congressional districts with mathematical precision.' "[72] Consequently, article 1, § 2 of the Constitution permits "limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[73] To comply with the standard of unavoidability, *Kirkpatrick* II requires a population deviation to satisfy three criteria. First, a deviation from the districting norm must not exceed 12,000 people.[74] Secondly, it cannot result from the use of inaccurate population figures.[75] Finally, a deviation cannot be considered unavoidable unless the apportioning body has come "as close to equality as it might have come."[76] This means that whenever it becomes apparent that the apportioning body could have districted the particular state in a more nearly equal manner, the population deviation can no longer be considered unavoidable. Consequently, unless the population variance can be justified by a legally acceptable reason, the districting statute must be declared unconstitutional so long as the plaintiff can point to another plan which would mathematically redistrict the state with greater equality.

Following the implications of *Swann* and *Duddleston*, the Court's *Kirkpatrick* II opinion requires proponents of congressional districting plans to present acceptable reasons for the variations among the populations of the various districts. Mr. Justice Brennan, however, proceeds to discard

69. *Supra* note 67, at 530.

70. *Supra* note 67, at 530. Only Justices Harlan, Stewart, and White hold that the *de minimis* doctrine should apply to congressional districting disputes. *Supra* note 67, at 550 (Harlan J. and Stewart J., dissenting) and 553 (White J., dissenting).

71. *Supra* note 67, at 530-31 (emphasis added).

72. *Supra* note 67, at 527; Wesberry v. Sanders, *supra* note 6, at 18; Reynolds v. Sims, *supra* note 6, at 577.

73. *Supra* note 67, at 531.

74. *Supra* note 67, at 528, 532.

75. *Supra* note 67, at 532.

76. *Supra* note 67, at 531.

every non-population factor that has been—possibly, every one that could be—advanced.[77] He rejects such considerations as the representation of distinct economic and social interests;[78] "practical political problems;"[79] the integrity of political subdivisions;[80] and geographic compactness.[81] In *Reynolds*, Chief Justice Warren observed that "[c]itizens, not history or economic interests, cast votes."[82] Under the principles established by *Kirkpatrick* II it would be equally correct to state that "citizens, not political subdivisions, or geographic areas, cast votes." Thus, in implementing the Supreme Court's "one man-one vote" standard, the formula for change is crystal clear—strict equality of population.

The remainder of this note will critically evaluate the guidelines established by *Kirkpatrick* II. These guidelines are logically consistent with the Court's narrow view of the redistricting issue. From the beginning, the Court has viewed a congressional districting case as a voting case, resting on each citizen's right to have his vote counted and weighted equally.[83] As a result, the objective in congressional districting is "not to meet a minimum mathematical standard, but to come as close as possible

77. *Supra* note 67, at 533-36. Apparently, the only nonpopulation factor that would justify population deviations is a state policy of constructing congressional districts of contiguous territory. The only appropriate population factor seems to be the use of population trends in constructing districts. However, the Court further stated: "By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic . . . manner." Kirkpatrick II, *supra* note 67, at 535.

78. *Supra* note 67, at 533; Wells II, *supra* note 68, at 546; Reynolds v. Sims, *supra* note 6, at 579-80; Lucas v. Fourty-Fourth General Assembly of Colorado, *supra* note 13, at 738.

79. *Supra* note 67, at 533; *accord*, Preisler II, *supra* note 5, at 989; Drum v. Seawell, 250 F. Supp. 922, 925 (M.D. N.C. 1966); Calkins v. Hare, *supra* note 12, at 828. However, as a federal court recognized in *Moore v. Moore*, *supra* note 17, at 582: "Although constitutional rights and principles cannot be ignored or made subordinate to political expediency, courts recognize the fact that legislative bodies in a democracy do not, and cannot perform and function according to a slide rule. . . . Democracy does not operate in that fashion. There remains the necessity of giving consideration to all legitimate contentions, interests and other appropriate factors involved in the legislative process."

80. *Supra* note 67, at 533-34; Wells II, *supra* note 68, at 546.

81. *Supra* note 67, at 535-36; Reynolds v. Sims, *supra* note 6, at 580. *See generally* DIXON, *supra* note 4, at 460-61; HACKER, *supra* note 9, at 74-7.

