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Karcher v. Daggett, 462 U.S. 725 (1983)

Justia Opinion Summary and Annotations

Syllabus **Case**

U.S. Supreme Court

Karcher v. Daggett, 462 U.S. 725 (1983)

Karcher v. Daggett

No. 81-2057

Argued March 2, 1983

Decided June 22, 1983

462 U.S. 725

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY

Syllabus

As a result of the 1980 census, the New Jersey Legislature reapportioned the State's congressional districts. The reapportionment plan contained 14 districts, with an average population per district of 526,059, each district, on the average, differing from the "ideal" figure by 0.1384%. The largest district (Fourth District) had a population of 527,472, and the

smallest (Sixth District) had a population of 523,798, the difference between them being 0.6984% of the average district. In a suit by a group of individuals challenging the plan's validity, the District Court held that the plan violated Art. I, § 2, of the Constitution because the population deviations among districts, although small, were not the result of a good faith effort to achieve population equality.

Held:

1. The "equal representation" standard of Art. I, § 2, requires that congressional districts be apportioned to achieve population equality as nearly as is practicable. Parties challenging apportionment legislation bear the burden of proving that population differences among districts could have been reduced or eliminated by a good faith effort to draw districts of equal population. If the plaintiffs carry their burden, the State must then bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal. *Cf. Kirkpatrick v. Preisler,* 394 U. S. 526; *White v. Weiser,* 412 U. S. 783. Pp. 462 U. S. 730-731.

2. New Jersey's plan may not be regarded *per se* as the product of a good faith effort to achieve population equality merely because the maximum population deviation among districts is smaller than the predictable undercount in available census data. Pp. 462 U. S. 731-740.

(a) The "as nearly as practicable" standard for apportioning congressional districts

"is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

Kirkpatrick, supra, at 394 U. S. 530. Only the principle of population equality as developed in *Kirkpatrick, supra,* and *Wesberry v. Sanders,* 376 U. S. 1, reflects the aspirations of Art. I, § 2. There are no *de minimis* population variations, which could practicably

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be avoided, that may be considered as meeting the standard of Art. I, § 2, without justification. Pp. 462 U. S. 731-734.

(b) There is no merit to the contention that population deviation from ideal district size should be considered to be the functional equivalent of zero as a matter of law where that deviation is less than the predictable undercount in census figures. Even assuming that the extent to which the census system systematically undercounts actual population can be precisely determined, it would not be relevant. The census count provides the only reliable -- albeit less than perfect -- indication of the districts' "real" relative population levels, and furnishes the only basis for good faith attempts to achieve population equality. Pp. 462 U. S. 735-738.

(c) The population differences involved here could have been avoided or significantly reduced with a good faith effort to achieve population equality. Resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality. Thus, the District Court did not err in finding that the plaintiffs met their burden of showing that the plan did not come as nearly as practicable to population equality. Pp. 462 U. S. 738-740.

3. The District Court properly found that the defendants did not meet their burden of proving that the population deviations in the plan were necessary to achieve a consistent, nondiscriminatory legislative policy. The State must show with specificity that a particular objective required the specific deviations in its plan. The primary justification asserted was that of preserving the voting strength of racial minority groups, but appellants failed to show that the specific population disparities were necessary to preserve minority voting strength. Pp. 462 U. S. 740-744.

535 F.Supp. 978, affirmed.

BRENNAN,J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN,STEVENS, and O'CONNOR, JJ., joined. STEVENS,J., filed a concurring opinion, *post,* p. 462 U. S. 744. WHITE,J., filed a dissenting opinion, in which BURGER, C.J., and POWELL and REHNQUIST,JJ., joined, *post,* p. 462 U. S. 765. POWELL,J., filed a dissenting opinion, *post,* p. 462 U. S. 784.

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JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this appeal is whether an apportionment plan for congressional districts satisfies Art. I, § 2, of the Constitution without need for further justification if the population of the largest district is less than one percent greater than the population of the smallest district. A three-judge District Court declared New Jersey's 1982 reapportionment plan unconstitutional on the authority of *Kirkpatrick v. Preisler,* 394 U. S. 526 (1969), and *White v. Weiser,* 412 U. S. 783 (1973), because the population deviations among districts, although small, were not the result of a good faith effort to achieve population equality. We affirm.

I

After the results of the 1980 decennial census had been tabulated, the Clerk of the United States House of Representatives notified the Governor of New Jersey that the number of Representatives to which the State was entitled had decreased from 15 to 14. Accordingly, the New Jersey Legislature was required to reapportion the State's congressional districts. The State's 199th Legislature passed two reapportionment bills. One was vetoed by the Governor, and the second, although signed into law, occasioned significant dissatisfaction among those

who felt it diluted minority voting strength in the city of Newark. *See* App. 83-84, 86-90. In response, the 200th Legislature returned to the problem of apportioning congressional districts when it convened in January, 1982, and it swiftly passed a bill (S-711) introduced by Senator Feldman, President *pro tem* of the State Senate,

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which created the apportionment plan at issue in this case. The bill was signed by the Governor on January 19, 1982, becoming Pub.L.1982, ch. 1 (hereinafter Feldman Plan). A map of the resulting apportionment is appended *infra*.

Like every plan considered by the legislature, the Feldman Plan contained 14 districts, with an average population per district (as determined by the 1980 census) of 526,059. [Footnote 1] Each district did not have the same population. On the average, each district differed from the "ideal" figure by 0.1384%, or about 726 people. The largest district, the Fourth District, which includes Trenton, had a population of 527,472, and the smallest, the Sixth District, embracing most of Middlesex County, a population of 523,798. The difference between them was 3,674 people, or 0.6984% of the average district. The populations of the other districts also varied. The Ninth District, including most of Bergen County, in the northeastern corner of the State, had a population of 527,349, while the population of the Third District, along the Atlantic shore, was only 524,825. App. 124.

The legislature had before it other plans with appreciably smaller population deviations between the largest and smallest districts. The one receiving the most attention in the District Court was designed by Dr. Ernest Reock, Jr, a political science professor at Rutgers University and Director of the Bureau of Government Research. A version of the Reock

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Plan introduced in the 200th Legislature by Assemblyman Hardwick had a maximum population difference of 2,375, or 0.4514% of the average figure. *Id.* at 133.

Almost immediately after the Feldman Plan became law, a group of individuals with varying interests, including all incumbent Republican Members of Congress from New Jersey, sought a declaration that the apportionment plan violated Art. I, § 2, of the Constitution [Footnote 2] and an injunction against proceeding with the primary election for United States Representatives under the plan. A three-judge District Court was convened pursuant to 28 U.S.C. 2284(a). The District Court held a hearing on February 26, 1982, at which the parties submitted a number of depositions and affidavits, moved for summary judgment, and waived their right to introduce further evidence in the event the motions for summary judgment were denied.

Shortly thereafter, the District Court issued an opinion and order declaring the Feldman Plan unconstitutional. Denying the motions for summary judgment and resolving the case on the record as a whole, the District Court held that the population variances in the Feldman Plan

were not "unavoidable despite a good faith effort to achieve absolute equality," *see Kirkpatrick, supra,* at 394 U. S. 531. The court rejected appellants' argument that a deviation lower than the statistical imprecision of the decennial census was "the functional equivalent of mathematical equality." *Daggett v. Kimmelman,* 535 F.Supp. 978, 982-983 (NJ 1982). It also held that appellants had failed to show that the population variances were justified by the legislature's purported goals of preserving minority

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voting strength and anticipating shifts in population. *Ibid.* The District Court enjoined appellants from conducting primary or general elections under the Feldman Plan, but that order was stayed pending appeal to this Court, 455 U. S. 1303 (1982) (BRENNAN, J., in chambers), and we noted probable jurisdiction, 457 U.S. 1131 (1982).

II

Article I, § 2, establishes a "high standard of justice and common sense" for the apportionment of congressional districts: "equal representation for equal numbers of people." *Wesberry v. Sanders,* 376 U. S. 1, 376 U. S. 18 (1964). Precise mathematical equality, however, may be impossible to achieve in an imperfect world; therefore, the "equal representation" standard is enforced only to the extent of requiring that districts be apportioned to achieve population equality "as nearly as is practicable." *See id.* at 7-8, 18. As we explained further in *Kirkpatrick v. Preiser:*

"[T]he 'as nearly as practicable' standard requires that the State make a good faith effort to achieve precise mathematical equality. *See Reynolds v. Sims,* 377 U. S. 533, 377 U. S. 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."

394 U.S. at 394 U. S. 530-531. Article I, § 2, therefore,

"permits only the limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown."

Id. at 394 U. S. 531. *Accord, White v. Weiser,* 412 U.S. at 412 U. S. 790.

Thus, two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging apportionment legislation

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must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided, the apportionment scheme must be upheld. If, however, the plaintiffs can

establish that the population differences were not the result of a good faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal. *Kirkpatrick,* 394 U.S. at 394 U. S. 532; *cf. Swann v. Adams,* 385 U. S. 440, 385 U. S. 443-444 (1967).

III

Appellants' principal argument in this case is addressed to the first question described above. They contend that the Feldman Plan should be regarded *per se* as the product of a good faith effort to achieve population equality because the maximum population deviation among districts is smaller than the predictable undercount in available census data.

A

Kirkpatrick squarely rejected a nearly identical argument.

"The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

394 U.S. at 394 U. S. 530; *see White v. Weiser, supra,* at 412 U. S. 790, n. 8, and 412 U. S. 792-793. Adopting any standard other than population equality, using the best census data available, *see* 394 U.S. at 394 U. S. 532, would subtly erode the Constitution's ideal of equal representation. If state legislators knew that a certain *de minimis* level of population differences was acceptable, they would doubtless strive to achieve that level, rather than equality. [Footnote 3] *Id.* at

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493 U. S. 531. Furthermore, choosing a different standard would import a high degree of arbitrariness into the process of reviewing apportionment plans. *Ibid.* In this case, appellants argue that a maximum deviation of approximately 0.7% should be considered *de minimis.* If we accept that argument, how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?

Any standard, including absolute equality, involves a certain artificiality. As appellants point out, even the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed. Yet problems with the data at hand apply equally to any population-based standard we could choose. [Footnote 4] As between two standards -- equality or something less than equality -- only the former reflects the aspirations of Art. I, § 2.

To accept the legitimacy of unjustified, though small, population deviations in this case would mean to reject the basic premise of *Kirkpatrick* and *Wesberry.* We decline appellants' invitation to go that far. The unusual rigor of their standard has been noted several times.

