Democracy and Distemper: An Examination of the Sources of Judicial Distress in State Legislative Apportionment Cases

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I. INTRODUCTION

A. Troublesome Thickets — Old or New?

When the United States Supreme Court in *Baker v. Carr*[1] led the courts of America down the path permitting judicial review of apportionment legislation, there were repeated warnings that the Court would ensnare itself in a "political thicket."[2] When the Court later decided *Wesberry v. Sanders*[3] and *Reynolds v. Sims,*[4] however, it encountered no thicket blocking progress toward its commitment to equality of voting powers. Even now it is not at all clear what of this feared "thicket" was supposed to be.[5]

In part, Justice Harlan's criticism of the Court's decision in *Baker*

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[1]369 U.S. 186 (1962). The Court in *Baker* reversed a lower court dismissal of a suit challenging Tennessee's state legislative apportionment as violating the equal protection clause. The Court held that federal courts had jurisdiction over the question, that the controversy was justiciable, and that federal courts possessed equitable powers sufficient to award relief.

[2]The imagery of a "political thicket" first appeared in Justice Frankfurter's opinion for the Court in Colegrove v. Green, 328 U.S. 549, 556 (1946), where the court held there was insufficient equitable power to make justiciable the claim that Illinois' congressional districts violated the equal protection clause. The imagery reappeared in Justice Harlan's dissent in Baker v. Carr, 369 U.S. at 330. In *Reynolds* itself, the opinion of Chief Justice Warren cautioned against "the dangers of entering into political thickets and mathematical quagmires." Reynolds v. Sims, 377 U.S. 533, 566 (1964).

[3]376 U.S. 1 (1964).

[4]377 U.S. 533 (1964). In addition to *Reynolds*, the court released five other state legislative apportionment cases on the same day: Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). Within two weeks the court had invalidated eight other state legislative apportionment plans. *See* Hill v. Davis, 378 U.S. 565 (1964); Pinney v. Butterworth, 378 U.S. 564 (1964); Hearne v. Smylie, 378 U.S. 563 (1964); Marshall v. Hare, 378 U.S. 561 (1964); Germano v. Kerner, 378 U.S. 560 (1964); Williams v. Moss, 378 U.S. 558 (1964); Nolan v. Rhodes, 378 U.S. 556 (1964)(per curiam); Meyers v. Thigpen, 378 U.S. 544 (1964)(per curiam); Swann v. Adams, 378 U.S. 533 (1964).

[5]J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 120 (1980).

to permit review of apportionment stemmed from institutional concerns.[6] He worried about the public perception of the Court's involvement in the apportionment process.[7] The benefit of hindsight, however, makes his worries seem somewhat trivial[8] because the Court's commitment to equality probably enhanced its standing in the eyes of the public.[9] Either the keen edge of the slogan "one person, one vote"[10] had cleared the thicket feared by the dissenters in *Baker* or the thicket had never really existed.

Twenty years after the Court decided *Reynolds*, an examination of state legislative apportionment cases and literature uncovers a confusing array of rules and obligations that have been imposed upon apportioning bodies.[11] The growth of tests and rules governing apportionment belies the simplicity and elegance of the original *Reynolds* formulation of "one person, one vote." The journey from simplicity to complexity has created confusion which distresses legislatures, courts, and observers.[12] In short, the Court may have gradually created its own "thicket" in state legislative apportionment cases. For those committed to equality, this newly visible "thicket" presents an obstacle to the goal of equal voting power announced in *Reynolds*.[13]

Close examination of this emerging thicket indicates that it is neither ancient nor political. Instead, it is of the Court's own making. Furthermore, while the thicket may have sprung from seeds originally sown in *Reynolds*, it is more certainly the cultivated product of the intellectual and ideological eclecticism of the Burger Court.[14] Harmless dicta of the

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[6]Baker v. Carr, 369 U.S. at 340 (Harlan, J., dissenting).

[7]*Id.*

[8]ELY, *supra* note 5, at 121.

[9]*Id.* There were sustained efforts of Senator Dirksen to pass a constitutional amendment overturning the Court's decision in *Reynolds*, but these efforts failed. *See* 111 CONG. REC. 19,373 (1965) (vote for Dirksen Amendment fails by eleven votes in 1965); 112 CONG. REC. 8,583 (1966) (vote for Dirksen amendment fails by thirteen votes in 1966). In the end, proponents of the Dirksen amendment voiced their support for an outdated cause. *See* 112 CONG. REC. 8,325 (1966)(quoting St. Louis Post-Dispatch saying "there is every reason to believe that Senator Dirksen is riding the deadest of dead horses . . . .").

[10]This phrase was used originally by Justice Douglas in Gray v. Sanders, 372 U.S. 368, 381. It reappeared in Justice Black's opinion in Wesberry v. Sanders, 376 U.S. at 18. The phrase re-surfaced in Reynolds v. Sims, 377 U.S. at 558, and at 587-88 (Clark, J. concurring). Although the slogan "one person, one vote" is itself empty of theoretically substantive meaning, it is a widely understood symbolic statement representing the commitment of the court to equally weighted votes for all citizens.

[11]For a review of these rules see Bickerstaff, *Reapportionment By State Legislatures: A Guide for the 1980's*, 34 SW. L. J. 607 (1980).

[12]*See infra* text accompanying note 100.

[13]Note that the *Reynolds* Court found that the equal protection clause demands "substantially equal state legislative representation for all citizens, of all places, as well as of all races." 377 U.S. at 568. The Court was not looking for just "fair and effective representation." *See infra* text accompanying note 201.

[14]*See infra* note 184 and accompanying text.

1960's have been used to create the complex holdings of the 1970's. And, in 1983, the Burger Court acted to confuse apportionment law even further.

B. The Bifurcated Court

On June 22, 1983, the United States Supreme Court released two decisions concerning state efforts to apportion[15] election districts.[16] The Court reached the decision in each case by a five to four vote, but the outcomes in the two cases were otherwise greatly dissimilar.[17] In *Karcher v. Daggett*,[18] the Court found a New Jersey apportionment statute[19] which provided for congressional districts with a maximum deviation of .6984% from the average to be in violation of article I, section 2 of the United States Constitution.[20] In contrast, the Court in *Brown v. Thomson*[21] sustained the Wyoming legislature's state representative system over an equal protection challenge despite an aggregate maximum interdistrict population variation of 89%.[22] Justices Brennan, Marshall, and Blackmun consistently opposed the validity of the challenged plans in *Karcher* and *Brown*,[23] while Chief Justice Burger, Justice Rehnquist, and Justice Powell consistently sought to uphold the constitutionality

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[15]Technically, apportionment is the task of allotting representatives to legislative districts. BLACK'S LAW DICTIONARY 91 (5th ed. 1979). Districting is the related task of defining the district boundaries. *Id.* at 427. In a larger sense, and as used by the Court in *Reynolds*, apportionment refers to the process of deciding whether to have districts, the number of districts to be created, the boundaries of these districts, and the numerical allocation of representatives to the districts. Any of these decisions may affect the weight given to a vote cast within the district. For this reason, this paper uses the term apportionment as used in *Reynolds*, and thus it includes districting.

[16]Brown v. Thomson, 462 U.S. 835 (1983); Karcher v. Daggett, 462 U.S. 725 (1983).

[17]In a single day, the Court approved its strictest ruling in congressional apportionment and the loosest in state legislative apportionment. The cases were dissimilar in other aspects as well. *See infra* note 30 and accompanying text.

[18]462 U.S. 725.

[19]1982 N.J. LAWS 1.

[20]The text of this clause provides:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative . . . . U.S. CONST. art. I, § 2, cl. 3.

[21]462 U.S. 835.

[22]*Id.* at 850 (Brennan, J., dissenting).

[23]*See Karcher*, 462 U.S. at 726 (Brennan, J., writing for the court, joined by Justices Marshall, Blackman, Stevens, and O'Connor); *Cf.* Brown v. Thomson, 462 U.S. at 850 (Brennan, J., dissenting with Justices White, Marshall, Blackmun joining).

of the plans.[24] The remaining Justices split their votes. Justices O'Connor and Stevens sided with the majority in each case, although each wrote a concurring opinion.[25] Justice White dissented in both cases.[26]

These voting records reveal much. Although nine judges voted in each case, only two justices agreed with both results. The dissatisfaction of the seven dissenting justices in the two cases is also reflected in the *Brown* concurrence in which Justice O'Connor, writing for herself and Justice Stevens, expressed "gravest doubts"[27] about the constitutionality of a statewide examination of the plan she and Stevens were voting to uphold. Their hesitant concurrence makes it appear that none of the Justices was truly satisfied with the cumulative results of the cases. The only uniformity on the Court in these decisions may be the conviction on the part of each group of Justices that the other Justices were going about their review of apportionment challenges incorrectly.[28] Ironically, it appears that none of the Justices wanted to challenge seriously the basic tenets of either *Reynolds* or *Wesberry*.[29]

Because all the Justices claimed *Reynolds* as precedent and because *Brown* was narrowly decided, *Brown* may have little precedential value.

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[24]*See Karcher*, 462 U.S. at 765 (White, J., dissenting with Justices Powell, Rehnquist, and Chief Justice Burger joining); *Cf. Brown*, 462 U.S. at 836 (Powell, J., writing for the Court, with Justices Rehnquist, Stevens, O'Connor, and Chief Justice Burger joining).

[25]*Karcher*, 462 U.S. at 744 (Stevens, J., concurring); *Brown*, 462 U.S. at 848 (O'Connor, J., concurring with Justice Stevens joining).

[26]*Brown*, 462 U.S. at 850 (White, J., joining dissent of Justice Brennan); *Karcher*, 462 U.S. at 765 (White, J., dissenting).

[27]*Brown*, 462 U.S. at 848 (O'Conner, J., concurring).

[28]*Brown*, 462 U.S. at 856 (Brennan, J., dissenting); *Karcher*, 462 U.S. at 766 (White, J., dissenting).

[29]The majority in *Karcher* began its analysis of the case using *Wesberry*. 462 U.S. at 730. The majority in *Brown* started its approach with *Reynolds*. 462 U.S. at 842. Likewise, Justice White's dissent in *Karcher* looked to *Reynolds* and *Wesberry* initially. 462 U.S. at 766 (White, J., dissenting). Although all the Justices claimed to base their views on *Reynolds* and *Wesberry*, their disagreement was fundamental, involving the propriety and direction of decisions in the apportionment area decided after 1964. For example, the dissenters in *Karcher* disagreed that the majority holding there — that there is no *de minimus* level below which congressional apportionment interdistrict population variations are not subject to judicial scrutiny — restated prior law from Kirkpatrick v. Preider, 394 U.S. 326 (1926). *Kirkpatrick* involved a challenge to Missouri's congressional redistricting which resulted in a maximum interdistrict population variation of 5.97%. *Id.* at 526. The Supreme Court expressly stated that no *de minimus* variance existed that would satisfy the "as nearly as practicable" approach of *Wesberry*. *Id.* at 530. *Karcher* did restate the *Kirkpatrick* holding, but the dissenting justices in *Karcher* were prepared to reexamine and overrule *Kirkpatrick*. *See Karcher*, 462 U.S. at 766 (White, J., dissenting).

The same Justices who dissented in *Karcher* created new law, however narrow its precedential value, in *Brown*. This was done by permitting an interdistrict population variation far greater than the generally understood limit of approximately sixteen percent. *Brown*, 462 U.S. at 850 (Brennan, J., dissenting). In contrast, the dissenters in *Brown* would have applied previous law, *id.* at 857-59, just as they had applied the established reasoning of *Kirkpatrick* to the resolution of *Karcher*.

The *Brown* decision's significance lies rather in the signals it sends. In state legislative apportionment cases, the Court by a bare majority appears to be prepared to move in a new direction, away from what had developed since *Reynolds*. For the first time since *Reynolds*, it was seen in *Brown* that a bare majority of Justices will accept gross variations in voting power equality for state legislative offices.

It is precisely because the Court did not elucidate in any manageable way when flagrant departures from equal population districts are permitted that *Brown* will spawn distress in legislatures, lower courts, and future Supreme Courts. *Brown* furthers the possibility of greater inequality in voting power at state legislative levels, and its language sidesteps any continued commitment to the purpose and goals of the equal protection clause.

An understanding of the stated and unstated sources of the principles used in *Brown* contributes to a rational explanation of the increasingly Byzantine rules of state legislative apportionment. If the sources of the current distress over state legislative apportionment are stated and understood, a way out of the current troubles may appear.

C. The Invisible Difference

Before *Brown* can be understood, it must be placed in the context of the Court's statements in *Karcher* about congressional reapportionment. The complete context is seen by treating the two cases as companion decisions. Only after such a review can the sources of distress in state legislative apportionment cases be traced to their origins.

The appearance of these two disparate opinions on the same day from the same Court seems disquieting.[30] After reading the cases, one is prompted to ask what sort of judicial theory it is that in the name of equality strikes down a scheme with a deviation of only .6984% as a violation of article I, section 2 of the Constitution while protecting a scheme which permits overrepresentation of voters by 89%. The anomaly of these two decisions urges an inquiry into why the Justices took their respective positions, and into how their theories take shelter under a Constitution which has no provisions expressly requiring the result in either case.[31]

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[30]Even if one knows that the Court uses different constitutional bases for requiring equality amongst districts depending on whether it is a congressional or state legislative plan, the results are disturbing. Despite all the difference in the language of the cases, both were decided on similar grounds. *See Karcher*, 462 U.S. at 744-49 (Stevens, J., concurring). *See also* Wesberry v. Sanders, 376 U.S. at 22 (Harlan, J., dissenting) (indicating that the court below and the appellants on appeal had argued that the fourteenth amendment controlled the issue of whether equally weighted votes were required in congressional districts).

[31]It is important to remember that both congressional districting schemes and state legislative districting plans are the product of state legislative actions. This fact makes

Some would argue that there is a rational basis for the different results reached in *Karcher* and *Brown*. The Court does use a different constitutional provision for each result.[32] Since 1964 when the Court used article I, section 2, to decide in *Wesberry* that congressional districts must be "as nearly as practicable" of equal population and used the equal protection clause of the fourteenth amendment to decide in *Reynolds* that the same rule applied to state legislative bodies, there has been potential for differences in the equality of interdistrict populations demanded by those two provisions. On one level, the Court's action in *Karcher* and *Brown* can be explained as the product of the distinction between state and congressional reapportionment schemes first explicity recognized in 1972 in *Mahan v. Howell*.[33] Since that time, the Court has occasionally voiced a different standard for the resolution of challenges to state legislative reapportionment plans than that used for congressional distribution cases.[34] The different results in *Karcher* and *Brown* could therefore be seen as the natural result of applying different bodies of law, developed from different constitutional provisions, to different "types" of apportionment cases.