82. Reynolds v. Sims, *supra* note 6, at 580.

83. Wesberry v. Sanders, *supra* note 1, at 7; DIXON, *supra* note 4, at 267-71; Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 729, 747-53 (1969); Jewell, *Minority Representation: A Political or Judicial Question*, 53 KY. L. J. 267, 268-71 (1965); *see generally* Weiss, *An Analysis of* Wesberry v. Sanders, 38 S. CAL. L. REV. 67 (1965).

to a solution which treats each voter on an equal basis."[84] The appellant's *de minimis* argument in *Kirkpatrick* II conflicts with the above stated principle, for it seeks to establish that a three per cent maximum deviation from the norm satisfies the "as nearly as practicable limitation."[85] As Mr. Justice Brennan pointed out, "[t]he whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards."[86] Obviously, the most mathematically precise plan possible is one that achieves absolute equality, and thus, the goal in congressional districting is to achieve mathematical exactness.

This rigid interpretation of "one man-one vote" can be justified on several grounds. In the first place, with half of Congress apportioned on a non-population basis, it is only proper that the other House should comply with a strict population equality standard. Secondly, a goal of "mathematical exactitude . . . certainly is capable of clear definition and, as [an objective], it establishes a clear target at which to shoot."[87]

However, the guidelines enunciated in *Kirkpatrick* II lead to a number of undesirable results. First, *Kirkpatrick* II represents a further intrusion of the judiciary into congressional matters. Mr. Justice Harlan has pointed out that article I of the Constitution commits to Congress the ultimate authority to legislate with respect to congressional districts.[88] Congress did legislate in this area for some years, but it later repealed this legislation and thereby left the fixing of congressional districts to the discretion of state legislatures.[89] In *Wesberry*, the Supreme Court entered the "political thicket" of congressional districting and required that districts set up under state law must, as nearly as practicable, be equal in population. *Wesberry* can possibly be interpreted to mean that the standard stated by the Court is the one to be followed by the states in the absence of standards stated by Congress. But in *Kirkpatrick* II the Court clearly demonstrates that it has now fixed a single constitutional standard for congressional districting and there is no room for congressional deviation

84. Brief for Appellee at 19, Kirkpatrick v. Preisler (Kirkpatrick II), *supra* note 67.

85. *Supra* note 67, at 531.

86. *Supra* note 67, at 531; Roman v. Sincock, 377 U.S. 695, 710 (1964).

87. Brief for Appellee at 9, Kirkpatrick v. Preisler (Kirkpatrick II), *supra* note 67.

88. Wesberry v. Sanders, *supra* note 1, at 42.

89. *See generally* Wesberry v. Sanders, *supra* note 1, at 42-45 (Harlan J., dissenting); HACKER, *supra* note 9, at 48-49; MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 229-31 (1965); Black, *Inequities in Districting for Congress*: Baker v. Carr *and* Colegrove v. Green, 72 YALE L.J. 13, 18-21 (1962); Celler, *supra* note 10.

from this standard. Thus, the *Wesberry-Kirkpatrick* II formulation represents a substantial judicial intrusion upon congressional power.

Another feature of the *Kirkpatrick* II case that deserves special attention is the Court's emphasis on "equal representation for equal numbers of people."[90] Mr. Justice Brennan's use of the phrase "equal representation" suggests that beyond the citizen's right of electoral expression, he has a comparable right to equal or proportionate attention from the lawmakers themselves. But "it was not . . . by any word or hint 'our Constitution's plain objective' to guarantee equality of representation; in fact, there is every evidence to the contrary."[91] In addition, the Court unquestioningly assumes that "equal representation" magically arises from creating districts of equal population. Yet, the relation between representative and constituent is neither so direct, nor so simple. Congressmen are, in practice, responsive to group pressures and the legislative output is often a result of coalitions of minority interests.[92] The general tendency of legislators to specialize, becoming experts in certain areas while deferring to their colleagues on other matters, further estranges them from the innocent effort to provide "equal representation to equal numbers of people."[93] To mention these factors is merely to suggest the complexitiy of the problem of "equal representation," a problem which cannot be resolved by the equal-population districting standard.