Because of that rigor, we have required that absolute population equality be the paramount objective of apportionment only in the case of

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congressional districts, for which the command of Art. I, § 2, as regards the National Legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures, but we have not questioned the population equality standard for congressional districts. *See, e.g., White v. Weiser,* 412 U.S. at 412 U. S. 793; *White v. Regester,* 412 U. S. 755, 412 U. S. 763 (1973); *Mahan v. Howell,* 410 U. S. 315, 410 U. S. 321-323 (1973). The principle of population equality for congressional districts has not proved unjust or socially or economically harmful in experience. *Cf. Washington v. Dawson & Co.,* 264 U. S. 219, 264 U. S. 237 (1924) (Brandeis, J., dissenting); B. Cardozo, The Nature of the Judicial Process 150 (1921). If anything, this standard should cause less difficulty now for state legislatures than it did when we adopted it in *Wesberry.* The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has. [Footnote 5] Finally, to abandon unnecessarily a clear and oft-confirmed constitutional interpretation would impair our authority in other cases, *Florida Dept. of Health v. Florida Nursing Home Assn.,* 450 U. S. 147, 450 U. S. 153-154 (1981) (STEVENS, J., concurring); *Pollock v. Farmers' Loan & Trust Co.,* 157 U. S. 429, 157 U. S. 652 (1895) (White, J., dissenting), would implicitly open the door to a plethora of requests that we reexamine other rules that some may consider

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burdensome, Cardozo, *supra,* at 149-150, and would prejudice those who have relied upon the rule of law in seeking an equipopulous congressional apportionment in New Jersey, *see Florida Nursing Home Assn., supra,* at 450 U. S. 154 (STEVENS, J., concurring). We thus reaffirm that there are no *de minimis* population variations which could practicably be avoided but which nonetheless meet the standard of Art. I, Sec. 2 without justification. [Footnote 6]

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B

The sole difference between appellants' theory and the argument we rejected in *Kirkpatrick* is that appellants have proposed a *de minimis* line that gives the illusion of rationality and predictability: the "inevitable statistical imprecision of the census." They argue:

"Where, as here, the deviation from ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero."

Brief for Appellants 18. There are two problems with this approach. First, appellants concentrate on the extent to which the census systematically undercounts actual population -- a figure which is not known precisely and which, even if it were known, would not be relevant to this case. Second, the mere existence of statistical imprecision does not make small deviations among districts the functional equivalent of equality.

In the District Court and before this Court, appellants rely exclusively on an affidavit of Dr. James Trussell, a Princeton University demographer. *See* App. 97-104. Dr. Trussell's carefully worded statement reviews various studies of the undercounts in the 1950, 1960, and 1970 decennial censuses, and it draws three important conclusions: (1) "the undercount in the 1980 census is likely to be above one percent"; (2) "all the evidence to date indicates that all places are not undercounted to the same extent, since the undercount rate has been shown to depend on race, sex, age, income, and education"; and (3) "[t]he distribution of the undercount in New Jersey is . . . unknown, and I see no reason to believe that it would be uniformly spread over all municipalities." *Id.* at 103-104. Assuming for purposes of argument that each of

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these statements is correct, they do not support appellants' argument.

In essence, appellants' one percent benchmark is little more than an attempt to present an attractive *de minimis* line with a patina of scientific authority. Neither Dr. Trussell's statement nor any of appellants' other evidence specifies a precise level for the undercount in New Jersey, and Dr. Trussell's discussion of the census makes clear that it is impossible to develop reliable estimates of the undercount on anything but a nationwide scale. *See id.* at 98-101. His conclusion that the 1980 undercount is "likely to be above one percent" seems to be based on the undercounts in previous censuses and a guess as to how well new procedures adopted in 1980 to reduce the undercount would work. Therefore, if we accepted appellants' theory that the national undercount level sets a limit on our ability to use census data to tell the difference between the populations of congressional districts, we might well be forced to set that level far above one percent when final analyses of the 1980 census are completed. [Footnote 7]

As Dr. Trussell admits, *id.* at 103, the existence of a one percent undercount would be irrelevant to population deviations among districts if the undercount were distributed evenly among districts. The undercount in the census affects the accuracy of the *deviations* between districts only to the extent that the undercount varies from district to district. For a one percent undercount to explain a one percent deviation between the census populations of two districts, the undercount in the smaller district would have to be approximately three times as large as the undercount in the larger

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district. [Footnote 8] It is highly unlikely, of course, that this condition holds true, especially since appellants have utterly failed to introduce evidence showing that the districts were designed to compensate for the probable undercount. Dr. Trussell's affidavit states that the rate of undercounting may vary from municipality to municipality, but it does not discuss by how much it may vary, or to what extent those variations would be reflected at the district level, with many municipalities combined. Nor does the affidavit indicate that the factors associated with the rate of undercounting -- race, sex, age, etc. -- vary from district to district, or (more importantly) that the populations in the smaller districts reflect the relevant factors more than the populations in the larger districts. [Footnote 9] As Dr. Trussell admits, the distribution of the undercount in New Jersey is completely unknown. Only by bizarre coincidence could the systematic undercount in the

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census bear some statistical relationship to the districts drawn by the Feldman Plan.

The census may systematically undercount population, and the rate of undercounting may vary from place to place. Those facts, however, do not render meaningless the differences in population between congressional districts, as determined by uncorrected census counts. To the contrary, the census data provide the only reliable -- albeit less than perfect -- indication of the districts'"real" relative population levels. Even if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one *can* say with certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size. That certainty is sufficient for decisionmaking. *Cf. City of Newark v. Blumenthal,* 457 F.Supp. 30, 34 (DC 1978). Furthermore, because the census count represents the "best population data available," *see Kirkpatrick,* 394 U.S. at 394 U. S. 528, it is the only basis for good faith attempts to achieve population equality. Attempts to explain population deviations on the basis of flaws in census data must be supported with a precision not achieved here. *See id.* at 394 U. S. 535.

C

Given that the census-based population deviations in the Feldman Plan reflect real differences among the districts, it is clear that they could have been avoided or significantly reduced with a good faith effort to achieve population equality. For that reason alone, it would be inappropriate to accept the Feldman Plan as "functionally equivalent" to a plan with districts of equal population.

The District Court found that several other plans introduced in the 200th Legislature had smaller maximum deviations than the Feldman Plan. 535 F.Supp. at 982. *Cf. White v. Weiser,* 412 U.S. at 412 U. S. 790, and n. 9. Appellants object that the alternative plans considered by the District Court were not comparable to the Feldman Plan, because

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their political characters differed profoundly. *See, e.g.*,App. 93-96 (affidavit of S. H. Woodson, Jr.) (arguing that alternative plans failed to protect the interests of black voters in the Trenton and Camden areas). We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, *see infra* at 462 U. S. 740-741, in which the State bears the burden of justifying the differences with particularity.

In any event, it was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick,*

"resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality."

394 U.S. at 394 U. S. 532. Starting with the Feldman Plan itself and the census data available to the legislature at the time it was enacted, *see* App. 23-34, one can reduce the maximum population deviation of the plan merely by shifting a handful of municipalities from one district to another. [Footnote 10]

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See also *Swann v. Adams,* 385 U.S. at 385 U. S. 445-446; n. 4, *supra*. Thus the District Court did not err in finding that the plaintiffs had met their burden of showing that the Feldman Plan did not come as nearly as practicable to population equality.

IV

By itself, the foregoing discussion does not establish that the Feldman Plan is unconstitutional. Rather, appellees' success in proving that the Feldman Plan was not the product of a good faith effort to achieve population equality means only that the burden shifted to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective. *White v. Weiser* demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts. *See* 412 U.S. at 412 U. S. 795-797; *cf. Upham v. Seamon,* 456 U. S. 37 (1982); *Connor v. Finch,* 431 U. S. 407, 431 U. S. 414-415 (1977). Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, *see Gomillion v. Lightfoot,* 364 U. S. 339 (1960), these are all legitimate objectives that, on a proper showing, could justify minor population deviations. *See, e.g., West Virginia Civil Liberties Union v.*

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Rockefeller, 336 F.Supp. 395, 398-400 (SD W.Va.1972) (approving plan with 0.78% maximum deviation as justified by compactness provision in State Constitution); *c&f. Reynolds v. Sims,* 377 U. S. 533, 377 U. S. 579 (1964); *Burns v. Richardson,* 384 U. S. 73, 384 U. S. 89, and n. 16 (1966). The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.

The possibility that a State could justify small variations in the census-based population of its congressional districts on the basis of some legitimate, consistently applied policy was recognized in *Kirkpatrick* itself. In that case, Missouri advanced the theory, echoed by JUSTICE WHITE in dissent, *see post* at 462 U. S. 771-772, that district-to-district differences in the number of eligible voters, or projected population shifts, justified the population deviations in that case. 394 U.S. at 394 U. S. 534-535. We rejected its arguments not because those factors were impermissible considerations in the apportionment process, but rather because of the size of the resulting deviations and because Missouri "[a]t best . . . made haphazard adjustments to a scheme based on total population," made "no attempt" to account for the same factors in all districts, and generally failed to document its findings thoroughly and apply them "throughout the State in a systematic, not an *ad hoc,* manner." *Id.* at 394 U. S. 535. [Footnote 11]

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The District Court properly found that appellants did not Justify the population deviations in this case. At argument before the District Court and on appeal in this Court, appellants emphasized only one justification for the Feldman Plan's population deviations -- preserving the voting strength of racial minority groups. [Footnote 12] They submitted affidavits from

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Mayors Kenneth Gibson of Newark and Thomas Cooke of East Orange, discussing the importance of having a large majority of black voters in Newark's Tenth District, App. 86-92, as well as an affidavit from S. Howard Woodson, Jr., a candidate for Mayor of Trenton, comparing the Feldman Plan's treatment of black voters in the Trenton and Camden areas with that of the Reock Plan, *id.* at 93-96. *See also id.* at 82-83 (affidavit of A. Karcher). The District Court found, however:

"[Appellants] have not attempted to demonstrate, nor can they demonstrate, any causal relationship between the goal of preserving minority voting strength in the Tenth District and

the population variances in the other districts. . . . We find that the goal of preserving minority voting strength in the Tenth District is not related in any way to the population deviations in the Fourth and Sixth Districts."

535 F.Supp. at 982.

Under the Feldman Plan, the largest districts are the Fourth and Ninth Districts, and the smallest are the Third and Sixth. *See supra* at 462 U. S. 728. None of these districts borders on the Tenth, and only one -- the Fourth -- is even mentioned in appellants' discussions of preserving minority voting strength. Nowhere do appellants suggest that the large population of the Fourth District was necessary to preserve minority voting strength; in fact, the deviation between the Fourth District and other districts has the effect of diluting the votes of all residents of that district, including members of racial minorities, as compared with other districts with fewer minority voters. The record is completely silent on the relationship between preserving minority voting

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strength and the small populations of the Third and Sixth Districts. Therefore, the District Court's findings easily pass the "clearly erroneous" test.

V

The District Court properly applied the two-part test of *Kirkpatrick v. Preisler* to New Jersey's 1982 apportionment of districts for the United States House of Representatives. It correctly held that the population deviations in the plan were not functionally equal as a matter of law, and it found that the plan was not a good faith effort to achieve population equality using the best available census data. It also correctly rejected appellants' attempt to justify the population deviations as not supported by the evidence. The judgment of the District Court, therefore, is

Affirmed.

[Footnote 1]

Three sets of census data are relevant to this case. In early 1981, the Bureau of the Census released preliminary figures showing that the total population of New Jersey was 7,364,158. In October, 1981, it released corrected data, which increased the population of East Orange (and the State as a whole) by 665 people. Brief for Appellants 3, n. 1. All calculations in this opinion refer to the data available to the legislature -- that is, the October, 1981, figures. After the proceedings below had concluded, the Bureau of the Census made an additional correction in the population of East Orange, adding another 188 people, and bringing the total population of the State to 7,365,011. *Ibid.* Because this last correction was not available to the legislature at the time it enacted the plan at issue, we need not consider it.

[Footnote 2]

In relevant part:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . ."

* * * *

"Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers. . . ."