The error in such an analysis is that even when the apportionment decisions were announced, the Court's use of article I, section 2 of the Constitution to decide *Wesberry* was seen as a subterfuge. As Justice Harlan pointed out in his *Wesberry* dissent, the congressional apportionment cases had risen to the Court on an equal protection claim.[35]

The error in using different constitutional provisions was most recently discussed by Justice Stevens in his concurrence in *Karcher*. Justice Stevens opined that "the holding in *Wesberry* as well as our holding today, has firmer roots in the Constitution than those provided by Article I, Section 2."[36] He reviewed the issues that congressional apportionment

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most Court language urging deference to the state legislative plans, while piling more restrictions on congressional plans, nonsensical. If the legislature is capable of meeting the requirements of congressional districting, it can certainly do state districting. Furthermore, prudence would mandate a reversal of the present scheme. It would be more logical to require greater scrutiny of legislative districting plans than of congressional plans, because in legislative plans self-interest is certainly a factor. For a discussion of the supposed "deference" to state lawmakers, see *infra* text accompanying notes 127-36.

[32]*See infra* note 36 and accompanying text.

[33]410 U.S. 3115 (1972)(The Court sustained a reapportionment plan for the Virginia legislature which contained a maximum interdistrict population variation of 16.4% even though it had disapproved smaller variations in congressional districts).

[34]*See, e.g.*, Brown v. Thomson, 462 U.S. 835 (1984); White v. Regester, 412 U.S. 755 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973).

[35]*Wesberry*, 376 U.S. at 22 (Harlan, J., dissenting)(demonstrating that an equal protection analysis is more rational than an article I analysis for congressional districting because, by its express terms, article I applies to interstate representation while equal protection implies treating all citizens within a state's jurisdiction equally).

[36]*Karcher*, 462 U.S. at 745 (Stevens, J., concurring).

cases raise and concluded that equality of representation "is firmly grounded in the Equal Protection Clause of the Fourteenth Amendment."[37] He recognized that using different constitutional provisions in congressional apportionment cases and state legislative apportionment involves, at most, the creation of a transparent barrier between identical rationales. The underlying rationale of both the congressional and state legislative apportionment cases is what the Constitution requires of voting power as measured by the phrase "one person, one vote." Thus, it should be irrelevant which constitutional provision is used to reach the result. It is doubtful, therefore, that the different results in *Karcher* and *Brown* can be justified by appeals to federalism and by giving different meanings to "equality" in the context of different constitutional provisions.

It is also difficult to see the results in both cases as correct because the court was so divided on the merits.[38] The division of the Court throws doubt on the claim that the outcome of each case was foreshadowed by the dichotomy between congressional and state legislative apportionment cases. As indicated above, only two Justices agreed with the results in both cases.[39] If the results in *Karcher* and *Brown* were dictated by applying past distinctions, then the results should have had greater support among the members of the Court, even accounting for any ideological differences among those members. A four-member dissent represents substantial dissatisfaction with the rules or analysis that the majority used. The fact that only two members of the Court did not dissent in either of these cases suggests that a great majority of the Court is having difficulty applying the language of *Baker*, *Wesberry*, and *Reynolds*. Both *Karcher* and *Brown* reveal that the Justices seem to be satisfied with the language of the early reapportionment cases, but in strong disagreement about the resolutions those cases compel in recent apportionment disputes.[40] The judicial confusion and division in these two cases might lead some to conclude that Justice Frankfurter was correct when he observed that "[c]ourts ought not to enter this political thicket."[41] However, if he perceived correctly that there would be problems in handling apportionment cases, he incorrectly thought those problems would be political. Instead, the current problems in apportionment cases suggest a judicial thicket created by the Court itself by its confusion on how to use *Reynolds* and how to define equality.

The purpose of this Article is to examine the sources of the distress that has infected the Supreme Court and lower courts in the area of

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[37]*Id.* at 747.

[38]*See supra* notes 23-26 and accompanying text.

[39]*See supra* note 25 and accompanying text.

[40]*See supra* notes 27-29 and accompanying text.

[41]Colgrove v. Green, 328 U.S. 529, 556 (1946).

state legislative apportionment twenty years after *Reynolds* held out the promise of equality of voting power for all. This examination is accomplished by asking why the equality of *Wesberry* and *Reynolds* was affirmed in *Karcher*, but came to be disregarded in *Brown*. It appears that the current judicial thicket has sprung from misapplied deference to state legislative action, unwarranted concessions to bicameralism, totemic respect for political subunits, and unexplainable reliance on incumbency, voter strength, political factors, and history. In addition, therefore, this Article seeks to explore the source of these factors, their policy bases, their rationality, and the extent to which they contribute to judicial rancor over state legislative apportionment. This article will also explore the consequences of permitting these sources to cause different treatment of state legislative apportionment. Solutions will be proposed to remedy both the judicial distress currently observed and its sources.

II. The Cases

A. Karcher v. Daggett

Following the 1980 federal census, the federal government notified New Jersey officials that, based on its current population, it was only entitled to fourteen congressional representatives.[42] This required that the state be reapportioned into fourteen districts. Two separate legislatures passed reapportionment bills.[43] The second of these bills, S-711, also known as the Feldman Plan, was the source of the litigation in *Karcher*.[44]

The Feldman Plan provided for fourteen congressional districts. These districts varied from a population low of 524,825 to a population high of 527,427. The maximum difference between the districts was 3,674 people, or 0.6984% of the average district.[45] A number of plaintiffs, including Republican congressional representatives, challenged this districting as a violation of article I, section 2 of the Constitution.[46] A three-member district court heard the case and held that because there were other reapportionment plans available with substantially lower interdistrict population variations there had not been a good faith effort to reduce population disparities between districts. The trial court rejected the defendant's claim that deviations smaller than the statistical error of the latest census meant "equality" for purposes of article I, section 2. Additionally, the court found that the alleged goals of the legislature

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[42]*Karcher*, 462 U.S. at 727 (1983).

[43]*Id.*

[44]*Id.* at 727-28. The Feldman Plan was codified at N.J. Stat. Ann. § 19:46-5 (West Supp. 1983).

[45]*Karcher*, 462 U.S. at 728.

[46]*Id.* at 729.

in selecting the plan could not justify the population deviation in that plan.[47]

On appeal, Justice Brennan, writing for a five-person majority, agreed with the lower court's disposition of the case.[48] In reaching this conclusion, Justice Brennan employed a standard two-part test taken from *Kirkpatrick v. Preisler*[49] to determine the constitutionality of the proposed congressional districting plan. First, the Court examined the plan to discern whether "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population."[50] Only if no good faith effort were found would the Court reach the second step of evaluating the state's goal in creating the disparities to see if the goal was legitimate. In order to reach an answer to the question of good faith, the Court had to resolve whether a population variation below one percent (or the marginal undercount in the census tally of New Jersey's population) met the constitutionally required "good faith" effort to achieve population equality.[51]

The Court rejected New Jersey's attempt to rely on the undercount margin as a *de minimus* level under which a districting plan would not be subject to constitutional scrutiny.[52] The Court stated that the ideal of equal representation was best served by using the "best population data available";[53] any level of *de minimus* population variations precluding judicial review would be arbitrary and invite greater population disparities than necessary in a world with computers and calculators. Because the Court found that mere "statistical imprecision does not make small deviations among districts the functional equivalent of equality,"[54] it considered evidence that plans with smaller deviations had been available to the legislature demonstrative of the fact that a good faith effort to achieve population equality had not been made.[55]

Because there had not been a good faith effort to achieve population equality among the districts, the state was required to meet the second test and demonstrate that some legitimate goal was served by the population disparities.[56] The state tried to justify the population variation between districts as a state plan to preserve minority voting strength,

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[47]*Id.* at 729-30.

[48]*Id.* at 727.

[49]394 U.S. 526 (1969).

[50]462 U.S. at 730.

[51]*Id.* at 731, 735-36.

[52]*Id.* at 738.

[53]*Id.* (quoting *Kirkpatrick*, 394 U.S. at 528).

[54]*Id.* at 735.

[55]*Id.* at 738-39.

[56]*Id.* at 740. Justice Brennan listed some of the items which might serve as legitimate goals for population disparities: a desire for compactness, a respect for municipal bound-

but this claim was not supported by the evidence.[57] Thus, the majority found that the very small population differences between congressional districts within New Jersey were forbidden by the Constitution; the differences could have been avoided and were not justified by some legitimate objective capable of specific description and verification.[58]

Justice Stevens, in his concurrence, stressed his agreement with the majority, but focused on problems that can arise in equal population districts where there has been gerrymandering to dilute a particular group's voting strength.[59] His opinion outlined ways "politically salient" classes could challenge reapportionment plans that deny them fairness in the political process.[60] In particular, he emphasized that numerical equality was only one criterion for measuring the neutrality of a proposed apportionment plan.[61] His opinion served to emphasize that even if a plan in question could be sustained because its population variation was *de minimus*, it might be successfully challenged on other grounds. He hinted that the deviations in population in *Karcher* were not based on neutral and therefore legitimate criteria and that this might be revealed by simply examining the shape of the districts.[62] Finally, Justice Stevens' opinion served as a plea for the fulfillment of the aims of *Wesberry* and *Reynolds*.[63]

The dissenting opinions in *Karcher*, written by Justices White and Powell, stated that the population variation in the New Jersey plan should survive constitutional scrutiny.[64] The dissenters found persuasive an argument that some *de minimus* level existed below which a court could not question the sources of interdistrict population variations.[65] This position would have required overruling *Kirkpatrick v. Priesler*, a 1969 congressional redistricting decision rejecting that same argument.[66]

Justice White's dissent strongly criticized the majority for reading the Constitution as inflexibly requiring strict population guidelines.[67] White also criticized the majority for overruling *sub silentio* parts of *Kirkpatrick* by listing as acceptable state goals criteria rejected in *Kirkpatrick*; White urged recognition of the fact that the majority had already tacitly overruled part of *Kirkpatrick* in stating that "any number of

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aries, a desire to preserve the core of prior districts, and a desire to avoid a contest between incumbent representatives. *Id.*

[57] *Id.* at 742-44.

[58] *Id.* at 744.

[59] *Id.* at 744 (Stevens, J., concurring).

[60] *Id.* at 754-55.

[61] *Id.* at 751-53.

[62] *Id.* at 755, 762.

[63] *Id.* at 765.

[64] *Id.* at 782-83 (White, J., dissenting), 784 (Powell, J., dissenting).

[65] *Id.*

[66] 394 U.S. 526 (1967).

[67] *Karcher*, 462 U.S. at 766 (White, J., dissenting).

consistently applied legislative policies might justify some variance."[68] White's dissent sought the application of a more flexible principle that had prevailed in state legislative apportioning cases. He would have selected a lower level of *de minimus* population variation than is accepted in state legislative apportionment cases, but he would still choose an arbitrary point below which the Constitution would not require scrutiny.[69]

Justice Powell wrote a separate dissent to express his views on the potential impact on gerrymandering that he perceived the holding in *Karcher* would have.[70]

B. Brown v. Thomson

Justice Powell wrote the majority opinion in *Brown v. Thomson*,[71] narrowly identifying the issue as "whether the state of Wyoming violated the Equal Protection Clause by allocating one of the sixty-four seats in its House of Representatives to a county the population of which is considerably lower than the average population per state representative."[72] The plaintiff in the case challenged a 1981 Wyoming statute[73] providing for a representative for Niobrara County, even though the population of Niobrara County was 60% lower than the average population per representative district.[74] Based on Wyoming's population,[75] an "ideal" district would have contained 7,377 individuals. The population of Niobrara County at the time was 2,924.[76] The statutory scheme resulted in a maximum deviation of 89% between state districts.[77] The legislative plan also provided that if the grant of a representative to Niobrara County was declared unconstitutional, the county would then share a representative with the neighboring county of Goshen.[78] The legislature of Wyoming acted under a state constitutional provision requiring that every county be used as a representative district.[79] Indirectly, therefore, the case presented the issue whether the state's constitutional provision, which directed that a district be composed of individual counties for the state House of Representative seats, was permissible under the federal Constitution.[80]

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[68]*Id.* at 779.

[69]*Id.* at 781-82. Justice White considered any interdistrict population variation below 5% *de minimus* and unworthy of constitutional review. *Id.* at 782.

[70]*Id.* at 784 (Powell, J., dissenting).

[71]462 U.S. at 835.

[72]*Id.* at 837.

[73]WYO. STAT. § 28-2-109 (1982).

[74]*Brown*, 462 U.S. at 843.

[75]Wyoming's population was given as 469,557. *Id.* at 839.

[76]*Id.*

[77]*Id.*

[78]*Id.* at 840.

[79]WYO. CONST. art. III, § 3.

[80]*Brown*, 462 U.S. at 846.

A three-member district court upheld the constitutionality of the statute, largely because similar apportionment plans had been sustained previously.[81] Additionally, the court found that the extra interdistrict population variation attributable to giving Niobrara County a representative was negligible when compared to the statewide deviation figure.[82] Apparently, the maximum statewide interdistrict population deviation without including a Niobrara County representative would have been 66%. Because the state's plan to add a Niobrara County representative "only" raised the maximum deviation by 23%, the Court claimed it was only validating this marginal increase in the maximum interdistrict population deviation.[83]

On appeal, Justice Powell's short majority opinion reaffirmed the validity of the *Reynolds v. Sims* requirement that "the seats of both houses of a bicameral state legislature must be apportioned on a population basis."[84] The majority, however, reasoned that the rule "requires *only* that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[85] Powell opined that minor deviations in state legislative districts do not warrant constitutional scrutiny, and that even more substantial variation in population districts is tolerable if there is a satisfactory explanation grounded on "acceptable" state policy.[86]

The *Brown* majority found that Wyoming's use of Niobrara County as a unit of representation was acceptable because it was "the result of the consistent and nondiscriminatory application of a legitimate state policy" of treating counties as representative districts.[87] The Court did not require that the "consistent and legitimate" state policy be some state goal separate from its apportioning procedure. Thus, instead of requiring a state policy of "furthering rural interest," for example, the Court implied that merely a policy of treating voters unequally is legitimate if consistent, nondiscriminatory, and done statewide.

The Court attempted to minimize its action in sustaining a plan

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[81]Brown v. Thomson, 536 F. Supp. 780, 783 (1983).

[82]*Id.*

[83]*Id.* at 783-84.

[84]*Brown*, 462 U.S. at 842 (quoting Reynolds v. Sims, 377 U.S. 533, 568 (1964)).

[85]*Brown*, 462 U.S. at 842. (quoting Reynolds v. Sims, 377 U.S. at 577). Justice Powell added the preface of the word "only" to the requirement. This may indicate a minimization of the meaning of "good faith" effort.

[86]*Id.* at 842-43.