Furthermore, as Justices Harlan[94] and White[95] demonstrate, the majority's insistence on absolute equality does not make sense even on its own terms. On the one hand, the Court's decision requires precise adherence to admittedly inexact census figures. Mr. Justice Fortas' concurring opinion clearly demonstrates that "[n]o purpose is served by an insistence on precision which is unattainable because . . . it is based upon figures which are always to some degree obsolete."[96] On the other hand, the Court rejects the use of political subdivision lines as a legally acceptable justification for population variances, and hence, downgrades a restraint

90. *Supra* note 67, at 530-31.

91. Irwin, *supra* note 83, at 751; *accord*, Kauper, *Some Comments on the Reapportionment Cases*, 63 MICH. L. REV. 243, 247 (1964).

92. *See* Reynolds v. Sims, *supra* note 1, at 623-24 (Harlan J., dissenting); Lucas v. Fourty-Fourth General Assembly of Colorado, *supra* note 13, at 750 (Stewart J., dissenting); DAHL, A PREFACE TO DEMOCRATIC THEORY 115 (1956); KEY, POLITICS, PARTIES & PRESSURE GROUPS 132-38 (5th ed. 1964); LATHAM, THE GROUP BASIS OF POLITICS 1-54 (1952); TRUMAN, THE GOVERNMENTAL PROCESS 14-26, 33-39 (1955); Jewell, *supra* note 83, at 268; Irwin, *supra* note 83, at 747.

93. Irwin, *supra* note 83, at 746.

94. *Supra* note 67, at 559 (Harlan J., dissenting).

95. *Supra* note 67, at 553 (White J., dissenting).

96. *Supra* note 67, at 539 (Fortas J., concurring).

on a far greater potential threat to equality of representation—gerrymandering.

> The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues.[97]

Thus, "[i]f the Court believes it has struck a blow . . . for fully responsive representative democracy, it is sorely mistaken."[98]

Finally, the guidelines enunciated in *Kirkpatrick* II will result in an "unnecessary intrusion of the judiciary into state legislative business."[99] In *Reynolds*, the Supreme Court stated that "reapportionment is primarily a matter for legislative consideration and determination."[100] But the Court's reliance on the "alternative districting plan" device necessarily leads to the conclusion that if in the judgment of the Court, not the legislature, a plan providing for greater equality in representation can be formulated, the legislature's plan must fail. It would seem, therefore, that only the courts can ultimately assume and properly complete the task of congressional districting—involving "the courts in the abrasive task of drawing district lines."[101]

Even the courts, however, will be beset with difficulties in formulating plans to comply with the unduly strict and unrealistic standards enunciated by the majority in *Kirkpatrick* II. Judicial redistricting is an impossible task for a court acting on its own with no more guidance than a standard of population equality. Once political subdivisions and other non-population factors are ignored, there are, theoretically, an infinite number of ways to divide a state into districts of absolute population equality.[102] It is no answer to this dilemma to contend that the court only has to turn to one of the plans submitted by the parties before it or to an amalgamation of several plans. Certainly, a court should not accept blindly the proposals submitted to it by the litigants. Usually, the plaintiffs represent some

97. *Supra* note 67, at 551; Reynolds v. Sims, *supra* note 1, at 578-79. In *Wells* II the issue of partisan gerrymandering was raised but not decided. For a general discussion of the issue of gerrymandering and the legal problems it creates *see* DIXON, *supra* note 4, at 458-99; Jewell, *supra* note 83; MCKAY, *supra* note 27, at 32-4.

98. *Supra* note 67, at 552 (Harlan J., dissenting).

99. *Supra* note 67, at 555 (White J., dissenting). "The Court may be groping for a clean-cut, *per se* rule which will minimize confrontations between courts and legislatures. . . . If so, the Court is wide of the mark. Today's result simply shifts the area of dispute a few percentage points down the scale." *Id.*

100. Reynolds v. Sims, *supra* note 1, at 586.

101. *Supra* note 67, at 553 (White J., dissenting).