[Footnote 3]

There is some evidence in the record from which one could infer that this is precisely what happened in New Jersey. Alan Karcher, Speaker of the Assembly, testified that he had set one-percent maximum deviation as the upper limit for any plans to be considered seriously by the legislature, Record Doc. No. 41, pp. 56-58 (Karcher deposition), but there is no evidence of any serious attempt to seek improvements below the one-percent level.

[Footnote 4]

Such problems certainly apply to JUSTICE WHITE's concededly arbitrary five-percent solution, *see post* at 462 U. S. 782, apparently selected solely to avoid the embarrassment of discarding the actual result in *Kirkpatrick,* along with its reasoning. No *de minimis* line tied to actual population in any way mitigates differences identified *post* at 462 U. S. 771-772, between the number of adults or eligible, registered, or actual voters in any two districts. As discussed below, *see infra* at 462 U. S. 736-738, unless some systematic effort is made to correct the distortions inherent in census counts of total population, deviations from the norm of population equality are far more likely to exacerbate the differences between districts. If a State does attempt to use a measure other than total population or to "correct" the census figures, it may not do so in a haphazard, inconsistent, or conjectural manner. *Kirkpatrick,* 394 U.S. at 394 U. S. 534-535; *see infra* at 462 U. S. 740-741.

[Footnote 5]

Note that many of the problems that the New Jersey Legislature encountered in drawing districts with equal population stemmed from the decision, which appellees never challenged, not to divide any municipalities between two congressional districts. The entire State of New Jersey is divided into 567 municipalities, with populations ranging from 329,248 (Newark) to 9 (Tavistock Borough). *See* Brief for Appellants 36, n. 38. Preserving political subdivisions intact, however, while perfectly permissible as a secondary goal, is not a sufficient excuse for failing to achieve population equality without the specific showing described *infra* at 462 U. S. 740-741. *See Kirkpatrick v. Preisler, supra,* at 394 U. S. 533-534; *White v. Weiser,* 412 U. S. 783, 412 U. S. 791 (1973).

[Footnote 6]

JUSTICE WHITE objects that "the rule of absolute equality is perfectly compatible with *gerrymandering' of the worst sort," Wells v. Rockefeller, 394 U. S. 542, 394 U. S. 551 (1969) (Harlan, J., dissenting). Post at 462 U. S. 776. That may certainly be true to some extent: beyond requiring States to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, Kirkpatrick does little to prevent what is known as gerrymandering. See generally Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn.L.Rev. 1121, 1144-1159 (1978); cf. 394 U.S. at 394 U. S. 534, n. 4. Kirkpatrick's object, achieving population equality, is far less ambitious than what would be required to address gerrymandering on a constitutional level.*

In any event, the additional claim that *Kirkpatrick* actually promotes gerrymandering (as opposed to merely failing to stop it) is completely empty. A federal principle of population equality does not prevent any State from taking steps to inhibit gerrymandering, so long as a good faith effort is made to achieve population equality as well. *See, e.g.,* Colo. Const. Art. V, § 47 (guidelines as to compactness, contiguity, boundaries of political subdivisions, and communities of interest); Mass.Const., Amended Art. CI, 1 (boundaries); N.Y.Elec.Law 4-100 (2) (McKinney 1978) (compactness and boundaries).

JUSTICE WHITE further argues that the lack of a *de minimis* rule encourages litigation and intrusion by federal courts into state affairs. *Post* at 462 U. S. 777-778. It cannot be gainsaid that the *de minimis* rule he proposes would have made litigation in this case unattractive. But experience proves that cases in which a federal court is called upon to invalidate an existing apportionment, and sometimes to substitute a court-ordered plan in its stead, frequently arise not because a newly enacted apportionment plan fails to meet the test of *Kirkpatrick,* but because partisan politics frustrate the efforts of a state legislature to enact a new plan after a recent census has shown that the existing plan is grossly malapportioned. *See, e.g., Carstens v. Lamm,* 543 F.Supp. 68 (Colo.1982); *Shayer v. Kirkpatrick,* 541 F.Supp. 922 (WD Mo.), *summarily aff'd,* 456 U.S. 966 (1982); *O'Sullivan v. Brier,* 540 F.Supp. 1200 (Kan.1982); *Donnelly v. Meskill,* 345 F.Supp. 962 (Conn.1972); *David v. Cahill,* 342 F.Supp. 463 (NJ 1972); *Skolnick v. State Electoral Board of Illinois,* 336 F.Supp. 839 (ND Ill.1971).

[Footnote 7]

See generally J. Passel, J. Siegel, & J. Robinson, Coverage of the National Population in the 1980 Census, by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis (Nov.1981) (Record Doc. No. 31) (hereinafter Passel). Estimates for the national undercount in previous censuses range from 2.5% to 3.3%. *See, e.g.,* Panel on Decennial Census Plans, Counting the People in 1980: An Appraisal of Census Plans 2 (Nat.Acad.Sciences 1978).

[Footnote 8]

As an example, assume that in a hypothetical State with two congressional districts District A has a population of 502,500, and District B has a population of 497,500. The deviation between them is 5,000, or one percent of the mean. If the statewide undercount is also one percent, and it is distributed evenly between the two districts, District A will have a "real" population of 507,525, and District B will have a "real" population of 502,475. The deviation between them will remain one percent. Only if three-fourths of the uncounted people in the State live in District B will the two districts have equal populations. If three-fourths of the uncounted people happen to live in District A, the deviation between the two districts will increase to 1.98%.

[Footnote 9]

For instance, it is accepted that the rate of undercount in the census for black population on a nationwide basis is significantly higher than the rate of undercount for white population. *See generally* Passel 9-20. Yet the census population of the districts in the Feldman Plan is unrelated to the percentage of blacks in each district. The Fourth District, for instance, is the largest district in terms of population, 0.268% above the mean; it has a 17.3% black population, App. 94. The First District is 14.6% black, *id.* at 96, and it is almost exactly average in overall population. The undercount in any particular district cannot be predicted only from the percentage of blacks in the district, but to the extent that blacks are not counted, the undercount would be more severe in the Fourth District than in the relatively less populous First District.

[Footnote 10]

According to the population figures used by Dr. Reock, the following adjustments to the Feldman Plan as enacted in Pub.L.1982, ch. 1, would reduce its maximum population variance to 0.449%, somewhat lower than the version of the Reock Plan introduced in the legislature: to the Fifth District, add Oakland and Franklin Lakes (from the Eighth District), and Hillsdale, Woodcliff Lake, and Norwood (from the Ninth District). To the Sixth District, add North Brunswick (from the Seventh District). To the Seventh District, add Roosevelt (from the Fourth District), and South Plainfield and Helmetta (from the Sixth District). To the Eighth District, add Montville and Boonton Town (from the Fifth District). To the Ninth District, add River Edge and Oradell (from the Fifth District).

Some of these changes are particularly obvious. Shifting the small town of Roosevelt from the Fourth to the Seventh District brings both appreciably closer to the mean, and the town is already nearly surrounded by the Seventh District. Similarly, River Edge, Oradell, Norwood, and Montville are barely contiguous with their present districts and almost completely surrounded by the new districts suggested above. Further improvement could doubtless be accomplished with the aid of a computer and detailed census data. *See also* n 5, *supra.*

We do not, of course, prejudge the validity of a plan incorporating these changes, nor do we indicate that a plan cannot represent a good faith effort whenever a court can conceive of

minor improvements. We point them out only to illustrate that further reductions could have been achieved within the basic framework of the Feldman Plan.

[Footnote 11]

The very cases on which *Kirkpatrick* relied made clear that the principle of population equality did not entirely preclude small deviations caused by adherence to consistent state policies. *See Swann v. Adams,* 385 U. S. 440, 385 U. S. 444 (1967); *Reynolds v. Sims,* 377 U. S. 533, 377 U. S. 579 (1964). District Courts applying the *Kirkpatrick* standard have consistently recognized that small deviations could be justified. *See, e.g., Doulin v. White,* 528 F.Supp. 1323, 1330 (ED Ark.1982) (rejecting projected population shifts as justification for plan with 1.87% maximum deviation because largest district also had largest projected growth); *West Virginia Civil Liberties Union v. Rockefeller,* 336 F.Supp. 395, 398-400 (SD W.Va.1972). Furthermore, courts using the *Kirkpatrick* standard to evaluate proposed remedies for unconstitutional apportionments have often, as in *White v. Weiser,* rejected the plan with the lowest population deviation in favor of plans with slightly higher deviations that reflected consistent state policies. *See, e.g., David v. Cahill,* 342 F.Supp. 463 (NJ 1972); *Skolnick v. State Electoral Board of Illinois,* 336 F.Supp. at 842-846. A number of District Courts applying the *Kirkpatrick* test to apportionments of state legislatures, before this Court disapproved the practice in *Mahan v. Howell,* 410 U. S. 315 (1973), also understood that justification of small deviations was a very real possibility. *E.g., Kelly v. Bumpers,* 340 F.Supp. 568, 571 (ED Ark.1972), *summarily aff'd,* 413 U.S. 901 (1973); *Ferrell v. Oklahoma ex rel. Nall,* 339 F.Supp. 73, 84-85 (WD Okla.), *summarily aff'd,* 406 U.S. 939 (1972); *Sewell v. St. Tammany Parish Police Jury,* 338 F.Supp. 252, 255 (ED La.1971). The court in *Graves v. Barnes,* 343 F.Supp. 704 (WD Tex.1972) later reversed by this Court for applying *Kirkpatrick* at all, *White v. Regester,* 412 U. S. 755 (1973) characterized the inquiry required by *Kirkpatrick* as follows:

"The critical issue remains the same: has the State justified any and all variances, however small, on the basis of a consistent, rational State policy."

343 F.Supp. at 713; *see id.* at 713-716.

[Footnote 12]

At oral argument in this Court, appellants stated that the drafters of the Feldman Plan were concerned with a number of other objectives as well, namely "to preserve the cores of existing districts" and "to preserve municipal boundaries." Tr. of Oral Arg. 4, 14. *See also* Answer and Counterclaim on Behalf of Alan J. Karcher ¶ 10 (Record Doc. No. 17). Similarly, Speaker Karcher's affidavit suggests that the legislature was concerned that the Ninth District should lie entirely within Bergen County. App. 84. None of these justifications was presented to the District Court or this Court in any but the most general way, however, and the relevant question presented by appellants to this Court excludes them:

"Whether the legislative policy of preserving minority voting strength justifies small deviations from census population equality in a congressional reapportionment plan."

Brief for Appellants i. Furthermore, several plans before the legislature with significantly lower population deviations kept municipalities intact and had an all-Bergen County Ninth District. *See* App. 66-14.

JUSTICE STEVENS, concurring.

As an alternative ground for affirmance, the appellees contended at oral argument that the bizarre configuration of New Jersey's congressional districts is sufficient to demonstrate that the plan was not adopted in "good faith." This argument, as I understand it, is a claim that the district boundaries are unconstitutional because they are the product of political gerrymandering. Since my vote is decisive in this case, it seems appropriate to explain how this argument influences my analysis of the question that divides the Court. As I have previously pointed out, political gerrymandering is one species of "vote dilution" that is proscribed by the Equal Protection Clause. [Footnote 2/1] Because an adequate judicial analysis of

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a gerrymandering claim raises special problems, I shall comment at some length on the legal basis for a gerrymandering claim, the standards for judging such a claim, and their relevance to the present case.