[87]*Id.* at 844. The Court tempered its reasoning concerning state policies requiring interdistrict population variations by saying that not any size variation would be accepted merely by following such a consistent and acceptable state policy of treating counties as representative districts. *Id.* at 844-45. One reason the Court may have done this is that any policy advanced as a purpose for the unequal apportionment would be, by definition, discriminatory.

with an 89% maximum deviation by only considering the deviation resulting from the Niobrara district. The majority did not attempt to validate a statewide plan that contained population deviations of the magnitude of the Wyoming plan. Thus, the Court mirrored the lower court's reasoning that only the 23% addition to the maximum interdistrict population variation created by granting Niobrara County a representative would go into the balancing text.[88]

The concurrence of Justices O'Connor and Stevens was vital to the resolution of *Brown*. As noted above, the concurrence stressed that the sole reason for concurring with the majority was the fact that the plaintiffs attacked only the grant of a representative to Niobrara County and not the statewide plan.[89] O'Connor made this observation despite her recognition that there existed great flexibility in applying constitutional standards of equality to accommodate state policies.[90] O'Connor and Stevens, therefore, limited *Brown* to a less-than-statewide attack on apportionment based on county lines.

The position of O'Connor and Stevens, however, is irreconcilable with the majority's express reliance on a consistent and neutral "statewide" plan to counterbalance the disparities in the Wyoming plan.[91] If it is permissible to urge a statewide policy as justification for voting power inequality, one cannot ignore the statewide consequences of a particular application of that policy.

Justice Brennan, writing for the four dissenters, argued that when viewed either in isolation or in the context of a faulty statewide scheme, the apportionment of a representative to Niobrara County was constitutionally defective.[92] Brennan outlined the four-part test that has evolved to evaluate state level representative apportionment plans.[93] First, a 10% variation is required to obtain constitutional scrutiny for a state districting plan.[94] Second, any deviations greater than ten percent might be justified by a showing of "legitimate considerations incident to the effectuation of a rational state policy"[95] which are free of "any taint of arbitrariness."[96] Third, the state must demonstrate that the inequalities exist only to further legitimate state interests and that the inequalities go no further than necessary to achieve those interests.[97] Brennan asserted that the final prong of the test prevents any plan from attaining constitutional

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[88] *Id.* *See also supra* text accompanying note 82.
[89] *Brown*, 462 U.S. at 850.
[90] *Id.* at 848.
[91] *Id.* at 843.
[92] *Id.* at 853 (Brennan, J., dissenting).
[93] *Id.* at 852.
[94] *Id.*
[95] *Id.* (quoting *Reynolds*, 377 U.S. at 579).
[96] *Id.*
[97] *Id.*

approval if the deviations are so large as to subvert the concept of equal representation.[98]

In applying this four-part test to the Wyoming apportionment plan, Brennan discovered that in addition to the variations in Wyoming's plan far exceeding the 10% *de minimus* level, the reasons proferred by the state for the variations could not justify the magnitude of the variations found either singly or across the state.[99] He pointed out that Wyoming's defense of population variations, sparseness, and uniqueness had been previously rejected, and he noted that allowing the voters of Niobrara County up to three times the voting power of other state citizens was directly at odds with dicta in *Reynolds*.[100] Brennan also attacked the majority's refusal to consider the Niobrara County representative in the context of the statewide interdistrict population variation.[101] Ultimately, Justice Brennan and the other dissenters could only take comfort in pointing out the narrowness of the holding.[102]

III. Sources

The source of the difficulties facing judges in state apportionment cases such as *Brown* can be traced to language in *Reynolds v. Sims*.[103] The Court decided in *Reynolds* and related cases to apply the "one person, one vote" rule to state legislative apportionment. Although *Reynolds* adopted the goal of equal population districts, the Court introduced language which suggested exceptions that could eventually be used to undermine the equality demanded in that opinion. Inevitably, the *Reynolds* opinion was subjected to detailed examination. Minor omissions and overlooked arguments have been a source of many severe criticisms of *Reynolds*. Almost no attention, however, has been given to dicta in *Reynolds* used since 1964 to undercut its primary commitment to equality of voting power.

Although this dicta has not been well examined, several critics of the reapportionment decisions have focused their attention on the fact that *Reynolds* did not take into account the theories of representation that are necessary to decide intelligently what the Constitution requires.[104] Justice Frankfurter, the source of this type of criticism, was correct in

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[98]*Id.*

[99]*Id.* at 853-54.

[100]*Id.* at 854-55.

[101]*Id.* at 850-51.

[102]*Id.* at 850.

[103]377 U.S. 533.

[104]*See, e.g.*, Note, *Reapportionment on the Substate Level of Government, Equal Representation or Equal Vote*? 50 B.U.L. Rev. 231 (1970). *See also* Lee and Herman, *Ensuring the Right to Equal Representation: How to Prepare or Challenge Legislative Apportionment Plans*. 5 U. Hawaii L. Rev. 1 (1983).

his dissent in *Baker v. Carr*[105] that the decision chose between competing theories of representation.[106] Such criticism, however, ignores the reality of constitutional litigation; any reapportionment case will pose specific questions regarding the permissibility of a challenged plan. Admittedly, resolving concrete questions will always involve examining some theoretical aspect of representation, but never will a comprehensive review of all possible representational theories be possible. The fact that the Court must consider representative theories piecemeal, however, is no ground for saying that the issues should never be heard at all. Moreover, the "case and controversy" requirement of article III prevents the Court from addressing the issues abstractly.

Critics respond to this observation by saying that, if the Court cannot consider the competing theories completely, the issues are too "complex and subtle" for judicial resolution.[107] There are two flaws in this argument. First, this criticism overlooks the fact that the inequalities objected to in the early reapportionment cases were inadvertant and frequently in violation of specific state constitutional provisions.[108] Second, the call for the Court to defer to legislative bodies overlooks the legislative origins of the fourteenth amendment's commands.

With respect to the first flaw, the legislative bodies this criticism seeks to bestow with an exclusive right to resolve the "complex and subtle" competing theories of political representation had not done so, or had done so in violation of their own local constitutional provisions. Even where representational theories had been considered, the result was to validate the status quo.[109] There is nothing "subtle" about clear violations of state law. The theme resounding from apportioning plans attacked in the 1960's was that of self-serving politicians ignoring their own state constitutional commands in order to maintain power.[110] The Court's opinion simply responded to the blatant inactivity of legislatures regarding apportionment.[111]

The second criticism, that the Court should defer to a legislature

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[105]Baker v. Carr, 369 U.S. at 300 (Frankfurter, J., dissenting).

[106]*Id.*

[107]*E.g.*, Rossum, *Representation and Republican Government: Contemporary Court Variation on the Founders' Theme*, 23 Am. J. Juris. 88, 95 (1978) (referring to Justice Fortas' comment in Avery v. Midland County, 390 U.S. 474 (1968)).

[108]Averbach, *The Reapportionment Cases: One Person, One Vote — One Vote, One Value*, 1964 Sup. Ct. Rev. 1, 46; Lee and Herman, *supra* note 104, at 3.

[109]*See, e.g.*, Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 718. *See also* Lee and Hermann, *supra* note 104, at 3.

[110]*Reynolds*, 377 U.S. 540, 553; *Cf.* Baker v. Carr, 369 U.S. at 191 (Tennessee failed to comply with state constitution for over sixty years requiring substantially population-based reapportionment every ten years.). *See also* Lee and Hermann, *supra* note 104, at 3. 3.

[111]*Reynolds*, 377 U.S. at 568.

which could discuss the "complex and subtle" issue in representational theory, is inapt; that is actually what the Court did. The draftsmen of the fourteenth amendment provided the Court with specific language requiring equal protection for citizens under state laws.[112] In construing the fourteenth amendment to require voting power equality, the Court necessarily implied that the "complex and subtle" issues of representational theory were settled by giving "equal protection" constitutional status by the amendment process. The various lawmakers and assemblies ratifying the fourteenth amendment had passed judgment on the issue and had decided on equality. In the context of apportionment, the Court merely used a functional definition of equality, a test an ordinary American would understand — "one person, one vote." The Court did not act as an academic commission or theoretical "think tank" to uncover all possible meanings of equality.

When the Court looked closely at the fifty governments of the United States of America, it discovered that, in a country which prided itself as being the home of free and equal people, the reality was that, as the term was commonly understood, people were not being treated "equally" by their state governments. In 1964, the Court found itself in the position of being the boy-tailor observing the emperor in his new suit. The cloth of popular equality had never been spun in many of the states, and the Court's responsibility was to announce that fact publicly to the parties before it. In *Reynolds v. Sims*, there may have been competition among various theories of representation, but, more pragmatically, there were simply facts demonstrating the gap between what the constitutions of both the United States and Alabama professed to require and the reality of 1962 voting power inequalities in Alabama.

The genius of the Court's solution to this problem in the form of the "one person, one vote" rule was its utter simplicity.[113] This solution surely meant, broadly speaking, that, in the United States, under the post-Civil War Constitution, majority rule *is* the rule in the selection and operation of the legislature and that, roughly speaking, the equal protection clause requires equal treatment of people's votes regardless of their status, location, or politics.[114] Theories of proportional representation, qualitative representation, direct representation, and indirect representation are only tangentially related to this basic concept.[115] Thus,

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[112]The fourteenth amendment provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend, XIV, § 1.

[113]ELY, *supra* note 5, at 121.

[114]*See Reynolds*, 377 U.S. at 565 ("Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. . . .[T]he concept of equal protection has traditionally been viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.")

[115]*See* Rossum, *supra* note 107, at 104-109. (*Reynolds* Court was not sensitive to

the main criticisms of *Reynolds* do not survive sustained scrutiny. The Court was not faced with the task of examining all representation theories, and it used a pragmatic definition of equality to enforce the nationally-created mandate of equality.

A. Method of Review

Even though those criticisms have failed, *Reynolds* has caused subsequent difficulty. One of the major sources of distress in state legislative apportionment cases stems from the dicta in *Reynolds* that both established a firm rule to guide lower courts and rendered uncertain the strength and dimensions of that rule.

In announcing the holding in *Reynolds*, the Court stated that, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[116] This rule, as stated, captures the simple "one person, one vote" standard in instructive and plain language.[117] Elsewhere in its opinion, however, the *Reynolds* Court made it clear that this rule was not as definite as it appeared. The Court's language distorted the scale with which trial court judges could measure individual cases. The Court opted to thrust flexibility into its manageable "basic Constitutional standard":

> [W]e deem it expedient not to spell out any precise constitutional tests. What is marginally permissible in one state may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at the detailed constitutional requirements in the area of state legislative apportionments.[118]

This case-by-case approach is not dissimilar from what the Court

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questions of reflective, quantitative, and indirect representation). *See also* Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). In *Lucas* there appeared to be a competing political philosophy accepted by a majority of the voters of the state. It cannot be said with any certainty, however, whether the approving voters were approving a political philosophy or the particular political regime then in power that had stagemanaged the wording of the proposed amendments and politicized each proposal *See id.* at 731-32. In any event, the political philosophy advanced there, if it truly was one, was illegitimate precisely because it attempted to contravene controlling federal constitutional precepts.

[116]*Reynolds*, 377 U.S. at 568.

[117]ELY, *supra* note 5, at 121. Ely has praised the "one person, one vote" rule for its manageability. Regardless of the degree of alteration in state legislatures such a rule would require, it at least has the benefit of being easily applied. The risk, of course, especially in a computer age, is that it will be applied too well without judicial intervention to prevent equipopulous gerrymandering. Justice Steven's approach to combat this problem was outlined in *Karcher*, 462 U.S. at 744 (Stevens, J., concurring). *See, e.g.*, Davis v. Bandemer, No. 84-1244 (U.S. oral argument heard Oct. 7, 1985) (decision pending).

[118]*Reynolds*, 377 U.S. at 578.

has done in other areas of constitutional law,[119] and this approach would undoubtedly have been appropriate if the Court had been merely returning a new doctrine to lower courts for growth and evolution. Such, however, was not the case. Instead, *Reynolds* both gave to and took from lower courts. The Court admiringly said in *Reynolds* that the lower court had been correct in recognizing that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion . . . ."[120] By this wording, the Court returned the issue to state legislatures *and* lower courts.

The inherent contradiction of urging case-by-case review of apportionment legislation and urging judicial deference to state legislative decisions on apportionment was not immediately apparent after *Reynolds*. In the next several state apportionment cases to rise to the United States Supreme Court, there was a trend towards developing constitutional rules on a case-by-case basis. For example, in *Mahan v. Howell*,[121] the Court approved permitting states to justify fairly substantial deviations in interdistrict population by relying on a policy of preserving political boundaries.[122] At the same time, however, the Court indicated that the range of the deviation accepted there, 16%, was probably the greatest that the Constitution would permit.[123] In *White v. Regester*[124] and *Gaffney v. Cummings*,[125] the Court permitted evolution in state legislative apportionment law by accepting the claim that interdistrict population variations below 10% were *de minimus* and therefore not subject to constitutional review.[126]

The combination of the judicial rules from *Mahan*, *Gaffney*, and *White* established a basic guideline for legislatures to follow in districting. The guidelines, while perhaps not mandating the equality originally envisioned in *Reynolds*, did provide a workable scheme for a state legislature faced with the task of reapportionment. A legislature knew that any deviation it permitted below ten percent was free from scrutiny. Thus, any policy behind establishing unequal districts did not need to be articulated if the interdistrict population variation was less than 10%.

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[119]*See, e.g.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (reversing a dismissal of a claim for a private cause of action against governmental agents for violation of the petitioner's fourth amendment rights, without providing an exhaustive outline of when such actions are possible).

[120]*Reynolds*, 377 U.S. at 586.

[121]410 U.S. 315 (1972).

[122]*Id.*

[123]*Id.* at 392.

[124]412 U.S. 755 (1973).

[125]412 U.S. 735 (1973).

[126]*White*, 412 U.S. at 764; *Gaffney*, 412 U.S. at 745.

A legislature also knew that if it wished to preserve that state's constitutional requirements or its own policy of honoring county lines, a plan with around a 16% interdistrict variation would be permitted. The legislature knew that any variation beyond that point was not permissible.

The rules in *Mahan*, *Gaffney*, and *White* were created by judicial review of apportionment. Elsewhere, however, there was simultaneous development of the Court's language urging deference to state legislatures. In 1966, the Warren Court, in *Burns v. Richardson*,[127] made it clear that it was seeking to avoid as much as possible any confrontation with state legislatures. The Court indicated that a "state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."[128]

Given this sensitivity toward state governments, it is not surprising that the Burger Court would use the concern for state legislative power embodied in the cautionary wording of *Reynolds* to lower the level of scrutiny given state legislative districting plans. On the surface, this attitude toward reviewing apportionment plans would prevent judicial intrusion into the sphere of the various state legislatures. As the Court stated in *Gaffney*, "We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decision making in the name of essentially minor deviations."[129] This language suggests that the deference to state legislatures developed after *Reynolds* went hand-in-hand with the case-by-case approach of developing subsequent rules outlining the permissible deviations from equality in state legislative apportionment.