102. *Supra* note 67, at 556 (White J., dissenting); Reynolds v. Sims, *supra* note 1, at 621-22 (Harlan J., dissenting); DIXON, *supra* note 4, at 268.

special interest group, not the broad spectrum of the interests of the entire state population. Additionally, there has been a breakdown of the adversary method in some apportionment cases. Often, both plaintiffs and defendants assert that a state's districting scheme is unconstitutional.[103] Thus, it becomes not only a mental task of unattainable proportions, but also, in terms of judicial workload, almost a physical impossibility for a court to objectively sift through the myriad proposals and select, or piece together, the "best" possible plan.

Moreover, it must be remembered that one of the prime goals of litigation over constitutional claims is that finality be achieved as quickly as possible. From this perspective a very real hazard of the "alternative districting plan" approach is that plaintiff-attack is made too easy on a mere showing that a more "equal" plan is possible. Under the standing rules of *Baker v. Carr*,[104] any dissatisfied voter can be a plaintiff and thus prevent finality in apportionment, even though the two major parties and all significant groups are satisfied with a particular plan. Thus, as long as diligent plaintiffs are around to challenge the constitutionality of a districting scheme, the courts will be inextricably involved in the districting process.

It is even questionable whether the proposals submitted by these plaintiffs can properly be referred to as districting plans. For example, in reapportioning the State of New York, the state apportionment committee spent over 2,570 man hours attempting to draw new district lines.[105] The technicians employed by the legislature made use of legislative maps exceeding thirty feet in length.[106] It is extremely doubtful whether a private citizen, without these resources, can draw districts with adequate descriptions. In *Wells* II, a consultant for the New York Legislature testified that he was unable to draw a map of appellant's plan in Nassau County because of its inadequate descriptions.[107] Thus, the "alternative districting plan" device leads to the anomalous result of a court invalidating a legislative districting scheme because a plaintiff-voter is able to produce an inexact plan with smaller population variances.

To conclude: In *Wesberry v. Sanders* the Supreme Court ruled that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[108] Measured by this standard, the

103. Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 372-75 (1963).

104. 369 U.S. 186 (1962).

105. Brief for Appellees at 17, Wells v. Rockefeller (Wells II), *supra* note 68.

106. *Id.* at 16.

107. *Id.* at 16-17.

108. Wesberry v. Sanders, *supra* note 1, at 7-8.

Court found that Georgia's congressional districting scheme, with a maximum deviation from the ideal of 108.9 per cent, was unconstitutional. In *Kirkpatrick* II, the Court now holds that even a three per cent maximum deviation from the districting norm fails to satisfy the "as nearly as practicable" limitation. While the districting statute invalidated in *Wesberry* grossly discriminated against voters in the larger congressional districts, the same cannot be said of the Missouri districting scheme. Where the greatest disparity among districts produces a situation in which one citizen casts a vote that was 97 per cent of the vote of a citizen in another district, it is doubtful whether such a differential can amount to a constitutional injury except in a purely abstract sense.

It would seem, therefore, that the Court rejects the Missouri plan because the state legislature considered factors other than population in discharging the command of article 1, § 2 of the Constitution. Thus, what is really involved in *Kirkpatrick* II is not a discriminatory denial of the right to vote, but rather a violation of the judicially created right to a system that recognizes numbers as the only basis for representation. Consequently, constitutional rectitude in congressional districting must be achieved in the following manner:

> Straight indeed is the path of the righteous legislator. Slide rule in hand, he must avoid all thought of county lines, local traditions, politics, history, and economics, so as to achieve the magic formula: one man, one vote.[109]

This "Draconian pronouncement" can lead to only one result: "abject surrender of jurisdiction to the mindless computer."[110]

Stephen L. Schar

CONSTITUTIONAL LAW—DECLARATORY JUDGMENTS—RELAXATION OF REQUIREMENTS?

During the 89th Congress, a special House subcommittee organized to investigate the expenditures of the House Committee on Education and Labor, and in particular, those of its chairman, Adam Clayton Powell, released a report charging Powell and members of his staff with deceptions as to certain travel expenditures and with making illegal salary payments to Powell's wife.[1] Formal action was postponed until the convening of the 90th Congress; Powell was then asked to step aside when the oath

109. *Supra* note 67, at 550 (Harlan J., dissenting).

110. Wells I, *supra* note 37, at 989.

1. H.R. Rep. No. 2349, 89th Cong., 2d Sess. 6-7 (1966).