I

Relying on Art. I, § 2, of the Constitution, as interpreted in *Wesberry v. Sanders,* 376 U. S. 1 (1964), and subsequent cases, appellees successfully challenged the congressional districting plan adopted by the New Jersey Legislature. For the reasons stated in JUSTICE BRENNAN's opinion for the Court, which I join, the doctrine of *stare decisis* requires that result. It can be demonstrated, however, that the holding in *Wesberry,* as well as our holding today, has firmer roots in the Constitution than those provided by Art. I, § 2.

The constitutional mandate contained in Art. I, § 2, concerns the number of Representatives that shall be "apportioned *among* the several States." [Footnote 2/2] The section says nothing about the composition of congressional districts *within* a State. [Footnote 2/3] Indeed, the text of that section places no restriction whatsoever on the power of any State to define the group of persons within the State who may vote for particular candidates. If a State should divide its registered voters into separate classes defined by the alphabetical order of their initials, by their age, by their period of residence in the State, or even by their political affiliation, such a classification would not be barred by the text of Art. I, § 2, even if the classes contained widely different numbers of voters.

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As Justice Harlan pointed out in his dissenting opinion in *Wesberry,* prior to the Civil War, the principle of numerical equality of representation was actually contradicted by the text of Art. I, § 2, which provided that the "whole Number of free Persons" should be counted, that certain Indians should be excluded, and that only "three-fifths of all other Persons" should be added to the total. [Footnote 2/4] In analyzing the Constitution, we cannot ignore the regrettable fact that, as originally framed, it expressly tolerated the institution of slavery. On the other hand, neither can we ignore the basic changes caused by the Civil War Amendments. They planted the roots that firmly support today's holding.

The abolition of slavery and the guarantees of citizenship and voting rights contained in the Thirteenth, Fourteenth, and Fifteenth Amendments effectively repealed Art. I, § 2's requirement that some votes be given greater weight than others. It remains true, however, that Art. I, § 2, does not itself contain any guarantee of equality of representation. The source of that guarantee must be found elsewhere. But as Justice Clark perceptively noted in his partial concurrence

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in *Wesberry* -- and as Justice Black had written earlier in his dissent in *Colegrove v. Green,* 328 U. S. 549, 328 U. S. 569 (1946) -- that guarantee is firmly grounded in the Equal Protection Clause of the Fourteenth Amendment. [Footnote 2/5] Even Justice Harlan's powerful dissent in *Wesberry* could find no flaw in that analysis.

In its review of state laws redefining congressional districts subsequent to *Wesberry v. Sanders,* the Court has not found it necessary to rely on the Equal Protection Clause. That Clause has, however, provided the basis for applying the "one person, one vote" standard to other electoral districts. *See, e.g., Baker v. Carr,* 369 U. S. 186 (1962); *Reynolds v. Sims,* 377 U. S. 533 (1964); *Avery v. Midland County,* 390 U. S. 474 (1968). Even if Art. I, § 2, were wholly disregarded, the "one person, one vote" rule would unquestionably apply to action by state officials defining congressional districts just as it does to state action defining state legislative districts. [Footnote 2/6]

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The Equal Protection Clause requires every State to govern impartially. When a State adopts rules governing its election machinery or defining electoral boundaries, those rules must serve the interests of the entire community. *See Reynolds v. Sims, supra,* at 377 U. S. 565-566. If they serve no purpose other than to favor one segment -- whether racial, ethnic, religious, economic, or political -- that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection.

In *Gomillion v. Lightfoot,* 364 U. S. 339, 364 U. S. 340 (1960), the Court invalidated a change in the city boundaries of Tuskegee, Alabama, "from a square to an uncouth twenty-eight-sided figure" excluding virtually all of the city's black voters. The Court's opinion identified the right that had been violated as a group right:

"When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens."

Id. at 364 U. S. 346. Although the Court explicitly rested its decision on the Fifteenth Amendment, the analysis in Justice Whittaker's concurring opinion -- like Justice Clark's in *Wesberry* -- is equally coherent, *see* 364 U.S. at 364 U. S. 349. Moreover, the Court has subsequently treated *Gomillion* as though it had been decided on equal protection grounds. *See Whitcomb v. Chavis,* 403 U. S. 124, 403 U. S. 149 (1971).

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Gomillion involved complete geographical exclusion of a racially identified group. But in case after case arising under the Equal Protection Clause the Court has suggested that "dilution" of the voting strength of cognizable *political* as well as racial groups may be unconstitutional. Thus, the question reserved in *Fortson v. Dorsey,* 379 U. S. 433, 379 U. S. 439 (1965), related to an apportionment scheme that might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *See also Gaffney v. Cummings,* 412 U. S. 735, 412 U. S. 751, 754 (1973); *White v. Regester,* 412 U. S. 755, 412 U. S. 765-770 (1973); *Whitcomb v. Chavis, supra,* at 403 U. S. 143-144; *Burns v. Richardson,* 384 U. S. 73, 384 U. S. 88-89 (1966). In his separate opinion in *Williams v. Rhodes,* 393 U. S. 23, 393 U. S. 39 (1968), Justice Douglas pointed out that the Equal Protection Clause protects "voting rights and political groups . . . as well as economic units, racial communities, and other entities." And in *Abate v. Mundt,* 403 U. S. 182, 403 U. S. 187 (1971), the Court noted the absence of any "built-in bias tending to favor particular political interests or geographic areas." In his dissenting opinion today, JUSTICE WHITE seems to agree that New Jersey's plan would violate the Equal Protection Clause if it "invidiously discriminated against a racial or political group." *Post* at 462 U. S. 783.

There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, *see Zobel v. Williams,* 457 U. S. 55, 457 U. S. 71 (1982) (BRENNAN, J., concurring), its protection against vote dilution cannot be confined to racial groups. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protection for other cognizable groups of voters as well. As I have previously written:

"In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders."

"From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important

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to recognize that it is the group's interest in gaining or maintaining political power that is at stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather, it is a function of numbers -- specifically the number of persons who will vote in the same way."

Mobile v. Bolden, 446 U. S. 55, 446 U. S. 88 (1980) (concurring in judgment). *See Cousins v. City Council of Chicago,* 466 F.2d 830, 851852 (CA7) (Stevens, J., dissenting), *cert. denied,* 409 U.S. 893 (1972). [Footnote 2/7]

II

Like JUSTICE WHITE, I am convinced that judicial preoccupation with the goal of perfect population equality is an inadequate method of judging the constitutionality of an apportionment plan. I would not hold that an obvious gerrymander is wholly immune from attack simply because it comes closer to perfect population equality than every competing plan. On the other hand, I do not find any virtue in the proposal to relax the standard set forth in *Wesberry* and subsequent cases, and to ignore population disparities after some arbitrarily defined threshold has been crossed. [Footnote 2/8] As one commentator

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has written:

"Logic, as well as experience, tells us. . . that there can be no total sanctuaries in the political thicket, else unfairness will simply shift from one form to another. [Footnote 2/9]"

Rather, we should supplement the population equality standard with additional criteria that are no less "judicially manageable." In evaluating equal protection challenges to districting plans, just as in resolving such attacks on other forms of discriminatory action, I would consider whether the plan has a significant adverse impact on an identifiable political group, whether the plan has objective indicia of irregularity, and then, whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole.

Until two decades ago, constrained by its fear of entering a standardless political thicket, the Court simply abstained from any attempt to judge the constitutionality of legislative apportionment plans, even when the districts varied in population from 914,053 to 112,116. *See Colegrove v. Green,* 328 U.S. at 328 U. S. 557. In *Baker v. Carr,* 369 U. S. 186 (1962), and *Reynolds v. Sims,* 377 U. S. 533 (1964), the Court abandoned that extreme form of judicial restraint and enunciated the "one person, one vote" principle. That standard is "judicially manageable" because census data are concrete and reasonably reliable and because judges can multiply and divide.

Even as a basis for protecting voters in their individual capacity, the "one person, one vote" approach has its shortcomings. Although population disparities are easily quantified, the standard provides no measure of the significance of any numerical difference. It is easy to recognize the element of

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unfairness in allowing 112,116 voters to elect one Congressman while another is elected by 914,053. But how significant is the difference between census counts of 527,472 and 523,798? Given the birth rate, the mortality rate, the transient character of modern society, and the acknowledged errors in the census, we all know that such differences may vanish between the date of the census and the date of the next election. Absolute population equality is impossible to achieve.

More important, mere numerical equality is not a sufficient guarantee of equal representation. Although it directly protects individuals, it protects groups only indirectly, at best. *See Reynolds v. Sims, supra,* at 377 U. S. 561. A voter may challenge an apportionment scheme on the ground that it gives his vote less weight than that of other voters; for that purpose, it does not matter whether the plaintiff is combined with or separated from others who might share his group affiliation. It is plainly unrealistic to assume that a smaller numerical disparity will always produce a fairer districting plan. Indeed, as Justice Harlan correctly observed in *Wells v. Rockefeller,* 394 U. S. 542, 394 U. S. 551 (1969), a standard

"of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues."

Since Justice Harlan wrote, developments in computer technology have made the task of the gerrymanderer even easier. *See post* at 462 U. S. 776 (WHITE, J., dissenting). [Footnote 2/10]

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The imperfections in the numerical standard do not, of course, render it useless. It provides one neutral criterion for evaluating a districting plan. Numerical disparities may provide sufficient basis for shifting the burden of justification to the State. Moreover, if all other

factors were in equipoise, it would be proper to conclude that the plan that most nearly attains the goal of complete equality would be the fairest plan. The major shortcoming of the numerical standard is its failure to take account of other relevant -- indeed, more important -- criteria relating to the fairness of group participation in the political process. To that extent, it may indeed be counterproductive. *See Gaffney v. Cummings,* 412 U.S. at 412 U. S. 748-749. [Footnote 2/11]

To a limited extent, the Court has taken cognizance of discriminatory treatment of groups of voters. The path the Court has sometimes used to enter this political thicket is marked by the label "intent." A finding that the majority deliberately sought to make it difficult for a minority group to elect representatives may provide a sufficient basis for holding that an objectively neutral electoral plan is unconstitutional. *See Rogers v. Lodge,* 458 U. S. 613, 458 U. S. 616-617 (1982). For reasons that I have already set forth at length, this standard is inadequate. *See id.* at 458 U. S. 642-650 (STEVENS, J., dissenting); *Mobile v. Bolden,* 446 U.S. at 446 U. S. 83 (STEVENS,J., concurring in judgment). I would not condemn a legislature's districting plan in the absence of discriminatory impact simply because its proponents were motivated, in part, by partisanship or group animus. Legislators are, after all, politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting. In the long run, constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers

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cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment. On the other hand, if a plan has a significant adverse impact upon a defined political group, an additional showing that it departs dramatically from neutral criteria should suffice to shift the task of justification to the state defendants.

For a number of reasons, this is a burden that plaintiffs can meet in relatively few cases. As a threshold matter, plaintiffs must show that they are members of an identifiable political group whose voting strength has been diluted. They must first prove that they belong to a politically salient class, *see supra* at 462 U. S. 749-750, one whose geographical distribution is sufficiently ascertainable that it could have been taken into account in drawing district boundaries. [Footnote 2/12] Second, they must prove that in the relevant district or districts or in the State as a whole, their proportionate voting influence has been adversely affected by the challenged scheme. [Footnote 2/13] Third, plaintiffs

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must make a *prima facie* showing that raises a rebuttable presumption of discrimination.