The breakdown of harmony between the rules on deference and the case-by-case approach occurred in *Brown*. The clash seems, in retrospect, to have been inevitable. These policies could exist in uneasy tension only so long before one or the other had to give way. Courts can develop legal guidelines on a case-by-case basis; legislatures, however, need constitutional-style or legislative-style "hard and fast" rules in order to fulfill their functions without perpetual fear of subsequent judicial invalidation. A firm "one person, one vote" rule would be easy for a state legislature to apply and for a court to require.[130] Any deviation, no matter how small, would result in invalidation. On the other hand, a flexible, case-by-case rule requires that every state legislative judgment be scrutinized by a court to see if the constitutional minimums have been honored. Therefore, as is sometimes recognized, the most "intrusive" rules, such as a solid "one person, one vote rule," are actually

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[127]389 U.S. 73 (1966).

[128]*Id.*

[129]412 U.S. at 749.

[130]*See infra* text accompanying note 144.

less intrusive because they do not require individual examination of every legislative act.[131]

Brown v. Thomson[132] is a premier example of the clash between the urge to follow the case-by-case approach and the urge to defer to state legislatures.[133] Rather than abide by the detailed constitutional requirements that had grown up following *Reynolds*, the Court in *Brown* opted to side with the theory of deference to state legislatures. This rendered uncertain the previously developed standards evolved by the case-by-case approach.[134] Thus, both courts and legislative bodies are now in doubt as to whether any stable limit exists to the permissible interdistrict population variations in state apportionment.

After *Brown*, each entity responsible for apportionment in a state must guess whether the policies it selects that call for population variation between districts can be sustained. Courts reviewing such cases know only that precedentially developed guidelines mean little, while deference to the legislature means much. The guesswork both courts and legislatures must engage in following *Brown* invites misunderstanding, confusion, and hostility between the judicial and legislative branches of state governments. By granting deference to state legislative decisions, the Court effectively called upon transitory majorities in legislatures to maximize numerical inequalities detrimental to their opponents. Additional litigation can be anticipated, with each side legitimately claiming *Reynolds* as support for its position. It should not be surprising that extreme rancor and hostility will erupt on benches handling such problems and among the parties in the proceedings.[135]

Because the Court's action in *Brown* requires an intense scrutiny of every case, a court will have to spend a great deal of time judging whether the claim is unique. This laborious and costly review process in federal and state courts could be avoided if a hard and fast line were drawn demarcating the permissible and the impermissible extent of interdistrict population variation. Only then will legislatures truly be free to draw district lines knowing their choices are constitutionally sound; and only then will courts called to review apportionment claims have a rule which inspires confidence in their decisions. Until that time, other states can set up factors like those used in Wyoming to justify creating

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[131]ELY, *supra* note 5, at 124-25.

[132]462 U.S. 835.

[133]As the dissent in *Brown* pointed out, it was clear that the previously decided case had never approved of anything near the interdistrict population variation accepted there. *Id.* at 854 (Brennan, J., dissenting).

[134]The concurrence of Justices O'Connor and Stevens in *Brown* makes this uncertainty greater, because it is unclear whether they would support the consequences and reasoning of *Brown* on other facts.

[135]*See infra* notes 146-78 and accompanying text.

an exalted class of voters.[136] The victory of the deferential strand of *Reynolds* threatens to obliterate functional limits of inequalities in voting power.

B. Intrusiveness — the Rule on State Constitutional Contradictions

Closely allied to *Reynolds*' conflicting directions regarding whether a case-by-case approach or a completely deferential approach is the proper method of reviewing apportionment plans is the Court's language granting deference to state constituional provisions. The result forces both legislatures and courts to walk a tightrope between conflicting provisions of state constitutions and the federal Constitution.

Provisions of state constitutions often arise as obstacles to good faith attempts by legislatures to maximize the voting equality of citizens in their states. For example, a Tennessee legislature's plan to create districts as close to equal as possible was struck down by the Tennessee Supreme Court for violating a state constitutional provision limiting districts to county boundaries.[137] The absurdity in the recent Tennessee case arose as the product of deferential and seemingly innocuous language in *Reynolds*. The Court in *Reynolds*, while making its bold decision to invalidate many states' apportionment plans, tempered the effect by saying in its discussion of the remedies that "clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."[138]

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[136]*See Brown*, 462 U.S. at 857 (Brennan, J., dissenting) ("Why, then, is it permissible to create such an exalted class based on location of residence?").

[137]State *ex rel.* Lockert v. Crowell, 656 S.W.2d 836 (1983). There is suitable irony in this in that Tennessee's inequality had prompted the suit in *Baker v. Carr*, which ushered in the review of apportionment plans. Tennessee was now being told that its efforts to promote equality were too good, that the legislature had advanced equality too much. In State *ex rel.* Lockert v. Crowell, the Tennessee court reached the awkward result of invalidating apportionment legislation because it created too much equality among districts. *Id.* at 840. The legislature had achieved its goal of near perfect equality by crossing county lines in the creation of the districts, assuming that the demands of *Reynolds* meant that the state constitutional restriction on crossing county lines was invalidated. The court's holding mirrored the rule in other jurisdictions that although the equal protection clause of the federal Constitution prevailed in any direct conflict with state constitutional provisions, unless absolutely necessary the state could not cross county lines in order to reach the lowest deviation in interdistrict population equality. *Id.* Of course, when it is "necessary" to cross county lines in order to achieve a plan that will meet court approval was unknown to the legislature during creation of the apportioning legislation. Court intrusion must occur in such a situation under present apportionment guidelines.

The Tennessee Supreme Court was following a similar body of law developed in Texas in Clements v. Valles, 620 S.W.2d 112 (Tex. 1981), and Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971). The courts there reached the conclusion that state constitutional provisions against crossing county lines in apportionment were valid, except to the limited extent such crossings had to occur in order to comply with the federal Constitution. *Clements*, 620 S.W.2d at 115; *Smith*, 471 S.W.2d at 379.

[138]*Reynolds*, 377 U.S. at 584.

The clearest language limiting a court's ability to tamper with a state's constitution appeared in *Minnesota State Senate v. Beens*,[139] where the lower court had ordered a wholesale restructuring of the bicameral legislature in Minnesota.[140] The Supreme Court reversed, saying that the special deference given to state constitutions also extends to legislation passed under direction of the state constitution.[141] Thus, the lower court was bound by the mere policy of previous Minnesota legislatures as to the size of the legislature because the state constitution delegated the decision on size to the legislature.[142] By this decision, the Supreme Court made it clear that the equal protection clause, which guarantees equality to all citizens of the land, would, in matters of apportionment, take a backseat to the polymorphous state constitutional restrictions found across the country. The equal protection clause would require overriding state constitutional nonpopulation requirements for apportionment only "to the extent necessary" to require apportionment "substantially" on a population basis.[143]

While in theory it may seem wise to permit state constitutional restrictions on apportionment to bind legislators except where "absolutely necessary" to effect substantial equality, the practical result is irrational, in part because the Court has never produced a test to determine when it is "absolutely necessary" to invalidate state constitutional apportionment restrictions. The functional tests of 10% as the threshold of scrutiny and 16% as the maximum allowable deviation were eliminated by *Brown*,[144] so that neither legislatures nor courts know with any certainty when it is necessary to set aside a state constitutional apportionment restriction. Only rarely has a state court found it wise to adopt the more manageable rule that any nonpopulation-based apportionment requirements which violate the equal protection clause of the federal Constitution are void.[145] Failure to follow this rule is not conducive to judicial economy or to serious progress toward equalizing the voting power of citizens.

An Idaho decision presents a particularly poignant example of the current dilemma that state legislative reapportionment creates. In *Hellar v. Cenarrusa*,[146] the Supreme Court of Idaho became the scene of an

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[139]406 U.S. 187 (1972) (per curiam).

[140]*Id.* at 196.

[141]*Id.* at 196-97.

[142]*Id.*

[143]*Cf. Lockert v. Crowell*, 656 S.W.2d at 838.

[144]462 U.S. at 855 (Brennan, J., dissenting).

[155]*Cf.* Logan v. O'Neill, 187 Conn. 721, 448 A.2d 1306 (1982); *In re* Reapportionment Plan for the Pennsylvania General Assembly, 497 Pa. 525, 442 A.2d 661 (1981).

[146]104 Idaho 858, 664 P.2d 765 (1983), *on appeal after remand*, 682 P.2d 524 (Idaho 1984), *order following legislative enactments*, 682 P.2d 538 (Idaho 1984), *opinion on final order*, 682 P.2d 539 (Idaho 1984) (Hereinafter referred to as *Hellar I*, *Hellar II*, *Hellar III*, and *Hellar IV*, respectively).

emotional and stressful confrontation among the state's judicial and legislative branches, the state and federal constitutions, and conflicting language and theories in Supreme Court opinions. The problems began with an apparently simple challenge to Idaho's 1982 reapportionment law.[147] Before the final decision was rendered, charges of unprofessional and unconstitutional judicial conduct had been made by the justices.[148]

The developments in the *Hellar* case reveal the difficulties associated with testing the validity of a state reapportionment scheme in light of *Brown*. *Hellar I*[149] was decided by an Idaho Supreme Court that overlooked a previous federal court case holding invalid a provision in the Idaho constitution requiring that districts for the legislature not cross county lines.[150] In *Hellar I*, the trial court ruled that the clause of Idaho's constitution which forbade district lines from crossing county boundaries was "not necessarily" invalidated by the equal protection clause of the fourteenth amendment to the United States Constitution.[151] The Idaho Supreme Court upheld that determination and remanded the case to the trial court to see if the legislative apportionment plan could be defended.[152]

On appeal again to the Idaho Supreme Court, (*Hellar II*),[153] the defendants argued that any plan produced by the state could not meet the criteria of both the United States Constitution and the state constitution. The Idaho Supreme Court refused to accept this argument. Relying on the new law of *Brown v. Thomson*, the court affirmed the lower court's finding of the unconstitutionality of the plan, but suggested in dicta that, based on *Brown*, there was now much greater latitude for states to accommodate their own constitutional restrictions.[154] The court noted that the deviation of population equality accepted in *Brown* involved a deviation of 89% and suggested that even if the plan for Idaho adopted tentatively by the court had a maximum interdistrict population variation of 41%, it would pass constitutional scrutiny under the equal protection clause as interpreted by the latest United States Supreme Court opinion.[155]

The Idaho Supreme Court retained jurisdiction in the case to await pending apportionment legislation. It invited the Idaho legislative body to pass a substitute plan for apportioning the state legislative body but wanted to review the constitutionality of that plan before it became

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[147]*Hellar I*, 104 Idaho 858, 664 P.2d 765 (1983).
[148]*Hellar IV*, 682 P.2d at 559 (Bakes, J., dissenting).
[149]104 Idaho 858, 664 P.2d 765.
[150]*See Hellar II*, 682 P.2d at 536 (Shepard, J., concurring and dissenting).
[151]104 Idaho at 861, 664 P.2d at 768.
[152]*Id.*
[153]682 P.2d 524.
[154]*Id.* at 527.
[155]*Id.*

effective.[156] Working under an extremely short deadline, the legislature passed a plan on March 31, 1984, just before its session came to a close.[157] On April 16, 1984, the court released an order (*Hellar III*)[158] and an opinion (*Hellar IV*)[159] in which it held that the plan passed by the legislature was invalid because, while it preserved the county boundary mandate of the state constitution, it failed to do so in a manner which provided for the least interdistrict population variation.[160] The plan thus failed to satisfy the federal Constitution.[161] The court held that it was not enough that the legislature had passed a plan conforming to the requirements regarding county boundaries and did so within population variations at least comparable to *Brown*; the legislature also had to demonstrate that no other plan having lower interdistrict population variations could have met the Idaho constitutional requirements.[162]

The decisions in *Hellar* are extraordinary in two respects. First, the decisions reveal that, in states with county line apportionment restrictions in the state constitution, the legislature is put into a "no win" situation. Any political decisions made in the statehouse regarding apportionment are sure to be challenged and reviewed by a court. Furthermore, to survive that review, these decisions must frequently be made by striking a delicate balance between the equal protection clause and the state's constitution. This decisionmaking probably cannot be accomplished without failing either the goals of equality or the goals of deference to state constitutions. It is hard to envision a more intrusive court rule than one which professes deference to state legislatures but requires these same legislatures to balance precariously between two constitutions and the state and federal courts. This approach can only result in partial deference or "partial" equality.

Second, the *Hellar* opinions are significant because of the division they created within the Supreme Court of Idaho. Three justices concurred with the majority opinion. One of those, Justice Bistline, however, felt compelled to enter as part of his concurrence a great portion of the record from the hearing in which the constitutionality of the latest legislative reapportionment plan was considered.[163] He attempted to refute the charges by the dissenting justices that the defendants of the proposed plans had been denied the due process guaranteed them by the fourteenth amendment.[164] More astoundingly, Justice Bistline felt compelled to comment upon the nature and tenor of the dissent:

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[156]*Id.* at 529.
[157]*Hellar IV*, 682 P.2d at 546 (Bistline, J., specially concurring).
[158]*Hellar III*, 682 P.2d 538 (Idaho 1984).
[159]682 P.2d 538 (Idaho 1984).
[160]682 P.2d 539 (Idaho 1984).
[161]*Id.*
[162]*Id.*
[163]*Hellar IV*, 682 P.2d 546-59 (Bistline, J., specially concurring).
[164]*Id.*

> [O]ne cannot accept in good grace the tenor and content of the dissenting opinions. Disgruntlement at not prevailing in advocacy ought not to lead to distraction and perversion. A dissenting opinion which is founded in logic and fortified by law would represent another point of view, and surely would be welcomed by bench and bar, the public, and certainly the side who has not prevailed. But where, it may be asked, is the dissenting opinion which portrays the law and logic by which the Court should have held H.B. 746 constitutional?
>
> Instead, in what may be observed as pure spleenventing there are two dissenting opinions which for the most part are seen as charging the majority with denying "these defendants the procedural due process guaranteed them by the United States Constitution."[165]

The dissenting opinions in the case were vitriolic in their assessment of what the majority had done. Justice Bakes reviewed what he perceived as purely procedural faults in the manner by which the majority decided that the legislative bill was unconstitutional.[166] He found the procedure and results so upsetting that he ended his opinion with a proposal that the losing side sue the majority for denying them their civil rights.[167] Underneath all his concern one detects a bitterness not often seen in judicial opinions and a hint that the source of Justice Bakes' bitterness was his conviction that the result was wrong.[168]

Justice Shepard, in a separate dissent, focused more on the problem that he perceived had developed when the court forced the legislature to walk the tightrope between the state and federal constitutions and then "insulted" the legislature by ignoring the legislative purposes behind the bill.[169] Justice Shepard's dissent also reflected concern that an earlier federal case[170] which had considered the provision of the Idaho Constitution that required districts to honor county boundaries had been relied upon by the state legislature in constructing its plan.[171] Reversing the legislature after it had relied on that case indicated to Justice Shepard that the legislature had no rules it could use in attempting to pass a constitutional apportionment act.