One standard method by which members of a disadvantaged political group may establish a dilution of their voting rights is by reliance on the "one person, one vote" principle, which depends on a state-wide statistical analysis. But *prima facie* evidence of gerrymandering can

surely be presented in other ways. One obvious type of evidence is the shape of the district configurations themselves. One need not use Justice Stewart's classic definition of obscenity -- "I know it when I see it" [Footnote 2/14] -- as an ultimate standard for judging the constitutionality of a gerrymander to recognize that dramatically irregular shapes may have sufficient probative force to call for an explanation. [Footnote 2/15]

Substantial divergences from a mathematical standard of compactness may be symptoms of illegitimate gerrymandering. As Dr. Ernest Reock, Jr., of Rutgers University has written:

"Without some requirement of compactness, the boundaries of a district may twist and wind their way across the map in fantastic fashion in order to absorb scattered

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pockets of partisan support. [Footnote 2/16]"

To some extent, geographical compactness serves independent values; it facilitates political organization, electoral campaigning, and constituent representation. [Footnote 2/17] A number of state statutes and Constitutions require districts to be compact and contiguous. These standards have been of limited utility, because they have not been defined and applied with rigor and precision. [Footnote 2/18] Yet Professor Reock and other scholars have set forth a number of methods of measuring compactness that can be computed with virtually the same degree of precision as a population count. [Footnote 2/19] It is true, of course, that the significance of a particular

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compactness measure may be difficult to evaluate, but as the figures in this case demonstrate, the same may be said of population disparities. In addition, although some deviations from compactness may be inescapable because of the geographical configuration or uneven population density of a particular State, [Footnote 2/20] the relative degrees of compactness of different

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district maps can always be compared. As with the numerical standard, it seems fair to conclude that drastic departures from compactness are a signal that something may be amiss.

Extensive deviation from established political boundaries is another possible basis for a *prima facie* showing of gerrymandering. As we wrote in *Reynolds v. Sims:*

"Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."

377 U.S. at 377 U. S. 578-579. [Footnote 2/21] Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in the provision of governmental services. In addition, legislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters. [Footnote 2/22] Although the significance of deviations from subdivision

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boundaries will vary with the number of legislative seats and the number, size, and shape of the State's subdivisions, the number can be counted [Footnote 2/23] and alternative plans can be compared.

A procedural standard, although obviously less precise, may also be enlightening. If the process for formulating and adopting a plan excluded divergent viewpoints, openly reflected the use of partisan criteria, and provided no explanation of the reasons for selecting one plan over another, it would seem appropriate to conclude that an adversely affected plaintiff group is entitled to have the majority explain its action. [Footnote 2/24] On the other hand, if neutral decisionmakers developed the plan on the basis of neutral criteria, if there was an adequate opportunity for the presentation and consideration of differing points of view, and if the guidelines used in selecting a plan were explained, a strong presumption of validity should attach to whatever plan such a process produced.

Although a scheme in fact worsens the voting position of a particular group, [Footnote 2/25] and though its geographic configuration or

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genesis is sufficiently irregular to violate one or more of the criteria just discussed, it will nevertheless be constitutionally valid if the State can demonstrate that the plan as a whole embodies acceptable, neutral objectives. The same kinds of justification that the Court accepts as legitimate in the context of population disparities would also be available whenever the criteria of shape, compactness, political boundaries, or decisionmaking procedures have sent up warning flags. In order to overcome a *prima facie* case of invalidity, the State may adduce "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims,* 377 U.S. at 377 U. S. 579, and may also

"show with some specificity that a particular objective requires the specific deviations in its plan, rather than simply relying on general assertions. The showing . . . is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely."

Ante at 462 U. S. 741. [Footnote 2/26]

If a State is unable to respond to a plaintiff's *prima facie* case by showing that its plan is supported by adequate neutral criteria, I believe a court could properly conclude that the challenged scheme is either totally irrational or entirely

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motivated by a desire to curtail the political strength of the affected political group. This does not mean that federal courts should invalidate or even review every apportionment plan that may have been affected to some extent by partisan legislative maneuvering. [Footnote 2/27] But I am convinced that the Judiciary is not powerless to provide a constitutional remedy in egregious cases. [Footnote 2/28]

III

In this case, it is not necessary to go beyond the reasoning in the Court's opinions in *Wesberry v. Sanders,* 376 U. S. 1 (1964), *Kirkpatrick v. Preisler,* 394 U. S. 526 (1969), and

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White v. Weiser, 412 U. S. 783 (1973), to reach the correct result. None of the additional criteria that I have mentioned would cast any doubt on the propriety of the Court's holding in this case. Although I need not decide whether the plan's shortcomings regarding shape and compactness, subdivision boundaries, and neutral decisionmaking would establish a *prima facie* case, these factors certainly strengthen my conclusion that the New Jersey plan violates the Equal Protection Clause.

A glance at the map shows district configurations well deserving the kind of descriptive adjectives -- "uncouth" [Footnote 2/29] and "bizarre" [Footnote 2/30] -- that have traditionally been used to describe acknowledged gerrymanders. I have not applied the mathematical measures of compactness to the New Jersey map, but I think it likely that the plan would not fare well. In addition, while disregarding geographical compactness, the redistricting scheme wantonly disregards county boundaries. For example, in the words of a commentator:

"In a flight of cartographic fancy, the Legislature packed North Jersey Republicans into a new district many call 'the Swan.' Its long neck and twisted body stretch from the New York suburbs to the rural upper reaches of the Delaware River."

That district, the Fifth, contains segments of at least seven counties. The same commentator described the Seventh District, comprised of parts of five counties, as tracing "a curving partisan path through industrial Elizabeth, liberal, academic Princeton and largely Jewish Marlboro

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in Monmouth County." The resulting monstrosity was called "the Fishhook" by detractors.

40 Congressional Quarterly 1193-1195 (1982). [Footnote 2/31]

Such a map prompts an inquiry into the process that led to its adoption. The plan was sponsored by the leadership in the Democratic Party, which controlled both houses of the state legislature as well as the Governor's office, and was signed into law the day before the inauguration of a Republican Governor. The legislators never formally explained the guidelines used in formulating their plan or in selecting it over other available plans. Several of the rejected plans contained districts that were more nearly equal in population, more compact, and more consistent with subdivision boundaries, including one submitted by a recognized expert, Dr. Ernest Reock, Jr., whose impartiality and academic credentials were not challenged. The District Court found that the Reock Plan "was rejected because it did not reflect the leadership's partisan concerns." *Daggett v. Kimmelman,* 535 F.Supp. 978, 982 (NJ 1982). This conclusion, which arises naturally from the absence of persuasive justifications for the rejection of the Reock Plan, is buttressed by a letter written to Dr. Reock by the Democratic Speaker of the New Jersey General Assembly. This letter frankly explained the importance to the Democrats of taking advantage of their opportunity to control redistricting after the 1980 census. The Speaker justified his own overt partisanship by describing the political considerations that had motivated the Republican majority in the adoption of district plans in New

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Jersey in the past -- and in other States at the present. [Footnote 2/32] In sum, the record indicates that the decisionmaking process leading to adoption of the challenged plan was far from neutral. It was designed to increase the number of Democrats, and to decrease the number of Republicans, that New Jersey's voters would send to Congress in future years. [Footnote 2/33] Finally, the record does not show any legitimate justifications for the irregularities in the New Jersey plan, although concededly the case was tried on a different theory in the District Court.

Because I have not made a comparative study of other districting plans, and because the State has not had the opportunity

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to offer justifications specifically directed toward the additional concerns I have discussed, I cannot conclude with absolute certainty that the New Jersey plan was an unconstitutional partisan gerrymander. But I am in full agreement with the Court's holding that, because the plan embodies deviations from population equality that have not been justified by any neutral state objective, it cannot stand. Further, if population equality provides the only check on political gerrymandering, it would be virtually impossible to fashion a fair and effective remedy in a case like this. For if the shape of legislative districts is entirely unconstrained, the dominant majority could no doubt respond to an unfavorable judgment

by providing an even more grotesque-appearing map that reflects acceptable numerical equality with even greater political inequality. If federal judges can prevent that consequence by taking a hard look at the shape of things to come in the remedy hearing, I believe they can also scrutinize the original map with sufficient care to determine whether distortions have any rational basis in neutral criteria. Otherwise, the promise of *Baker v. Carr* and *Reynolds v. Sims* -- that judicially manageable standards can assure "[f]ull and effective participation by all citizens," 377 U.S. at 377 U. S. 56 -- may never be fulfilled.

[Footnote 2/1]

See Cousins v. City Council of Chicago, 466 F.2d 830, 848-853 (CA7) (stevens, J., dissenting), *cert. denied,* 409 U.S. 893 (1972); *Mobile v. Bolden,* 446 U. S. 55, 446 U. S. 86-89 (1980) (STEVENS, J., concurring in judgment); *Rogers v. Lodge,* 458 U. S. 613, 458 U. S. 652 (1982) (STEVENS, J., dissenting).

[Footnote 2/2]

Article I, § 2, provides, in part:

"Representatives and direct Taxes shall be apportioned *among* the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

U.S.Const., Art. 1, 2, cl. 3 (emphasis supplied).

[Footnote 2/3]

During the first 50 years of our Nation's history, it was a widespread practice to elect Members of the House of Representatives as a group on a statewide basis. *Wesberry v. Sanders,* 376 U. S. 1, 376 U. S. 8 (1964).

[Footnote 2/4]

"Representatives were to be apportioned among the States on the basis of free population plus three-fifths of the slave population. Since no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I did exactly what the Court now says it prohibited: it 'weighted' the vote of voters in the slave States. Alternatively, it might have been thought that Representatives elected by free men of a State would speak also for the slaves. But since the slaves added to the representation only of their own State, Representatives from the slave States could have been thought to speak only for the slaves of their own States, indicating both that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group and that Representatives were in large degree still thought of as speaking for the whole population of a State."

Id. at 376 U. S. 27-28.

Reading a "one person, one vote" requirement into Art. I, § 2, is historically as well as textually unsound. *See* Kelly, Clio and the Court: An Illicit Love Affair, 1965 S.Ct.Rev. 119, 135-136.

[Footnote 2/5]

That Clause

"does not permit the States to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. . . . No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. The probable effect of the 1901 State Apportionment Act in the coming election will be that certain citizens, and among them the appellants, will in some instances have votes only one-ninth as effective in choosing representatives to Congress as the votes of other citizens. Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit."

Colegrove v. Green, 328 U.S. at 328 U. S. 569 (Black, J., dissenting), quoted in part in *Wesberry v. Sanders, supra,* at 19 (Clark, J., concurring in part and dissenting in part).

[Footnote 2/6]

The "one person, one vote" rule, like the Equal Protection Clause in which it is firmly grounded, provides protection against more than one form of discrimination. In the cases in which the rule was first developed, district boundaries accorded significantly less weight to individual votes in the most populous districts. But it was also clear that those boundaries maximized the political strength of rural voters and diluted the political power of urban voters. *See* A. Hacker, Congressional Districting: The Issue of Equal Representation 20-26 (1963); *see generally* Standards for Congressional Districts (Apportionment), Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 73, H.R. 575, H.R. 8266, and H.R. 8473, 86th Cong., 1st Sess., 65-90 (1959). The primary consequence of the rule has been its protection of the individual voter, but it has also provided one mechanism for identifying and curtailing discrimination against cognizable groups of voters.

[Footnote 2/7]

Similarly, the motivation for the gerrymander turns on the political strength of members of the group, derived from cohesive voting patterns, rather than on the source of their common interests. 466 F.2d at 852.

[Footnote 2/8]

The former would appear to be consistent with what the Court has written in this case, *ante* at 462 U. S. 734-735, n. 6; the latter would be consistent with what JUSTICE WHITE has

written in dissent, *post* at 462 U. S. 780-783. Either of these approaches would leave the door to unrestricted gerrymandering wide open. *See* Engstrom, The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation, 1976 Ariz.State L.J. 277, 285-286, 296; Baker, Quantitative and Descriptive Guidelines to Minimize Gerrymandering, 219 Annals N.Y.Acad.Sci. 200, 208 (1973) ("If more specific guidelines to minimize gerrymandering are not forthcoming, then a great democratic principle -- one man, one vote -- will have degenerated into a simplistic arithmetical facade for discriminatory cartography on an extensive scale").

[Footnote 2/9]

Dixon, The Court, the People, and "One Man, One Vote," in Reapportionment in the 1970s, p. 32 (N. Polsby ed.1971).

[Footnote 2/10]

Computers now make it possible to generate a large number of alternative plans, consistent with equal population guidelines and various other criteria, in a relatively short period of time, and to analyze the political characteristics of each one in considerable detail. In contrast,

"[i]n the 1970's round of reapportionment, some states were barely able to generate a single reapportionment plan in the time allotted to the task."

National Conference of State Legislatures, Reapportionment: Law and Technology 55 (June 1980); *see also* Engstrom, *supra,* n. 8, at 281-282.

[Footnote 2/11]

See Edwards, The Gerrymander and "One Man, One Vote," 46 N.Y.U.L.Rev. 879 (1971); Elliott, Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment, 37 U.Chi.L.Rev. 474, 483-488 (1970); Engstrom, *supra,* n. 8.

[Footnote 2/12]

Identifiable groups will generally be based on political affiliation, race, ethnic group, national origin, religion, or economic status, but other characteristics may become politically significant in a particular context. *See* Clinton, Further Explorations in the Political Thicket: The Gerrymander and the Constitution, 59 Iowa L.Rev. 1, 38-39 (1973) (cognizable interest group with coherent and identifiable legislative policy); Comment, Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence, 41 U.Chi.L.Rev. 398, 407-408 (1974) (clearly identifiable and stable group).

[Footnote 2/13]

The difficulty in making this showing stems from the existence of alternative strategies of vote dilution. Depending on the circumstances, vote dilution may be demonstrated if a population concentration of group members has been fragmented among districts, or if members of the group have been overconcentrated in a single district greatly in excess of the percentage needed to elect a candidate of their choice. *See Mobile v. Bolden,* 446 U.S. at 446 U. S. 91, and n. 13 (STEVENS, J., concurring in judgment); Hacker, *supra,* n. 6, at 46-50; *cf.* Note, Compensatory Racial Reapportionment, 25 Stan.L.Rev. 84, 97-100 (1972) (pointing to the shortcomings of several tests of political strength, including opportunity to cast swing votes and opportunity to elect a representative of their own group).

In litigation under the Voting Rights Act, federal courts have developed some familiarity with the problems of identifying and measuring dilution of racial group voting strength. Some of the concepts developed for statutory purposes might be applied in adjudicating constitutional claims by other types of political groups. The threshold showing of harm may be more difficult for adherents of a political party than for members of a racial group, however, because there are a number of possible baseline measures for a party's strength, including voter registration and past vote-getting performance in one or more election contests. *See generally* Backstrom, Robins, & Eller, Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 Minn.L.Rev. 1121, 1131-1139 (1978).

[Footnote 2/14]

Jacobellis v. Ohio, 378 U. S. 184, 378 U. S. 197 (1964).

[Footnote 2/15]

Professor Dixon quite properly warns against *defining* gerrymandering in terms of odd shapes. *See* R. Dixon, Democratic Representation: Reapportionment in Law and Politics 459-460 (1968). At the same time, however, he recognizes that a rule of compactness and contiguity, "if used merely to force an explanation for odd-shaped districts, can have much merit." *Id.* at 460. *See* L. Tribe, American Constitutional Law 760 (1978) (oddity of district's shape, coupled with racial distribution of the population, should shift the burden of justification to the State).

[Footnote 2/16]

Reock, Measuring Compactness as a Requirement of Legislative Apportionment, 5 Midwest J.Pol.Sci. 70, 71 (1961). *Cf.* Backstrom, Robins, & Eller, *supra,* n. 13, at 1126, 1137 (compactness standard cannot eliminate gerrymandering but may reduce the band of discretion available to those drawing district boundaries). It is, of course, possible to dilute a group's voting strength even if all districts are relatively compact. Engstrom, *supra,* n. 8, at 280.

[Footnote 2/17]

See Taylor, A New Shape Measure for Evaluating Electoral District Patterns, 67 Am.Pol.Sci.Rev. 947, 948 (1973). Compactness is not to be confused with physical area. As we stated in *Reynolds v. Sims,* 377 U. S. 533, 377 U. S. 580 (1964):

"Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing."

Nevertheless, although low population density may require geographically extensive districts, different questions are presented by the creation of districts with distorted shapes and irregular, indented boundaries.

[Footnote 2/18]

One state statute and 21 State Constitutions explicitly require that districts be compact; two state statutes and 27 Constitutions explicitly provide that districts be formed of contiguous territory. *See* Congressional Research Service, State Constitutional and Statutory Provisions Concerning Congressional and State Legislative Redistricting (June 1981). *But see* Clinton, *supra,* n. 12, at 2 (ineffective enforcement); Comment, *supra,* n. 12, at 412-413.

[Footnote 2/19]

The scholarly literature suggests a number of different mathematical measures of compactness, each focusing on different variables. One relatively simple method is to measure the relationship between the area of the district and the area of the smallest possible circumscribing circle. *See* Reock, *supra,* n. 16, at 71. This calculation is particularly sensitive to the degree of elongation of a given shape. Another simple method is to determine the ratio of a figure's perimeter to the circumference of the smallest possible circumscribing circle, a measurement that is well suited to measuring the degree of indentation. *See* Schwartzberg, Reapportionment, Gerrymanders, and the Notion of "Compactness," 50 Minn.L.Rev. 443-452 (1966). Other measures of compactness are based on the aggregate of the distances from the district's geometrical or population-weighted center of gravity to each of its points, *see* Kaiser, An Objective Method for Establishing Legislative Districts, 10 Midwest J.Pol.Sci. 200-223 (1966); Weaver & Hess, A Procedure for Nonpartisan Districting: Development of Computer Techniques, 73 Yale L.J. 288, 296-300 (1963); the degree of indentation of the boundaries of a nonconvex district, *see* Taylor, *supra,* n. 17; the aggregate length of district boundaries, *see* Common Cause, Toward a System of "Fair and Effective Representation" 54-55 (1977); Adams, Statute: A Model State Apportionment Process: The Continuing Quest for "Fair and Effective Representation," 14 Harv.J.Legis. 825, 875-876, and n. 184 (1977); Edwards, *supra,* n. 11, at 894; Walker, One Man-One Vote: In Pursuit Of an Elusive Ideal, 3 Hastings Const.L.Q. 453, 475 (1976); and the ratio of the maximum to the minimum

diameters in a district, R. Morrill, Political Redistricting and Geographic Theory 22 (1981). In each case, the smaller the measurement, the more compact the district or districts. *See also* 1980 Iowa Acts, ch. 1021, § 4b(3)c (setting forth alternative geometrical tests for determining relative compactness of alternative districting plans: the absolute value of the difference between the length and width of the district, and the "ratio of the dispersion of population about the population center of the district to the dispersion of population about the geographic center of the district").

[Footnote 2/20]

If a State's political subdivisions have oddly shaped boundaries, adhering to these boundaries may detract from geographical compactness. *See* Colo.Rev.Stat. §§ 2-2-105, 2-2-203 (1980) (legislative explanations that variations from compactness were caused by "the shape of county boundary lines, census enumeration lines, natural boundaries, population density, and the need to retain compactness of adjacent districts"); Adams,*supra,* n. 19, at 875-876, n. 184.

In addition, geographic compactness may differ from sociopolitical compactness. Baker, *supra,* n. 8, at 205. As one geographer has noted:

"In many regions, the population is uneven, perhaps strung out along roads or railroads. Travel may be easier and cheaper in some directions than in others, such that an elongated district astride a major transport corridor might in fact be the most compact in the sense of minimum travel time for a representative to travel around the district. If so, then a modified criterion, the ratio of the maximum to the minimum travel time, would be a preferred measure."

Morrill, *supra,* n.19, at 22.

[Footnote 2/21]

In *Kirkpatrick v. Preisler,* 394 U. S. 526, 394 U. S. 534, n. 4 (1969), the Court correctly noted that adherence to subdivision boundaries could not prevent gerrymandering. But there it was concerned with the State's attempt to justify population disparities by a policy of adhering to existing subdivision boundaries. My discussion here is directed toward partisan gerrymandering in a scheme with relatively equipopulous districts. To the extent that dicta in *Kirkpatrick* reject the notion that respecting subdivision boundaries will not inhibit gerrymandering, I respectfully disagree. *See* n. 26, *infra.*

[Footnote 2/22]

Morrill, *supra,* n.19, at 25.

[Footnote 2/23]

See, e.g., Mahan v. Howell, 410 U. S. 315, 410 U. S. 319, 323 (1973); Backstrom, Robins, & Eller, *supra,* n. 13, at 1145, n. 71; Morrill, *supra,* n.19, at 25. The smaller the population of a subdivision relative to the average district population, the more dubious it is to divide it among two or more districts. It is also particularly suspect to divide a particular political subdivision among more than two districts which also contain territory in other subdivisions.

[Footnote 2/24]

See, e.g., Wright v. Rockefeller, 376 U. S. 52, 376 U. S. 73-74 (1964) (Goldberg, J., dissenting); Edwards, *supra,* n. 11, at 881 (the 1961 New York congressional redistricting plan was drawn up by majority party members of a legislative committee and staff without participation by any member of the opposition party; no public hearings were held; the plan was released to the public the day before its adoption; it was approved by a straight party-line vote in a single afternoon at an extraordinary session of the legislature; and the Governor signed the bill the same day).

[Footnote 2/25]

The State may defend on the grounds that this element has not been adequately shown. For example, if the plaintiffs' challenge is based on a particular district or districts, the State may be able to show that the group's voting strength is not diluted in the State as a whole. Even if the group's voting strength has in fact been reduced, the previous plan may have been gerrymandered in its favor. *See generally* Backstrom, Robins, & Eller, *supra,* n. 13, at 1134-1137 (discussing possible standards of "fair representation").

[Footnote 2/26]

In determining whether the State has carried its burden of justification, I would give greater weight to the importance of the State's interests and the consistency with which those interests are served than to the size of the deviations. Thus, I do not share the perspective implied in the Court's discussion of purported justifications in *Kirkpatrick v. Preisler,* 394 U.S. at 394 U. S. 533-536.

[Footnote 2/27]

Given the large number of potentially affected political groups, even a neutral, justifiable plan may well change the position of some groups for the worse. In addition, some "vote dilution" will inevitably result from residential patterns, *see* Backstrom, Robins, & Eller, *supra,* n. 13, at 1127. Although the State may, of course, adduce this factor in defense of its plan, the criteria for a *prima facie* case should be demanding enough that they are not satisfied in the case of every apportionment plan. *See Mobile v. Bolden,* 446 U.S. at 446 U. S. 90 (STEVENS, J., concurring in judgment) ("the standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation than the judiciary can manage"); *id.* at 446 U. S. 93, n. 15 (quoting opinion of Justice Frankfurter in *Baker v. Carr,* 369 U. S. 186, 369 U. S. 267 (1962)).