In addition to the majority opinion, the special concurrence, and the two dissents, Justice Huntley wrote a response to the dissents to refute the charges made against the majority.[172] In particular, he pointed

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[165] *Id.* at 548.
[166] *Id.* at 559 (Bakes, J., dissenting).
[167] *Id.* at 566.
[168] *Id.* at 565. *Cf. id.* at 566 (Shepard, J., dissenting).
[169] *Hellar IV*, 682 P.2d at 567 (Shepard, J., dissenting).
[170] Summers v. Cenarrusa, 342 F. Supp. 288 (D. Idaho 1972).
[171] *Hellar IV*, 682 P.2d at 566 (Shepard, J., dissenting).
[172] *Id.* at 568 (Huntley, J., responding to the dissents).

out that the earlier federal court case had only considered the fact that no plans honoring both the United States Constitution and the state constitution were available.[173] Because the plan sustained by the lower court had accomplished substantital equality of population within the districts and had followed the requirements of the state constitution, Justice Huntley felt the court was justified in not honoring the prior federal cases.[174] Justice Huntley's greatest scorn, however, was for the dissent's suggestion that the losing parties sue the court. He found that comment to be a "disingenuous attempt at intimidation, and might be thought by some to indicate a lack of a modicum of judicial approach and detachment."[175]

Other states have been perplexed by the same question that faced the Idaho Supreme Court in *Hellar*.[176] Generally, the conclusion has been that the state constitutional provisions which mandate nonpopulation bases for distributing representative seats must survive "to the extent possible." As *Hellar* demonstrates, this posture invites political battles in the legislature and divisive and protracted struggles in the courts. Rarely has a state adopted the position that provisions interfering with population-based apportionment must fall automatically,[177] even though this position would have the advantage of removing one source of protracted legislative fights and judicial instrusions into the resolution of those fights.[178]

Given the population deviation of 89% accepted in *Brown*, it now appears that judges have little with which to measure the constitutionality of state apportionment plans and state constitutional provisions. Because the formulated test relies on "to the extent possible" and "only as necessary" language to measure what the federal equal protection clause will permit, it is impossible to predict whether any particular interdistrict population variation will be upheld when challenged; *Brown* removed the only functional and consistently applied rules used to judge what the equal protection clause requires short of absolute equality. What a

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[173]*Id.* at 570.

[174]*Id.*

[175]*Id.* Although the judicial animosity and legislative developments in *Hellar* were undoubtedly extreme, the situation requiring legislatures and courts to walk a tightrope between state and federal constitutions is not. *See infra* note 176 and accompanying text.

[176]*See, e.g.*, Wells v. White, 274 Ark. 197, 623 S.W.2d 187 (1981), *cert. denied*, 456 U.S. 906 (1982); *In re* Reapportionment of Colorado General Assembly, 647 P.2d 191 (Colo. 1982); People *ex rel.* Scott v. Grivett, 50 Ill.2d 156, 277 N.E.2d 881, *cert. denied*, 407 U.S. 921 (1972); Logan v. O'Neill, 187 Conn. 721, 448 A.2d 1306 (1982); Merriam v. Secretary of the Commonwealth, 375 Mass. 246, 376 N.E.2d 838 (1978); Opinion of the Justices, 307 A.2d 198 (Me. 1973); Commonwealth *ex rel.* Specter v. Levin, 293 A.2d 15 (Pa.), *appeal dismissed*, 409 U.S. 810 (1972).

[177]*See supra* note 145.

[178]*See supra* note 176.

judge hearing an apportionment case now knows is only that, while it is clear the state constitution is not to be followed to the letter, some inexplicable and undiscernible figure of interdistrict population variation will be permitted by the federal Constitution even though the Constitution operates on the principle of "one person, one vote."

The result of moving to a "no standard" standard is hard to predict. The absence of a settled rule may result in gross disparities between what is allowed in one state and what is allowed in another. It was, perhaps, this type of difference between what is permitted to citizens of various states that the equal protection clause was designed to prevent. However, it is the language in *Reynolds* that commanded equality, yet suggested preserving state constitutional provisions, that permitted the evolution of doctrines by the Burger Court allowing for this result.

C. Bicameralism

Dicta in *Reynolds* protecting bicameralism at the state level also undermined the rationality of the rules for state legislative reapportionment. The premise of *Reynolds* was that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[179] The Court made it clear that analogies to inequalities in the representative basis found in the United States Senate and House of Representatives were inapt in a discussion of state legislatures.[180] The state-created federal government was, in the Court's opinion, entirely dissimilar from the structure of a state government which creates and destroys its subunits at will.[181]

Nevertheless, *Reynolds*' conclusion that "we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature"[182] was tempered by another statement that bicameralism was not rendered anachronistic and meaningless when the predominant basis of representation was solely population.[183] In *Reynolds*, the Court suggested various population-neutral ways a state could rationalize continuation of bicameral government once both houses were elected on a population basis.[184] The Court expressly asserted that such population

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[179]377 U.S. at 568.

[180]*Id.* at 571-75.

[181]*Id.* at 576.

[182]*Id.*

[183]*Id.* at 576-77.

[184]*Id.* at 577 (suggesting chamber organization, age requirement, and multi-member districts to distinguish two chambers in a bicameral system even if both were elected on a population basis).

neutral factors were currently in use in states apportioned substantially on a population basis.[185]

The Court's language in these passages shows the Court going out of its way to offer a rational basis for the continuation of state traditions that the passage of time and evolution of American politics have rendered anachronistic. The Court's failure to recognize that American state bicameralism existed as an historical accident is unfortunate.[186] The Court wrote dicta about bicameralism apparently unaware that its words would later be used as a source for deviations from voting equality.[187]

While the equal protection clause does not demand that a state legislature have only one house,[188] the inclusion in *Reynolds* of the bicameralism language[189] suggests that the Court was fortifying the principle of state bicameralism. This indicates that the Court felt obligated to mollify reactions to the *Reynolds* opinion. By offering states a justification for bicameralism, the Court in *Reynolds* provided a future argument that interdistrict population variations to serve bicameral functions are justified. This argument is made possible by the relatively easy substitution of neutrally applied nonpopulation-based differences in the composition of the two houses of a state legislature for the population neutral factors listed in *Reynolds*.

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[185]*Id.*

[186]By describing twentieth century American bicameralism as an "historical accident," it is merely meant that, in terms of political theory, there is no inherent value in a two-chambered legislature that could not be structured into a three or four chambered legislature. Furthermore, the American preference for bicameral governments seems to stem from the historical and economic events which permitted English governmental development into a two chambered body, which was mirrored in the various English colonies.

[187]As early as 1850, astute thinkers had recognized that when both houses of a state government were elected by popular vote the second house was superfluous. Nolan, *Unicameralism and the Indiana Constitutional Convention of 1850*, 26 IND. L. J. 349 (1950). Academic recognition of this fact influenced mainstream politics in the early twentieth century. During this period there were many proposals to establish unicameral state governments. Between 1913 and 1934, there were numerous (forty-six by one count) separate statewide votes on changing state constitutions to provide for unicameral government. *See* Wood-Simons, *Operation of the Bicameral System in Illinois and Wisconsin*, 20 ILL. L. REV. 674 (1926). *See also* Orfield, *The Unicameral Legislature in Nebraska,* 34 MICH. L. REV. 26 (1935); Lancaster, *Nebraska Considers a One-House Legislaure*, 23 NAT. MUN. REV. 373 (1934). *See also* Senning, *Unicameralism Passes Test*, 33 NAT. MUN. REV. 60 (1944). An analysis of votes on these proposals suggests that the tradition of having two houses and opposition of incumbent legislators contributed substantially to the defeat of these proposals, which were more attractive than the votes would imply.

Ultimately, Nebraska became the only state to embrace unicameralism as a result of these proposals, although the theoretical and academic appeal of such proposals is recurring. *See* Note, *Restructuring the Legislature: A Proposal for Unicameralism in Washington*, 51 WASH. L. REV. 901-03 (1976).

[188]*Cf.* Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972).

[189]377 U.S. 576 ("We do not believe that the concept of bicameralism is rendered anachronistic and meaningless . . . .").

Before *Brown*, the Court commented further on bicameralism. In a per curiam decision in *Sixty-Seventh Minnesota State Senate v. Beens,*[190] the Court, in denying the lower court's power to require large scale changes in a state legislature to achieve equality, said, "If a change of that extent were acceptable, so, too, would be a federal court's cutting or increasing size by seventy-five percent or ninety percent or, indeed, by prescribing a unicameral legislature for a state that has always followed bicameral precedent."[191] The implication here was that bicameralism, if selected by a state, was untouchable by a court acting to administer the equal protection clause.

Once it was clear that unicameralism was an impermissible remedy for apportionment violations, it was only a short step to a determination that nonpopulation bases for apportionment could be used to achieve different compositions in the two houses of a state legislature so long as an equal protection minimum was met. Accordingly, where a state's constitution required that counties be treated as a basis for distinguishing the two legislative chambers, it was permissible under the federal Constitution to deviate from equality to accommodate this state bicameralism.

After *Mahan* permitted this result, it seemed understood that accommodation of nonpopulation-based apportionment to sustain bicameral theory would end where population variations exceeded 16%.[192] This understanding was taken away by the Court's action in *Brown*. The opinion in *Brown* began with a statement that Wyoming had had a bicameral legislature since its statehood in 1890.[193] This is significant because it shows the Court was impressed with the longevity of the bicameral form of government that required the county-based apportionment plan. The Court then reviewed apportionment litigation in Wyoming[194] and found that the apportionment of the Wyoming house of representatives had been sustained in 1964 and again in 1972.[195]

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[190]406 U.S. 187.

[191]*Id.* at 199.

[192]*See supra* text accompanying note 122.

[193]462 U.S. at 837.

[194]*Id.* at 837-38.

[195]The *Brown* Court overlooked the language in the 1964 case which said, "It is not seriously contended, however, that this disparity [in the population of house of representative districts] creates an invidious discrimination or violation of the equal protection clause of the Fourteenth Amendment . . . . The principal thrust of plaintiff's complaint and argument is directed at the reapportionment provisions of the statute as they apply to the senate." Schaefer v. Thomson, 240 F. Supp. 247, 251 (D. Wyo. 1964), *supplemented*, 251 F. Supp. 450 (1965), *aff'd sub nom.*, Harrison v. Schaefer, 383 U.S. 269 (1966). Thus, the Wyoming house of representatives apportionment was originally approved in a case where it was never really litigated.

In 1972, the district court reviewing the 1971 Reapportionment Act in Wyoming relied on the earlier approval of the house of representatives in the 1964 case to dismiss the apportionment challenge offered then because "the 1963 reapportionment of the House

Disparate treatment along bicameral lines, however, surfaced early in this reapportionment litigation. The *Brown* Court footnoted this dichotomy and indicated only that "[t]he Wyoming House of Representatives presents a different case because the number of representatives is substantially larger than the number of counties."[196] Under the Court's rationale, differences in structure of the two houses in a state legislature justify use of a nonpopulation basis for apportioning one of these houses. Because so many states have one house "substantially larger" than the other, the rationale of *Brown* could be used elsewhere to satisfy bicameralism at the expense of equality.

Other indications that the *Brown* Court was accommodating the bicameral structure of the Wyoming legislature appeared in the Court's continuing references to Wyoming's policy of "preserving county boundaries."[197] The Court failed to recognize expressly that the state's policy was not to "preserve county boundaries," but to preserve one chamber in which every county was represented. If the state were only interested in preserving county boundaries, it could easily combine small population counties. Instead, the state's goal was to serve a particular theory of bicameralism — to have every county represented.

The Court hinted, however, that it understood there was a difference between "preserving county" representation and using counties as representational units in only a few places. For example, the Court stated that "there also can be no question that Wyoming's Constitutional policy — followed since statehood — of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate concerns."[198] Later, the Court referred to the state's efforts to ensure that the voters of Niobrara County would have their own representative.[199] These statements hint that the Court was well aware that the state needed permission to use counties for representation in one house of a bicameral state legislature; *Brown* gave that permission.

Although not expressly admitted by the court, *Brown* permitted gross deviations from voter equality to accommodate the nonpopulation-based apportionment necessary to sustain the state's bicameralism. The evo-

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was not substantially altered . . . ." Thompson v. Thomson, 344 F. Supp. 1378, 1380 (D. Wyo. 1972). Again, the merits of the challenge were not examined. Thus, when the *Brown* Court cited this approval of the apportionment scheme of the Wyoming house of representatives, it repeated a tradition of avoiding a substantive look at what the house apportionment in Wyoming actually did to voting equality. More importantly, the Court simultaneously noted the different treatment given apportionment for the Wyoming Senate. It had been declared unconstitutional in 1964. *Schaefer*, 240 F. Supp. at 253.

[196]467 U.S. at 845.

[197]*Id.* at 843, 847.

[198]*Id.* at 842.

[199]*Id.* at 848.

lution from suggestion of population neutral criteria in *Reynolds* to the approval of nonpopulation criteria applied neutrally in *Brown* exchanges equality for deference to bicameralism. Because *Brown* permits bicameralism to serve as the source of voting power inequalities, it comes close to recognizing as valid the analogy of state governmental structure to the federal governmental structure. This analogy had been expressly rejected in *Reynolds*.[200] After *Brown*, states with constitutions similar to Wyoming's may have permission to use political units as representational units in one chamber of a two-chambered legislature. Thus, the Court, while pledging fealty to *Reynolds*, eviscerated *Reynolds*' basic commitment to a primarily population-based apportionment requirement.

Language in *Reynolds* indicating the weakness of bicameralism after *Reynolds* could have offered movement toward the equality envisioned there. Such dicta would perhaps have prompted greater discussion of the theories of bicameralism and potentially assisted the states' movement toward unicameralism. If a state saw that equal voting power renders a second chamber superfluous, it might not attempt to justify a second chamber by creating nonpopulation-based apportionment plans for that chamber. Instead, the dicta of *Reynolds* bolstering bicameralism has permitted an evolution away from the equality demanded there. Hence, when faced with an apportionment case in a state like Wyoming, a judge is torn between the "spirit" of *Reynolds* and the conflicting lessons of its progeny. A judge or legislator in such a case has no real measure of the reach of the equal protection clause.

To remedy this problem, the Court has three options. First, it could simply say that a state is free to organize one chamber of a bicameral house on a nonpopulation basis. This rule, however, would be flatly contrary to *Reynolds* and alien to the equality commanded by the fourteenth amendment. Second, the Court could establish firm guidelines on how far from equality a state can go in experimenting with bicameral theories. This approach, however, seems to have been precluded by *Brown's* rejection of the reliable 16% maximum variation without offering any new fixed level of permissible variation. The only remaining approach is for the Court to recognize that *Reynolds* was primarily concerned with equality. If the Court recognizes that the equal protection clause preempts all state laws to the contrary, then the number of chambers a state has is absolutely irrelevant to the federal court's application of the equal protection clause. This third approach would simply require a state, no matter how many chambers it has, to apportion them on a population basis. Once a state has satisfied the federal goal of equal protection, it could then organize its various chambers on whatever population neutral criteria it liked. Until such a simple and easily applied

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[200]377 U.S. at 573.

rule is adopted, the bicameralism language in *Reynolds* will continue to cause contention in apportionment cases.

D. Theories of Representation

In *Baker v. Carr*,[201] Justice Frankfurter in dissent made an observation that led to much criticism of the majority's action. He commented that the nature of reapportionment cases required selection between competing theories of representation.[202] To the extent that is true, the majority in *Reynolds* made clear its conception of what the Constitution, as amended, required in the way of representation: "Legislators represent people, not trees or acres."[203] Like the earlier pronouncement of the one person, one vote requirement, this statement meant that a democracy's commitment to equality dictated its legitimate representational theories. Thus, the Constitution envisioned representation of individual people as individuals, not as interest groups. A population-based representation scheme was the only way to satisfy both the goal of equality and the democratic ideals of American constitutionalism.[204]

In *Reynolds*, the Court established that equality of representation was the primary goal in selecting a theory of representation. Only through this equality could a citizen achieve "full and effective participation" in the government of his or her state. The mechanism to reach the primary goal of *Reynolds* was equal voting power achieved through population-based apportionment. However, just as there was a post-*Reynolds* evolution away from strict demands for equality of population-based representative districts, there was a movement away from the goal of equality of representation. This tendency was facilitated by the Court permitting states to use *de minimus* variations without review and to justify substantial population deviations by state policies accommodating nonpopulation-based theories of representation. In *Brown*, the Court approved a maximum interdistrict population variation far beyond any previous limit and used language indicating that it had misunderstood or forgotten the goal of representational theory articulated in *Reynolds*.

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[201]369 U.S. 186.

[202]*Id.* at 299-300 (Frankfurter, J., dissenting).

[203]377 U.S. at 562.

[204]In describing the Constitution's requirements, the *Reynolds* Court said:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

377 U.S. at 565.

Some of the Court's curious language in *Brown* about representation was derived from the trial court which apparently neither understood the permissible type of representation under *Reynolds* nor attempted to compare Wyoming's theory of representation to the *Reynolds* model. The lower court's misunderstanding is exemplified in the following passage:

> Wyoming as a state is unique among her sister states. A small population is encompassed by a large area. Counties have always been a major form of government in the State. Each county has its own special economic and social needs. The needs of the people are different and distinctive. Given the fact that the representative from the combined counties of Niobrara and Goshen would probably come from the larger county, i.e. Goshen, the interests of the people of Niobrara County would be virtually unprotected. . . . Under the facts of this action, to deny these people their own representative borders on abridging their right to be represented in the determination of their futures. . . . Without representation of their own in the State House of Representatives, the people of Niobrara County could well be forgotten.[205]

The failure of the Supreme Court to recognize what the lower court was doing in *Brown* is striking. The district court's language indicates that it considered a proper model of representation to be representing counties, not people. The underlying premise of *Reynolds*, however, was that state representatives represent people, not trees or acres.[206]

Because the trial court in *Brown* started from the presumption that representation of counties was proper, the conclusion it reached is not surprising. At least three of the Supreme Court Justices considering the cases apparently found such representation proper.[207] Although the Court noted that "[e]ven a neutral and consistently applied criterion such as

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[205]Brown v. Thomson, 536 F. Supp. 780, 784 (D. Wyo. 1982), *aff'd on appeal*, 462 U.S. 835 (1983). The concurrence of Judge Doyle reflected this same sort of thinking:

> If a representative had been taken from one of the other counties in order to give Niobrara one, it would be a different matter. . . . [I]nasmuch as the Legislature created a new additional representative, rather than taking away one or more, the result was a total of 64 rather than 63. As a result of this, no county suffered, and no one can claim that he or she was injured. . . . Every other county comes very close to fair and equitable representation.

536 F.Supp. at 786 (Doyle, J., concurring). Later he displayed his lack of understanding of the representational goal of *Reynolds* by saying that "every county can be represented in the legislature." *Id.*

[206]377 U.S. at 562.

[207]*Brown*, 462 U.S. 835 (Burger, C. J., Powell, J., and Rehnquist, J., joining the Court's opinion without limitation as suggested in the concurrence of Justice O'Connor and Justice Stevens).

use of counties as representative districts can frustrate *Reynold's* [sic] mandate. . . ,"[208] the Court later in the opinion appeared to suggest that there is a proper role for using counties as a representational basis. "There can also be no question that Wyoming's constitutional policy — followed since statehood. . . ensuring that each county has one representative is supported by substantial and legitimate state concerns."[209] Later the Court approved the lower court's reasoning by stating that "the effect of the 63-member plan would be to deprive the voters of Niobrara County of their own representative, even though the remainder of the House of Representatives would be constituted so as to facilitate representation of the interests of each county."[210]

This dicta brings the majority's understanding of its own statements into question. If the Court really meant to endorse the idea of representation of counties rather than people, it appears that a fragile majority of the Court is attracted by nonpopulation-based theories of representation. Were the Court to recognize officially in a subsequent case that county "interests" are a legitimate basis for representation, it would contradict the *Reynolds* statement that legislators represent people and not trees. Until these possible contradictions are clarified, the *Brown* Court has raised another obstacle to resolution of state legislative apportionment cases. Group interest representation was supported by the *Brown* Court's dicta without any recognition that such support would require overruling part of *Reynolds*. As a result, lower courts were given the Sisyphean task of applying the Court's dicta in *Brown* while honoring the contradictory instruction of *Reynolds*.[211]

E. Political Subunits

Even divorced from the theory of representation of subunits rather than people, the evolution from *Reynolds* to *Brown* has blurred the significance of a state's interest in preserving the integrity of political divisions. *Reynolds* did indicate that "[a] State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering."[212] Although the Court later implies that a state might have a clearly rational scheme to give some legislative representation to political subdivisions, nothing in the Court's opinion connects this rational state policy to a legitimate state desire other than that of using population as basis for representation.

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[208] *Id.* at 845.

[209] *Id.* at 843.

[210] *Id.* at 848.

[211] *See Hellar II*, 682 P.2d 524 (Shepard, J., concurring and dissenting) (*Brown* "simply can not be reconciled with previous opinions of the Court unless *Reynolds v. Sims* and its progeny are overruled, but we are told that those cases still are the foundation of legislative apportionment.").

[212] 377 U.S. at 581.

Given the language in *Reynolds* that citizens vote, not trees or acres, it may well be that the Court could not conceive of a legitimate basis for such a state policy other than to prevent gerrymandering. Thus, any attempt to provide representation on the basis of political subdivisions that is not an attempt to avoid gerrymandering may be suspect under a strict reading of *Reynolds*. Additionally, it must be remembered that *Reynolds* also recognized the inappropriateness of comparing state legislative schemes with the federal governmental structure.[213]

After *Reynolds*, the Court had opportunities to reevaluate the extent to which states could justify deviations from equality by claiming respect for political subdivision. The same day *Reynolds* was decided, *WMCA, Inc. v. Lomenzo*[214] reversed a lower court decision that had found the county was a classic unit of governmental organization and administration in Delaware and that allocation of representatives on county lines was therefore acceptable.[215] In *WMCA, Inc.*, the Court found that even an historical element of sovereignty residing in Delaware's county governments did not permit use of the federal analogy to distribute representatives to the counties as counties.[216]

In another case decided the same day as *Reynolds*, the Court established a test clarifying the extent to which deviations, including those for political subunits, would be acceptable. In *Roman v. Sincock*,[217] a challenge to a Maryland apportionment scheme which used counties as districts, the Court indicated that deviations based on state constitutional grounds were not sustainable:

> [T]he proper judicial approach is to ascertain, whether, under the particular circumstance existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness and discrimination.[218]

The Court in *Roman* articulated this standard even though Justice Powell in *Brown* later asserted that "[t]here can be no question that Wyoming's constitutional policy — followed since statehood — of using counties as representative districts and ensuring that each county has one representative is supported by substantial and legitimate state concerns."[219] Justice Stewart had been required to make that same claim in dissent

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[213]See *supra* note 180 and accompanying text.
[214]377 U.S. 633 (1964).
[215]*Id.* at 640.
[216]*Id.*
[217]Roman v. Sincock, 377 U.S. 695 (1964).
[218]*Id.* at 710.
[219]462 U.S. at 843.

in *Lucas v. Forty-Fourth General Assembly of Colorado*.[220] Stewart complained that a scheme which denied a county a representative would leave the county unrepresented.[221] This complaint was accepted by the lower court[222] and affirmed by the Supreme Court in *Brown*.[223]

The practice of using counties as units after 1964 was largely shaped by *Kirkpatrick v. Prisler*,[224] later recognized as the seminal case involving congressional districting. At the time it was decided, *Kirkpatrick* simply concerned the legitimacy of various size deviations from population equality in a state districting scheme.[225] The Court in *Kirkpatrick* explicitly rejected claims that honoring political subdivision boundaries was a legitimate reason for the deviations that appeared in the plan before the Court:

> We do not find legally acceptable the argument that variances are justified if they necessarily result from a state's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries. The state interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for political gerrymandering, but an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities.[226]

Thus, although *Kirkpatrick* involved congressional apportionment, the Court appeared to place a minimal value on plans to honor political subdivision lines in districting. Additionally, if the goal of inhibiting gerrymandering by use of counties as districts could not save such a plan, it is doubtful the Court would have been willing to accept other bases, such as history or aesthetics.

Reynolds envisioned essentially a population-based scheme adjusted to accommodate boundaries where possible for convenience. After 1971, it appears that the Court began to reverse this theory — i.e., after 1971 a state could apportion by county and deviate from that only where necessary to achieve "substantial" population equality. The difference between the two approaches is that one approach starts with a premise of equality and permits exceptions, while the other approach starts with

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[220]377 U.S. 713, 762 (1964) (Stewart, J., dissenting).
[221]*Id.* at 762 (Stewart, J., dissenting).
[222]536 F. Supp. 780, 784 (1982).
[223]462 U.S. at 848.
[224]394 U.S. 526 (1969).
[225]*Id.*
[226]*Id.* at 533.

a premise of inequality and deviates from that inequality solely to reach the minimum equality required by the federal Constitution.

Prior to *Kirkpatrick*, the Court in *Kilgarlin v. Hill*[227] considered Texas' reapportionment plans and demanded that sustained deviations had to be the least possible given the planned goal of honoring county lines. In *Kilgarlin* the Court reversed a lower court which had accepted variations of considerable size in Texas' redistricting attempt without requiring that Texas demonstrate that the goal of respecting county lines required the deviations.[228] It would appear that under this approach, lower courts would be encouraged to use only a population basis for reapportionment, although county boundaries could be used as a convenient tool for drawing lines.

In 1971, the Court's holding in *Abate v. Mundt*[229] indicated that political subdivisions might be a permissible source of population variation. Despite *Kirkpatrick's* language, the Court accepted the state's desire to preserve the integrity of political subdivisions as a justification for an apportionment plan which departed from numerical equality.[230] The Court justified this result by noting that counties usually included fewer people than congressional districts.[231] Therefore, some deviation in state districting could be allowed solely because the legislature was attempting to honor political subdivsion lines — usually counties.

The *Abate* holding was not the product of earlier decisions, however. The dissent stressed that *Reynolds* and *Kirkpatrick* required a good faith effort to achieve absolute equality.[232] For the dissent, good faith meant more than merely juggling existing geographical units to arrive at some semblance of equality; it stressed that good faith could never be demonstrated where the legislature relied solely on county lines to draw boundaries for the districts.[233]

The extent to which the *Abate* ruling altered the orientation of the Court on the permissibility of using political subunits as an excuse to deviate from equality was demonstrated in *Mahan v. Howell*.[234] In *Mahan*, a Virginia apportionment plan was challenged. The plan had substantial population variations among districts created by adhering to county lines.[235] This apportionment structure existed even though the state constitution had recently been amended to remove the prohibition against crossing county lines in districting.[236]

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[227]386 U.S. 120 (1967).
[228]*Id.*
[229]403 U.S. 182 (1971).
[230]*Id.*
[231]*Id.*
[232]*Id.* at 188 (Brennan, J., dissenting).
[233]*Id.*
[234]410 U.S. 315 (1972).
[235]*Id.* at 319.
[236]*Id.* at 317.

In addition to determining whether *Kirkpatrick* controlled state apportionment cases, the Court in *Mahan* had to decide whether the district court was correct in invalidating the plan on the basis that using county lines was unnecessary under the new constitution and created unnecessary population variations.[237] The Supreme Court, in reversing the district court, found that the legislature's wish to preserve county lines, which was no longer based on a constitutional directive, was sufficient to justify the substantial population variations in the plan.[238] Thus, the mere assertion of a state policy of preserving state districts could justify a deviation of up to 16.4%.

Although the 16.4% figure might be the limit of acceptable variation,[239] it was clear that the Court no longer bound itself by the rules applied in congressional cases or by the dicta in *Reynolds* requiring population equality first and other considerations second in state apportionment cases.[240] After *Mahan*, a state's goal of population equality between districts was apparently on equal footing with other state policies. This result promotes judicial and legislative confusion and adds to the problems in state legislative apportionment cases. By denying the absolute primacy of the goal of equality, the Court has done nothing to press states to honor the *Reynolds* goal of voting power equality; nor has the Court provided a workable means of balancing equality with the competing state goals of preserving political subunits.

F. Political Subgroups

The politics of apportionment frequently result in a dominant political party maximizing the voting strength of identifiable political subgroups. These efforts touch the basic representational theory question of whether legislators are to represent interests or individuals. The Court in *Reynolds* answered this question.[241] Subsequently, however, apportionment plans have been successfully defended despite interdistrict population disparities created to favor a particular party. For example, in *Gaffney v. Cummings*,[242] the district court found that the challenged plan was the product of an explicit attempt to divide the state into "safe seats" for the two parties.[243] On appeal, the Supreme Court ignored the language from *Reynolds* and found that because legislative passage of reapportioning bills is always

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[237]*Mahan*, 410 U.S. at 320-21, 325.