[Footnote 2/28]

See Gomillion v. Lightfoot, 364 U. S. 339, 364 U. S. 341 (1960) (noting that allegations would "abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering"). If the Tuskegee map in *Gomillion* had excluded virtually all Republicans, rather than blacks, from the city limits, the Constitution would also have been violated. Professor Tribe gives a comparably egregious numerical hypothetical:

"For example, if a jurisdiction consisting of 540 Republicans and 460 Democrats were subdivided randomly into 10 districts, Republicans would probably be elected in six or more districts. However, if malevolent Democrats could draw district lines with precision, they might be able to isolate 100 Republicans in one district and win all the other district elections by a margin of one or two votes, thus capturing 90% of the state legislature while commanding only 46% of the popular vote."

Tribe, *supra,* n. 15, at 756, n. 2. *See* Hacker, *supra,* n. 6, at 47-50.

[Footnote 2/29]

Gomillion v. Lightfoot, supra, at 364 U. S. 339.

[Footnote 2/30]

Indeed, this very map was so described in a recent article entitled New Jersey Map Imaginative Gerrymander, appearing in the Congressional Quarterly:

"New Jersey's new congressional map is a four-star gerrymander that boasts some of the most bizarrely shaped districts to be found in the nation."

40 Congressional Quarterly 1190 (1982). A quick glance at congressional districting maps for the other 49 States lends credence to this conclusion. *See* 1983-1984 Official Congressional Directory 989-1039 (1983).

[Footnote 2/31]

The same commentator described the Thirteenth District in this manner:

In an effort to create a "dumping ground" for Republican votes troubling to Democrats Hughes and Howard, the Legislature established a 13th District that stretches all over the map, from the Philadelphia suburbs in Camden County to the New York suburbs in Monmouth County.

40 Congressional Quarterly, at 1198. At oral argument, we observed the likeness between the boundaries of yet another district -- the Fourth -- and the shape of a running back. Tr. of Oral Arg. 21.

[Footnote 2/32]

"Congressional redistricting in New Jersey must also be viewed from the more broad-based national perspective. The Republican party is only 27 votes short of absolute control of Congress. With a shift of population and consequently Congressional seats from the traditionally Democratic urban industrial states to the more Republican dominated sun-belt states, the redistricting process is viewed by Republicans as an opportunity to close that 27-vote margin, or perhaps even overcome it entirely."

535 F.Supp. at 991. Copies of the letter were sent to all Democratic legislators.

[Footnote 2/33]

Although Circuit Judge Gibbons disagreed with the holding of the District Court in this case, the concluding paragraphs of his dissenting opinion unambiguously imply that he would have no difficulty identifying this as a case in which the district lines were drawn in order to disadvantage an identifiable political group. He wrote:

"The apportionment map produced by P. L.1982, c.1 leaves me, as a citizen of New Jersey, disturbed. It creates several districts which are anything but compact, and at least one district which is contiguous only for yachtsmen. While municipal boundaries have been maintained, there has been little effort to create districts having a community of interests. In some districts, for example, different television and radio stations, different newspapers, and different transportation systems serve the northern and southern localities. Moreover the harshly partisan tone of Speaker Christopher Jackman's letter to Ernest C. Reock, Jr. is disedifying, to say the least. It is plain, as well, that partisanship produced artificial bulges or appendages of two districts so as to place the residences of Congressmen Smith and Courter in districts where they would be running against incumbents."

Id. at 984.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

This case concerns the congressional reapportionment of New Jersey. The districting plan enacted by the New Jersey Legislature and signed into law by the Governor on January 19, 1982, Pub.L.1982, ch. 1, reduced the number of congressional districts in the State from 15 to 14 as required by the 1980 census figures. The 14 congressional districts created by the legislature have an average deviation of 0.1384% and a maximum deviation between the largest and smallest districts of 0.6984%. In other words, this case concerns a

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maximum difference of 3,674 individuals in districts encompassing more than a half million people. The New Jersey plan was invalidated by a divided District Court because these population variances were not "*unavoidable despite a good faith effort to achieve absolute*

equality.'" Daggett v. Kimmelman, 535 F.Supp. 978, 982 (NJ 1982), quoting Kirkpatrick v. Preisler, 394 U. S. 526, 394 U. S. 531 (1969). Today, the Court affirms the District Court's decision, thereby striking for the first time in the Court's experience a legislative or congressional districting plan with an average and maximum population variance of under 1%.

I respectfully dissent from the Court's unreasonable insistence on an unattainable perfection in the equalizing of congressional districts. The Court's decision today is not compelled by *Kirkpatrick v. Preisler, supra,* and *White v. Weiser,* 412 U. S. 783 (1973), *see* Part I, *infra,* and if the Court is convinced that our cases demand the result reached today, the time has arrived to reconsider these precedents. In any event, an affirmance of the decision below is inconsistent with the majority's own "modifications" of *Kirkpatrick* and *White,* which require, at a minimum, further consideration of this case by the District Court. *See* 462 U. S. *infra.*

I

"[T]he achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment." *Reynolds v. Sims,* 377 U. S. 533, 565-566 (1964). One must suspend credulity to believe that the Court's draconian response to a trifling 0.6984% maximum deviation promotes "fair and effective representation" for the people of New Jersey. The requirement that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's," *Wesberry v. Sanders,* 376 U. S. 1, 376 U. S. 7-8 (1964), must be understood in light of the malapportionment in the States at the time *Wesberry* was decided. The plaintiffs in *Wesberry* were voters in a congressional district (population 823,680) encompassing Atlanta that was three

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times larger than Georgia's smallest district (272,154) and more than double the size of an average district. Because the State had not reapportioned for 30 years, the Atlanta District possessing one-fifth of Georgia's population had only one-tenth of the Congressmen. Georgia was not atypical; congressional districts throughout the country had not been redrawn for decades, and deviations of over 50% were the rule. [Footnote 3/1] These substantial differences in district size diminished, in a real sense, the representativeness of congressional elections. The Court's invalidation of these profoundly unequal districts should not be read as a demand for precise mathematical equality between the districts. Indeed, the Court sensibly observed that "it may not be possible [for the States] to draw congressional districts with mathematical precision." *Id.* at 376 U. S. 18. In *Reynolds v. Sims, supra,* at 377 U. S. 577, decided the same Term, the Court disavowed a requirement of mathematical exactness for legislative districts in even more explicit terms:

"We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

The States responded to *Wesberry* by eliminating gross disparities between congressional districts. Nevertheless, redistricting plans with far smaller variations were struck by the Court five years later in *Kirkpatrick v. Preisler, supra,* and its companion, *Wells v. Rockefeller,* 394 U. S. 542 (1969). The redistricting statutes before the Court contained total percentage deviations of 5.97% and 13.1%, respectively.

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But *Wesberry's* "as nearly as practicable" standard was read to require "a good faith effort to achieve precise numerical equality." 394 U.S. at 394 U. S. 530-531. Over the objections of four Justices, *see id.* at 394 U. S. 536 (Fortas, J., concurring); *id.* at 394 U. S. 549 (Harlan, J., joined by Stewart, J., dissenting); *id.* at 394 U. S. 553 (WHITE, J., dissenting), *Kirkpatrick* rejected the argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy the "as nearly as practicable" standard. *Kirkpatrick's* rule was applied by the Court in *White v. Weiser, supra,* to invalidate Texas' redistricting scheme which had a maximum population variance of 4.13%.

Just as *Wesberry* did not require *Kirkpatrick, Kirkpatrick* does not ineluctably lead to the Court's decision today. Although the Court stated that it could see "no nonarbitrary way" to pick a *de minimis* point, the maximum deviation in *Kirkpatrick,* while small, was more than eight times as large as that posed here. Moreover, the deviation in *Kirkpatrick* was not argued to fall within the officially accepted range of statistical imprecision of the census. Interestingly enough, the Missouri redistricting plan approved after *Kirkpatrick* contained a deviation of 0.629% -- virtually the same deviation declared unconstitutional in this case. *Preisler v. Secretary of State of Missouri,* 341 F.Supp. 1158, 1162 (WD Mo.), *summarily aff'd sub nom. Danforth v. Preisler,* 407 U.S. 901 (1972). [Footnote 3/2] Accordingly, I do not view the Court's decision today as foreordained by *Kirkpatrick* and *Weiser*. Apparently neither did JUSTICE BRENNAN who, in staying the District Court's order, wrote:

"The appeal would thus appear to present the important question whether *Kirkpatrick v. Preisler* requires adoption of the plan that achieves the most precise mathematical

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exactitude, or whether *Kirkpatrick* left some latitude for the New Jersey Legislature to recognize the considerations taken into account by it as a basis for choosing among several plans, each with arguably 'statistically insignificant' variances from the constitutional ideal of absolute precision."

455 U.S. 1303, 455 U. S. 1305 (1982).

There can be little question but that the variances in the New Jersey plan are "statistically insignificant." Although the Government strives to make the decennial census as accurate as humanly possible, the Census Bureau has never intimated that the results are a perfect count of the American population. The Bureau itself estimates the inexactitude in the taking of the 1970 census at 2.3%, [Footnote 3/3] a figure which is considerably larger than the 0.6984% maximum variance in the New Jersey plan, and which dwarfs the 0.2470% difference between the maximum deviations of the selected plan and the leading alternative plan, that suggested by Professor Reock. Because the amount of undercounting differs from district to district, there is no point for a court of law to act under an unproved assumption that such tiny differences between redistricting plans reflect actual differences in population. As Dr. James Trussel, an expert in these matters, and whose testimony the Court purports to accept, *ante* at 462 U. S. 735-736, explained:

"The distribution of the undercount in New Jersey is obviously also unknown, and I see no reason to believe that

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it would be uniformly spread over all municipalities. For these reasons, one cannot make congressional districts of truly equal size if one relies on census counts. Nor is it meaningful to rank one redistricting plan as superior to another when differences in district size are small. In my professional opinion, districts whose enumerated populations differ one from another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion."

App. 103-104.4 [Footnote 3/4]

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Even if the 0.6984% deviation here is not encompassed within the scope of the statistical imprecision of the census, it is miniscule when compared with other variations among the districts inherent in translating census numbers into citizens' votes. First, the census "is more of an event than a process." *Gaffney v. Cummings,* 412 U. S. 735, 412 U. S. 746 (1973).

"It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down."

Ibid. As the Court admits,

"the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed."

Ante at 462 U. S. 732. [Footnote 3/5] Second, far larger differences among districts are introduced because a substantial percentage of the total population is too

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young to register or is disqualified by alienage. [Footnote 3/6] Third, census figures cannot account for the proportion of all those otherwise eligible individuals who fail to register. [Footnote 3/7] The differences in the number of eligible voters per district for these reasons overwhelm the minimal variations attributable to the districting plan itself. [Footnote 3/8]

Accepting that the census, and the districting plans which are based upon it, cannot be perfect represents no backsliding in our commitment to assuring fair and equal representation in the election of Congress. I agree with the views of Judge Gibbons, who dissented in the District Court, that *Kirkpatrick* should not be read as a

"prohibition against toleration of *de minimis* population variances which have no statistically relevant effect on relative representation."