[238]*Id.* at 327.

[239]*Id.* at 329.

[240]377 U.S. at 562.

[241]*Id.* at 568. The Court stated that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population based representation." *Id.* at 579-80.

[242]412 U.S. 735 (1973).

[243]*Id.* at 753.

a political process, political consequences neither were, nor could be, barred from the apportioning process.[244] Therefore, it reversed the lower court's determination that the state's goal was unconstitutional. Apparently, interdistrict population disparties were tolerable to the limited extent envisioned by the *Gaffney* Court to further the dominant political party's interests.

Another feature of apportionment plans designed to aid political groups is that each such plan is designed to minimize the voting power of some disfavored minority. When this damaging aspect of such apportionment plans has been challenged, courts have given conflicting results. In *Burns v. Richardson*,[246] a case decided in 1966, the Court reversed a lower court's orders that eliminated multi-member senatorial apportionment for the Hawaii legislature. The Court found that invidious discrimination could not be shown merely through the use of multi-member districts; such discrimination must appear through evidence in the record that "under the circumstances of a particular case" a multi-member district was designed for or otherwise resulted in minimizing or cancelling out the voting strength of racial or political voters.[247] The Court found no such evidence.[248]

Later, the Court also insisted that a demonstration of intent and actual effect be proven before a scheme would be found defective for diluting the voting strength of a particular group.[249] Nevertheless, the obvious implication of such holdings is that, although the burden of proof is high, it is unconstitutional to minimize intentionally voting power of political minorities through an apportionment scheme.

A contrary statement by the Court surfaced in *Whitcomb v. Chavis*.[250] In *Whitcomb,* the Court was asked to sustain a lower court finding that the effect of multi-member districting in Marion County, Indiana, unconstitutionally minimized the voting strength of black voters.[251] The Court refused to agree with this claim, stating that "[t]he voting power of ghetto residents may have been cancelled out as the District Court held, but this seems a mere euphemism for political defeat at the polls."[252] According to this approach, minority groups are destined to have their influence minimized through the natural functioning of the political process, and the equal protection clause does not operate to prevent

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[244]*Id.* at 754.

[245]*Id.* at 753. The Court stated that states are not required to use a "politically mindless approach." *Id.*

[246]384 U.S. 73.

[247]*Id.* at 88.

[248]*Id.* at 87, 98.

[249]*See, e.g.*, Mobile v. Bolden, 446 U.S. 55 (1980).

[250]403 U.S. 124 (1971).

[251]*Id.*

[252]*Id.* at 153.

this result.[253] This theory mirrored the reasoning in *Gaffney* that it was not unconstitutional to create interdistrict population inequalities to further political subgroups.

The problem was that such a theory collided with the theory arising from *Burns*. Therefore, even prior to *Brown*, signals sent to lower courts on the constitutionality of using political subgroups to rationalize interdistrict population inequalities were mixed; *Gaffney* and *Whitcomb* seemed to accept either helping or hurting political subgroups through the apportionment process. In contrast, the other post-*Reynolds* cases, such as *Kirkpatrick*, expressly stated that "to accept population variances, large or small, in order to create districts with specific interest orientation is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people."[254]

Although confusing, the discord between *Kirkpatrick* and *Whitcomb* is not entirely inexplicable. After 1967 a more favorable climate might have existed for reviewing political subgroup-oriented apportionment. The Voting Rights Act of 1967[255] spawned its own reapportionment litigation, and this litigation inevitably intertwined with purely constitutionally-based challenges to apportionment plans. By attempting to improve and facilitate the participation of all races in the voting process, the Act encouraged court challenges to schemes having the effect of denying black voters equally effective votes and representation. The remedies offered by the Act occasionally have the effect of reversing past prejudice so that redistricting schemes must attempt to maximize the voting strength of the black citizens within the districts.[256] Such benign discrimination has been held to be constitutional, but would technically violate the language of *Reynolds*. The passage and application of the Voting Rights Act may well have contributed to the confusion of the Court's pronouncements in *Gaffney* and *Whitcomb*.

The Voting Rights Act may also have provided a basis for the Court to find a "rational state policy" in a state's use of political subgroups. By doing so, the state would bring its apportionment plan within the *Mahan* guidelines. *Mahan* had recognized that an interdistrict population variation of up to 16% was acceptable when premised on a rational state policy serving a legitimate state end. Because the Voting Rights Act mandated consideration of some political subgroups, it may have become easy to think that a state could always consider political subgroups and use them as the basis for a "rational state policy."[257]

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[253] *Id.*

[254] 394 U.S. at 533.

[255] Voting Rights Act of 1965, 42 U.S.C. § 1973.

[256] *See* Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983). *But see* Marshall v. Edwards, 582 F. 2d 927 (5th Cir. 1978).

[257] *Mahan*, 410 U.S. at 325 (quoting Reynolds v. Sims, 377 U.S. at 579).

After 1971, the Supreme Court had precedent allowing political subgroups to be used as the basis of interdistrict population inequalities. It also had precedent disallowing such apportionment. Even with that conflict, the Court was limited in permitting such deviation. The confusion was made tolerable by the workable *Mahan* 16% standard. *Brown*, however, destroyed the measure used by courts and legislatures. *Brown's* invitation to deviations greater than 16% will result in the need to scrutinize every challenged apportionment plan to see exactly what the legislative motivation was. This encouragement of litigation does not seem to serve any judicial purpose.

The easiest resolution of this problem has been articulated and has been the common sense resolution all along. As a Tennessee judge has noted, the function of "drawing legislative district lines" must be blind to "race, color, religion, ethnicity, political persuasion, economic condition, or the like or incumbencies."[258]

The adoption of this position would assure that both equality and fairness are served. A majority could rule as the majority, but it could not apportion to perpetuate itself. The Court overlooked this solution when it found in *Gaffney* that any requirement that political parties not be the basis for the districting of a state could result in "the most grossly gerrymandered results."[259] In *Gaffney*, the Court ignored the fact that *Reynolds* had expressly disapproved of group-conscious districting and had given assurances that the Constitution forbade simple as well as clever schemes for disenfranchising voters.[260] Had the Court considered that principle of *Reynolds*, it would have recognized that protection from gerrymandering could be accomplished without sacrificing the goal of purely population-based apportionment.[261]

Excluding some potential difficulties with the Voting Rights Act,[262]

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[258]*Lockert v. Crowell*, 656 S.W.2d at 845 (Brock, J., concurring and dissenting).

[259]412 U.S. at 753.

[260]377 U.S. at 563.

[261]See *Karcher*, 462 U.S. 749-50 (Stevens, J., concurring).

[262]A strict equality rule poses problems under the Voting Rights Act because it would require invalidating salutary attempts under the Act to remedy past inequities by racial-conscious apportionment. Such apportionment raises substantial theoretical difficulties anyway, however. For example, it is impossible to ascertain which districting scheme is best for a particular group. A particular minority group representing 34% of the population might be grouped into one district or spread among three districts equally. If the group were in one district, it could easily elect "its" representative. If the group were dispersed into three separate districts, it would be possible for the minority to be the decisive factor in the election of three officials.

These difficult problems suggest that the Voting Rights Act and its remedies should be treated as a wholly different body of law from apportionment under the *Reynolds* formulation. If it is agreed that the special remedial powers granted Congress in the fifteenth amendment permit use of the powers in the Voting Rights Act, then it is appropriate to preserve for purely equal protection analysis the strict equality rule proposed here.

it seems that the best way to avoid the difficulties and confusion created by *Brown's* allowance of interdistrict population deviations to accommodate political subgroups to an non-defined extent is a strict population-based apportionment rule. Bold, inflexible equality of voting power would better fulfill the promise of *Reynolds* and avoid the unmanageable quagmire created by the conflicting theories of *Kirkpatrick*, *Whitcomb*, and *Brown*.

G. History and Geography

In the same passage that condemns group interest representation in *Reynolds*, the Court announced that "neither history alone, nor economic or other sorts of group interests are permissible factors."[263] The Court explained that the historical reasons for limiting districts to areas easily reached and covered by travel simply do not make sense in a modern, interconnected, telecommunicating world.[264] That conclusion was reached in 1964.

Twenty years later, the Court was embracing the factors rejected in *Reynolds* as the basis for accepting the largest deviation from equality ever accepted by the Court.[265] In *Brown*, Justice Powell recognized that the state would have to justify the substantial deviation from population equality.[266] He accepted four reasons for the deviation. First, Wyoming had applied this factor "in a manner free from any taint of arbitrariness or discrimination."[267] This conclusion was reached by a demonstration that the state had been following the practice for decades, consistently throughout the state.[268] Second, the Court accepted a claim that the state policy was particularly important because of the state's conditions.[269] Specifically, the Court relied on the trial court's finding that "Wyoming as a state is unique among her sister states. A small population is encompassed by a large area. Counties have always been a major form of government in the state. Each county has its own special and social needs. The needs of the people are different and distinctive."[270] Third, the Court accepted a showing that the deviation went no further than necessary to preserve the state's policy.[271] Last, the Court concluded that there was no built-in bias in the apportionment plan.[272]

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[263]377 U.S. at 579-80.

[264]*Id.* at 580.

[265]*See supra* note 97 and accompanying text.

[266]462 U.S. at 842-43.

[267]*Id.* at 843 (quoting Roman v. Sincock, 377 U.S. 695, 710 (1964)).

[268]*Id.*

[269]*Id.* at 843-44.

[270]*Id.* at 851 n.5 (quoting *Brown*, 536 F. Supp. at 784).

[271]*Id.* at 841.

[272]*Id.* at 844.

Each of these conclusions was based on a premise rejected by *Reynolds*. First, following *Reynolds*, it could not be contended that population inequalities do not discriminate. Every deviation from population equality dilutes the vote of some individual.[273] Second, the decision to select counties as the basis for representation could hardly be more arbitrary. The development and creation of counties is nearly always an historical accident; county boundaries are determined by political needs, property lines, and geographical anomalies.[274] Furthermore, the basis for the conclusion that county boundaries were not arbitrary was simply that the state had proceeded under this plan for decades, and *Reynolds* had expressly said that history alone cannot justify population disparities.[275] Moreover, *Reynolds* had expressly noted that sparseness of population and large-area districts did not justify population disparities.[276] Given the immense advances in both communications and modes of travel since 1964, it is inconceivable that the districts invalidated despite claims of sparseness of population and area in 1964 could be acceptable today.

Powell's third contention, that the plan went no further than necessary to satisfy the state's policy, is contradicted by the state's own action in preparing a plan that would have suited the legislature if the plan permitting such a substantial population variation had been found unconstitutional.[277] As Justice Brennan asserted in the dissent, the question is whether another plan serving the same policy could do so substantially as well.[278] Given that the incremental effect of the Niobrara County representative was minimal, it would seem that the presence of that representative was not a substantial factor to the legislature. Thus, the alternative plan, which would have had a lower overall population deviation, would have served substantially as well.

Justice Powell's fourth justification for the Wyoming plan overlooked the fact that any scheme based on an award of a representative for every county has the built-in bias of favoring rural voters over urban voters.[279] Therefore, Justice Powell's claim that the plan favors no particular group is unconvincing.

Both concurring Justices in *Brown* agreed with the majority that the longstanding policy of treating counties as representative districts

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[273]377 U.S. at 562-63.

[274]*See* Averbach, *The Reapportionment Cases, One person, One Vote — One Vote, One Value*, 1964 S. Ct. Rev. 1, 39.

[275]377 U.S. at 579-80.

[276]*Id.* at 580. *See also* Chapman v. Meier, 420 U.S. 1, 24-25 (1975).

[277]*Brown*, 462 U.S. at 841.

[278]*Id.* at 852 (Brennan, J. dissenting).

[279]Durfee, *Apportionment of Representation in the Legislature: A Study of State Constitutions*, 43 Mich. L. Rev. 1091, 1096 (1945).

was a factor for deciding that the scheme was constitutional.[280] This seems odd in the face of *Reynolds* language absolutely rejecting history and geography as bases for justifying inequality.[281] Furthermore, these bases had been rejected in other cases as well. For example, the court in *Butterworth v. Dempsey*[282] found that *Reynolds* meant that the "Equal Protection Clause is not concerned with desires to perpetuate political philosophies, geographical entities, or historical anomalies.[283] Similarly, in striking down the Colorado apportionment plan in *Lucas v. Forty-fourth Colorado General Assembly*,[284] the Court indicated that just because a plan rationally considers geographic, historic, topographic, and economic interests does not provide an adequate justification for substantial disparity from population-based representation.[285] Even some years later in *Kirkpatrick* and *Swann v. Adams*,[286] the Court reemphasized that geography was an unacceptable basis for variation in population between districts.[287]

Although the Court in *Abate v. Mundt*[288] was prepared to recognize some justifiable deviations from equality, geographical or political interests were not expressly listed as available justifications.[289] The Court recognized for the first time, however, that historical factors may support a particular scheme.[290] Justice Brennan in dissent expressed his displeasure with such a deviation from the original *Reynolds* formulation when he stated: "It is not clear to me why such a history, no matter how protracted, should alter the constitutional command to make a good-faith effort to achieve equality of voting power as near to mathematical exactness as is possible."[291]

When the Court accepted the distinction between the congressional and legislative apportionment cases in *Mahan v. Howell*,[292] it accepted an argument similar to that later advanced by Wyoming in *Brown*.[293] As Justice Brennan set forth in his *Mahan* dissent, however, the state's claim that the deviations were permissible because of the state's unique situation was disingenuous: "Every apportionment case presents a unique combination."[294]

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[280]462 U.S. at 849 (O'Connor, J., Stevens, J. concurring).
[281]377 U.S. at 579-80.
[282]229 F. Supp. 754 (D. Conn. 1964).
[283]*Id.* at 763.
[284]377 U.S. 713.
[285]*Id.* at 738.
[286]385 U.S. at 447.
[287]394 U.S. at 536.
[288]403 U.S. 182.
[289]*Id.* at 185.
[290]*Id.*
[291]*Id.* at 189 (Brennan, J., dissenting).
[292]410 U.S. 315.
[293]*See Brown*, 462 U.S. at 841 n.5, 843.
[294]*Mahan*, 410 U.S. at 334 (Brennan, J., dissenting). Justice Brennan's statements on

Even with *Mahan*'s language, the Court as late as 1977 still accepted most of the *Reynolds* position on geography, topography, and history. In *Chapman v. Meier*,[295] the Court took great pains to assert that "sparse population is not a legitimate basis for a departure from the goal of equality."[296] And in 1977, the Court found that a historical policy against fragmenting counties was insufficient to overcome the strong preference for single-member districts.[297]

By 1983, however, Justice Brennan, writing in *Karcher*, included in his list of considerations which may justify population deviations in congressional districting the goal of "preserving the cores of prior districts."[298] This goal would seem to be predicated on an historical consideration declared unacceptable in his prior opinions. His position in *Karcher* suggests that he, along with the other Justices, was prepared in 1983 to recognize more the controlling hand of history in permitting some deviation from equality in apportionment cases. He would not, however, embrace the extent to which the economic, geographic, and demographic features unique to Wyoming were accepted by the lower court and the Supreme Court.[299] What he feared, that the temptation will be too great for legislatures to justify otherwise unacceptable population deviations on the uniqueness of their situation, were the same fears leading the *Reynolds* Court to reject history as a basis for inequality. *Brown* increased the possibility that these fears will be realized and diminished the clarity of *Reynolds*' original commitment to equality.

H. Incumbency

Some legislatures, in passing apportionment plans, have either overtly or covertly attempted to minimize future competition against incumbent legislators.[300] This subject has been touched upon by the courts, resulting in confusion over whether the equal protection clause forbids or permits the goal of protecting incumbents. If this goal is permitted, the question remains whether it is rational to limit to an arbitrary percentage the interdistrict population variations permitted to further such a goal.

In one of the first cases after *Reynolds* to consider this problem, the Nebraska District Court in *League of Nebraska Municipalities v. Marsh*[301] heard a challenge to a districting plan that had been created

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this subject are probably true. It is hard to envision a state that has no unique geographic, demographic, economic, historic, or topographic factors which could be used to deviate from equality of population, even where equality is otherwise feasible.

[295]420 U.S. 1 (1974).

[296]*Id.* at 24.

[297]*Id.* at 25.

[298]*Karcher*, 462 U.S. at 740.

[299]*Brown*, 462 U.S. at 841.

[300]*See, e.g.*, Burns v. Richardson, 384 U.S. 73, 89 n.16 (1965) (protection of incumbents does not itself establish invidiousness).

[301]242 F. Supp. 357 (D. Neb. 1965).

in part to avoid contests between incumbents.[302] The district court found that a plan with population variations that could be explained at least partly as an attempt to minimize incumbent contests did not represent a good faith effort to achieve equality of population among districts.[303] The court invalidated the plan,[304] stating that under *Reynolds*, the goal of reapportionment was "just representation of the people, not the protection of incumbents in the legislative body."[305] This reasoning seemed to follow the idea in *Reynolds* that attempts at equality must be made in good faith. Because good faith required a sincere effort on the part of the legislators to clear everything from their minds except population when devising an apportionment plan, protection of incumbents was not permissible.

The reasoning in *Marsh* was used elsewhere. In *Klahr v. Williams*,[306] a challenge to the redistricting of Arizona uncovered the fact that the computer used to devise the plan had been programmed to minimize contests between incumbent legislators.[307] Because of the consequent interdistrict variations in population, the court found the plan defective.[308] The court agreed with the district court of Nebraska in concluding that "the incumbency factor has no place in any reapportionment or redistricting."[309]

In *Burns v. Richardson*,[310] the Supreme Court had merely indicated its position in a footnote that plans designed to avoid incumbency battles were not necessarily invidious.[311] Indeed, under equal population districts, a decision to avoid incumbent battles need not necessarily dilute the strength of any individual voter. When the courts in *Marsh* and *Klahr* examined the challenged plans, however, the evidence was unmistakable that the goal of reducing incumbency fights had contributed to the variation in population among the districts. By realizing that the government was not designed to make it convenient to run for office, the courts rationally concluded that incumbency was not a legitimate basis for those population variations.

After the Supreme Court said that incumbency protection was not necessarily invidious, it seemed that while the Court was not prepared to invalidate automatically a district drawn to prevent incumbency fights, it would do so when population variations could be reduced by removing that criterion from consideration. In *Karcher*, however, decided the same

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[302] *Id.* at 359-60.
[303] *Id.* at 361.
[304] *Id.*
[305] *Id.* at 360.
[306] 313 F. Supp. 148 (D. Ariz. 1970).
[307] *Id.* at 151-52.
[308] *Id.* at 151.
[309] *Id.* at 152.
[310] 384 U.S. 73 (1966).
[311] *Id.* at 89 n.16.

day as *Brown*, Justice Brennan, writing for the majority, listed a host of state policies, including avoiding incumbent battles, that might justify population variations.[312] Because even the majority in *Karcher* seemed to accept avoidance of incumbency contests as a legitimate reason for population variation in Congressional districting, the looser standards already acknowledged for state redistricting could now be permitted as well. Thus, the clear and easy mandate of *Reynolds* is clouded further.

I. Ambiguous, Cautious Language

One source of problems for those given responsibility for implementing *Reynolds* is the potentially contradictory and weak language that crept into the opinion. Generally, the opinion required equality of voting power through population-based apportionment. Occasionally, however, the Court's language was equivocal. For example, in the conclusion of the passage concerning bicameralism, the *Reynolds* Court made the statement that "these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned *substantially* on a population basis."[313] It is unclear why the Court included the word "substantially." Earlier, the Court had made its announcement that "[f]ull and effective participation by all citizens in state government requires, therefore, that *each* citizen have *an equally effective voice* in the election of members of his state legislature."[314] "Equal" is an absolute; either a person's vote counts the same as other votes or it does not. Thus, there is no room for modifying "equal" with "substantially."

Elsewhere in *Reynolds*, the Court had written that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies."[315] Immediately below the passage indicating that bicameralism was still viable for houses apportioned "substantially on a population basis,"[316] the Court wrote:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.[317]

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[312] *Karcher*, 462 U.S. at 740.
[313] 377 U.S. at 577 (emphasis added).
[314] *Id.* at 565 (emphasis added).
[315] *Id.* at 567.
[316] *Id.* at 577.
[317] *Id.*

The opinion thereby creates confusion as to whether a state legislature must make a good faith effort to achieve interdistrict population equality or merely a good faith effort to achieve substantial interdistrict population equality. In theoretical terms, this distinction is potentially great. A commitment to equality of voting power eliminates all non-neutral, non-population districting restrictions. A commitment to substantial equality requires elimination of only the least favored non-neutral districting requirements.

As long as the Warren Court was reviewing state apportionment plans, the commands of the equal protection clause as interpreted in *Reynolds* actually served the goal of equality of voting power. When *Kirkpatrick*[318] and *Swann*[319] established that there was no *de minimus* level for reviewing congressional apportionment cases, it seemed a logical conclusion that the same sternness toward interdistrict inequalities would apply under the equal protection clause.[320]

In 1972, however, the new Burger Court majority in *Mahan* seized upon the *Reynolds* dicta examined above to find that a different standard of review existed for state legislative apportionment. The dichotomy accepted in *Mahan* seemed a natural predicate, however, to a Court more concerned with protecting the autonomy of state legislatures than with individual voting rights.

By the time *Gaffney*[321] was decided, the primary goal identified by the language "equally effective vote" for each citizen[322] had been altered. No longer was the Court even verbally committed to equality of representation at the state level. Instead, it would suffice under the equal protection clause for a state to provide "fair and effective representation."[323] This change in wording permitted substantial deviations from equality within the districts. As Justice Brennan reaffirmed in the majority opinion of *Karcher*, article I, section 2 continues to "establish a high standard of justice and common sense for the apportionment of congressional districts: equal representation for equal numbers of people."[324]

In contrast, the language of *Brown* reflects a different understanding of *Reynolds*. Justice Powell conceded that the policy advanced by the state would not guarantee protection for any magnitude of population deviation: "Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds'* mandate of fair and effective representation if the population disparities are excessively high."[325] This language appears to be based on *Reynolds* but

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[318]394 U.S. 526.

[319]385 U.S. 440.

[320]Mahan v. Howell, 410 U.S. 315, 334, 340 (Brennan, J., dissenting).

[321]412 U.S. 735.

[322]377 U.S. at 565. *See also id.* at 579.

[323]412 U.S. at 749.

[324]*Karcher*, 462 U.S. at 730 (quoting Wesberry v. Sanders, 376 U.S. 1, 18 (1964)).

[325]*Brown*, 462 U.S. at 845.

actually sidesteps *Reynolds*' primary concern with equality.[326] The *Reynolds* Court had discussed fair and effective participation only through the mechanism of equality of voting power.[327]

The transition from strict equality to "fair and effective representation" apparently took place first in 1972 in *Gaffney v. Cummings*[328] when the court considered a Connecticut apportionment scheme. While *Reynolds* had been cast principally in terms of equal representation and equal voting power, as reflective of the constitutional clause under which the challenges were mounted, the Court in *Gaffney* made the transition in reapportionment cases to a discussion of whether the apportionment scheme provided for "fair and effective"[329] representation. Because "fair" and "equal" are not synonymous,[330] this change of language is a sign of the Court's changing attitude toward the requirements of the equal protection clause. Based on this changed focus, any guidelines that had developed were then weakened or destroyed by *Brown*. The Court in the early 1970's thus began to review the reapportionment cases with focus on the due process clause and not on the equal protection clause — on notions of fairness rather than notions of equality.

The effect of dropping the "equality" standard of *Reynolds* has been to make the Court's scrutiny a balancing test rather than a search for equality and justification for deviations from equality. Unfortunately, the transition from the Court's commitment to equality to its search for fairness has not been accompanied by standards to measure that fairness. Thus, the courts and legislatures are left, after *Brown*, to their own diverse conclusions as to what "fair and effective" representation may be. This result is another step towards confusion in apportionment, a confusion that could end in the submersion of equality.

IV. Implications

Between 1971 and 1983, the Supreme Court tended to resolve questions between the state and an individual in favor of the state. Several of the current Justices are known for their states' rights position,[331] and the direction taken in the apportionment cases suggests that greater deference will be given to state legislative bodies in dividing their territory for state legislative districts. The primary goal of equality has become burdened with more and more tangled factors that have justified deviations from pure mathematical equality.

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[326]*See supra* note 322.

[327]377 U.S. at 565.

[328]412 U.S. 735.

[329]*Id.* at 749 ("minor deviations which do not deprive one of fair and effective representation in his state legislature are not invalidated by the Equal Protection Clause").

[330]Fair means having the qualities of impartiality and honesty. Black's Law Dictionary 535 (5th ed. 1979). Equal means "on the same . . . level with." *Id.* at 481.

[331]Note, for example, National League of Cities v. Usery, 426 U.S. 833 (1976), and its progeny.

Just as more and more responsibility is being shifted to the states, it appears that the Court is preparing to slacken its commitment to individual equality of voting power. This may mean that the future will permit more state decisions made by fewer representative groups than *Reynolds* envisioned. This result is particularly disconcerting because, while *Reynolds* and even *Brown* still pose some limits to interdistrict population deviation, the disparate approaches in those cases will result in gross inconsistencies. Apportionment in many states may satisfy neither the goal of equality demanded by the federal Constitution nor the goals of individual state constitutions which regulate apportionment on a non-population basis. Therefore, both the state and federal constitutions are frustrated to varying degrees, while no rational basis exists for such a result in either constitutional documents, needs of state government, or theories of political structure. The by-product of *Brown* is the unleashing of claims for inequality that could result in irrational patterns of apportionment.

Would it not be better simply to require, as the Supreme Court does now in congressional districting, that the goal of population equality be reached as closely as practicable, regardless of county boundaries? This policy would still permit a state to honor such factors as political subdivision boundaries where convenient, but would put states under no obligation to strain to salvage those boundaries at the expense of equality. This approach would facilitate equality of voting power, support legislative freedom from federal intrusion, and minimize litigation and political infighting over the apportionment process.

The theory of *Karcher*, if applied to state legislative apportionment, would solve most of the perplexing and insoluble conflicts in state legislative apportionment law. While superficially very intrusive, a flat rule that absolute equality is the primary goal of apportionment has the simplicity that will enable a legislature to monitor its own compliance with the equal protection clause. Instead of establishing a system which requires court approval and involves court delay and antagonism every time reapportionment is carried out, a flat and simple rule would minimize the courts' future role in evaluating apportionment schemes.

While even *Reynolds* considered that there are some legitimate bases for variation among districts, the evolution of congressional apportionment cases indicates that, where a real effort is made, those variations can be fashioned to produce only minute inequalities. Permitting greater inequalities than are inherent in the measurement and quantification of population seems unnecessary given the current development of computer technology for constructing districts. Furthermore, lest such development hastens a trend to equipopulous gerrymandering, the Court should indicate its willingness to use the due process clause to develop, along the line of Justice Stevens' concurrence in *Karcher*,[332] rules to prohibit any

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[332]*See supra* text accompanying notes 59-62. *See also* Davis v. Bandemer, No. 84-

blatant attempt to dilute the effectiveness of any particular recognizable group. Just as computers can be programmed to give extraordianry gerrymanders, they can be programmed to construct completely neutral-criteria equipopulous districts. The role of the Court should be to ensure that that is done whenever feasible.

The framers of the Constitution could have selected other modes of representation other than population — and they did so under the demands for compromise.[333] When the agony of the Civil War gave birth to the equal protection clause in the fourteenth amendment and a renewed commitment to equality, however, a profound commitment to a particular kind of democracy was made. Until the Court reviews its position on state apportionment and reduces the unhealthy tension between outdated provisions of state constitutions and the commands of the equal protection clause, it can assuredly be said of America's state elections that "some voters are more equal than others."[334] Such a situation can only breed contempt for the system that fosters such inequality. It would behoove the Court to re-think its position on state level reapportionment and develop methods, where necessary, to ensure that the primary goal in apportionment in each state remains equality and that the chance for hostile division over the goals of apportionment be avoided. If this is not done, the judicial distemper which now surfaces when apportionment cases arise in the states can only increase in the years to come.

The vision of America as a country committed to equality in its Constitution is tarnished by a judicial system that permits a compromise of equality to the extent seen in *Brown*. The realities of reapportionment litigation after *Brown* suggest that tension between state and federal constitutions will allow gross inequalities of voting power based on one or many of the competing interests legitimized by *Brown*. Furthermore, that tension, along with confusing strands of legal theory and rules built up or around dicta in *Reynolds*, inhibits the orderly growth of a rational and consistent approach to apportionment under the federal Constitution. The Court's re-examination of *Brown* and an application of the strict equality standards of *Kaurcher* could eliminate the unhealthy tension and confusion experienced by state legislatures, courts, and the federal government when they are faced with state reapportionment questions.

1244 (U.S. oral argument heard Oct. 7, 1985) (decision pending).

[333]"Representatives . . . shall be apportioned among the several States . . . according to their respective Number of free persons, . . . and three fifths of all other Persons. U.S. CONST. art. I, § 2, col. 3. This was the famous compromise to mollify the slave states.

[334]*See supra* note 315.