Daggett v. Kimmelman, 535 F.Supp. at 984. A plus-minus deviation of 0.6984% surely falls within this category.

If today's decision simply produced an unjustified standard with little practical import, it would be bad enough. Unfortunately, I fear that the Court's insistence that

"there are no *de minimis* population variations which could practicably be avoided but which nonetheless meet the standard of Art. I, § 2, without justification,"

ante at 462 U. S. 734, invites further litigation of virtually every congressional redistricting plan in

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the Nation. At least 12 States which have completed redistricting on the basis of the 1980 census have adopted plans with a higher deviation than that presented here, and 4 others have deviations quite similar to New Jersey's. [Footnote 3/9] Of course, under the Court's rationale, even Rhode Island's plan -- whose two districts have a deviation of 0.02% or about 95 people would be subject to constitutional attack.

In all such cases, state legislatures will be hard pressed to justify their preference for the selected plan. A good faith effort to achieve population equality is not enough if the population variances are not "unavoidable." The court must consider whether the population differences could have been further "reduced or eliminated altogether." *Ante* at 462 U. S. 730. With the assistance of computers, there will generally be a plan with an even more minimal deviation from the mathematical ideal. Then, "the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." *Ante* at 462 U. S. 731. As this case illustrates, literally any variance between districts will be considered "significant." [Footnote 3/10] The State's burden will not be easily met: "the State bears the burden of justifying

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the differences with particularity." *Ante* at 462 U. S. 739. When the State fails to sustain its burden, the result will generally be that a court must select an alternative plan. The choice will often be disputed until the very eve of an election, *see, e.g., Upham v. Seamon,* 456 U. S. 37, 456 U. S. 44 (1982) (per curiam), leaving candidates and voters in a state of confusion.

The only way a legislature or bipartisan commission can hope to avoid litigation will be to dismiss all other legitimate concerns and opt automatically for the districting plan with the smallest deviation. [Footnote 3/11] Yet no one can seriously contend that such an inflexible insistence upon mathematical exactness will serve to promote "fair and effective representation." The more likely result of today's extension of *Kirkpatrick* is to move closer to fulfilling Justice Fortas' prophecy that

"a legislature might have to ignore the boundaries of common sense, running the congressional district line down the middle of the corridor of an apartment house or even dividing the residents of a single-family house between two districts."

394 U.S. at 394 U. S. 538. Such sterile and mechanistic application only brings the principle of "one man, one vote" into disrepute.

II

One might expect the Court had strong reasons to force this Sisyphean task upon the States. Yet the Court offers

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no positive virtues that will follow from its decision. No pretense is made that this case follows in the path of *Reynolds* and *Wesberry* in insuring the "fair and effective representation" of citizens. No effort is expended to show that Art. I, § 2's requirement that Congressmen be elected "by the people," *Wesberry v. Sanders,* 376 U. S. 1 (1964), demands the invalidation of population deviations at this level. Any such absolute requirement, if it did exist, would be irreconcilable with the Court's recognition of certain justifications for population variances. *See ante* at 462 U. S. 740. Given no express constitutional basis for the Court's holding, and no showing that the objectives of fair representation are compromised by these minimal disparities, the normal course would be to uphold the actions of the legislature in fulfilling its constitutionally delegated responsibility to prescribe the manner of holding elections for Senators and Representatives. Art. I, § 4. Doing so would be in keeping with the Court's oft-expressed recognition that apportionment is primarily a matter for legislative judgment. *Upham v. Seamon, supra,* at 456 U. S. 41; *White v. Weiser,* 412 U.S. at 412 U. S. 795; *Reynolds v. Sims,* 377 U.S. at 377 U. S. 586.

"[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework. . . ."

Connor v. Finch, 431 U. S. 407, 431 U. S. 414-415 (1977).

Instead, the Court is purely defensive in support of its decision. The Court refuses to adopt any fixed numerical standard below which the federal courts would not intervene, asserting that "[t]he principle of population equality for congressional districts has not proved unjust or socially or economically harmful in experience." *Ante* at 462 U. S. 733. Of course, the *principle* of population equality is not unjust; the unreasonable *application* of this principle is the rub. Leaving aside that the principle has never been applied with the vengeance witnessed today, there are many, including myself, who take issue with the Court's self-congratulatory assumption that *Kirkpatrick* has been a success. First, a

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decade of experience with *Kirkpatrick* has shown that "the rule of absolute equality is perfectly compatible with *gerrymandering' of the worst sort." Wells v. Rockefeller, 394 U.S. at 394 U. S. 551 (Harlan, J., dissenting). With ever more sophisticated computers, legislators can draw countless plans for absolute population equality, but each having its own political ramifications. Although neither a rule of absolute equality nor one of substantial equality can, alone, prevent deliberate partisan gerrymandering, the former offers legislators a ready justification for disregarding geographical and political boundaries. I remain convinced of what I said in dissent in Kirkpatrick and Wells:*

"[Those] decisions . . . downgrade a restraint on a far greater potential threat to equality of representation, the gerrymander. Legislatures intent on minimizing the representation of selected political or racial groups are invited to ignore political boundaries and compact districts so long as they adhere to population equality among districts using standards which we know and they know are sometimes quite incorrect."

394 U.S. at 394 U. S. 555. There is now evidence that Justice Harlan was correct to predict that

"[e]ven more than in the past, district lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs."

Id. at 552. [Footnote 3/12]

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In addition to providing a patina of respectability for the equipopulous gerrymander, *Kirkpatrick's* regime assured extensive intrusion of the judiciary into legislative business.

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"[T]he [re]apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' *Burns v. Richardson,* 384 U.S. at 384 U. S. 92, is primarily a political and legislative process."

Gaffney v. Cummings, 412 U.S. at 412 U. S. 749. What we said in *Gaffney* with respect to legislative reapportionment is apropos here:

"[T]he goal of fair and effective representation [is not] furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan."

Ibid. More than a decade's experience with *Kirkpatrick* demonstrates that insistence on precise numerical equality only invites those who lost in the political arena to refight their battles in federal court. Consequently, "[m]ost estimates are that between 25 percent and 35 percent of current house district lines were drawn by the Courts." American Bar Association, Congressional Redistricting 20 (1981). As I have already noted, by extending *Kirkpatrick* to deviations below even the 1% level, the redistricting plan in every State with more than a single Representative is rendered vulnerable to after-the-fact attack by anyone with a complaint and a calculator.

The Court ultimately seeks refuge in *stare decisis.* I do not slight the respect that doctrine is due, *see, e.g., 412 U. S.*

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Weiser, 412 U. S. 783 (1973), but is it not at least ironic to find *stare decisis* invoked to protect *Kirkpatrick* as the Court itself proceeds to overrule other holdings in that very decision? In *Kirkpatrick,* the Court squarely rejected the argument that slight variances in district size were proper in order to avoid fragmenting political subdivisions:

"[W]e 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."

394 U.S. at 394 U. S. 533-534. [Footnote 3/13] Several pages later, the Court rejected in equally uncategorical terms the idea that variances may be justified in order to make districts more compact. *Id.* at 394 U. S. 535-536. "A State's preference for pleasingly shaped districts," the Court concluded, "can hardly justify population variances." *Id.* at 394 U. S. 536. In Justice Fortas' words, the *Kirkpatrick* Court "reject[s], *seriatim,* every type of justification that has been -- possibly, every one that could be advanced." *Id.* at 394 U. S. 537.

Yet today the Court -- with no mention of the contrary holdings in *Kirkpatrick,* opines:

"Any number of consistently applied legislative policies might justify some variance, including for instance, making districts compact, respecting municipal boundaries,

preserving the cores of prior districts, and avoiding contests between incumbent Representatives.

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Ante at 462 U. S. 740. I, of course, welcome the Court's overruling of these ill-considered holdings of *Kirkpatrick*. There should be no question but that state legislatures may account for political and geographic boundaries in order to preserve traditional subdivisions and achieve compact and contiguous districts. JUSTICE STEVENS recognizes that courts should"

"give greater weight to the importance of the State's interests and the consistency with which those interests are served than to the size of the deviations."

Ante at 462 U. S. 760, n. 26. Thus, a majority of the Court appears ready to apply this new standard "with a strong measure of deference to the legitimate concerns of the State." *Post* at 462 U. S. 785, n. 1 (POWELL, J., dissenting).

In order that legislatures have room to accommodate these legitimate noncensus factors, a range of *de minimis* population deviation, like that permitted in the legislative reapportionment cases, is required. The Court's insistence that every deviation, no matter how small, be justified with specificity discourages legislatures from considering these "legitimate" factors in making their plans, lest the justification be found wanting, the plan invalidated, and a judicially drawn substitute put in its place. Moreover, the requirement of precise mathematical equality continues to invite those who would bury their political opposition to employ equipopulous gerrymanders. A *de minimis* range would not preclude such gerrymanders, but would at least force the political cartographer to justify his work on its own terms.

III

Our cases dealing with state legislative apportionment have taken a more sensible approach. We have recognized that certain small deviations do not, in themselves, ordinarily constitute a *prima facie* constitutional violation. *Gaffney v. Cummings,* 412 U. S. 735 (1973); *White v. Regester,* 412 U. S. 755 (1973). Moreover, we have upheld plans with reasonable variances that were necessary to account for political

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subdivisions, *Mahan v. Howell,* 410 U. S. 315 (1973), to preserve the voting strength of minority groups, and to insure political fairness, *Gaffney v. Cummings, supra*. What we held in *Gaffney v. Cummings* for legislative apportionment is fully applicable to congressional redistricting:

"'[T]he achieving of fair and effective representation for all citizens is' . . . a vital and worthy goal, but surely its attainment does not, in any common sense way, depend upon eliminating

the insignificant population variations involved in this case. Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among district populations. . . . An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement."

412 U.S. at 412 U. S. 748-749.

Bringing together our state legislative and congressional cases does not imply overlooking relevant differences between the two. States normally draw a larger number of legislative districts, which accordingly require a greater margin to account for geographical and political boundaries. "[C]ongressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts." *White v. Weiser,* 412 U.S. at 412 U. S. 793. Furthermore, because congressional districts are generally much larger than state legislative districts, each percentage point of variation represents a commensurately greater number of people. But these are differences of degree. They suggest that the level at which courts should entertain challenges to districting plans, absent unusual circumstances, should be lower in the

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congressional cases, but not altogether nonexistent. [Footnote 3/14] Although I am not wedded to a precise figure, in light of the current range of population deviations, a 5% cutoff appears reasonable. I would not entertain judicial challenges, absent extraordinary circumstances, where the maximum deviation is less than 5%. Somewhat greater deviations, if rationally related to an important state interest, may also be permissible. [Footnote 3/15] Certainly, the maintaining of compact, contiguous districts, the respecting of political subdivisions, and efforts to assure political fairness, *e.g., Gaffney v. Cummings, supra,* constitute such interests.

I would not hold up New Jersey's plan as a model reflection of such interests. Nevertheless, the deviation involved here is *de minimis,* and, regardless of what other infirmities the

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plan may have, constitutional or otherwise, there is no violation of Art. I, § 2 -- the sole issue before us. It would, of course, be a different matter if appellees could demonstrate that New Jersey's plan invidiously discriminated against a racial or political group. *See White v. Regester, supra; Gaffney v. Cummings, supra,* at 412 U. S. 751-754; *Whitcomb v. Chavis,* 403 U. S. 124 (1971); *Gomillion v. Lightfoot,* 364 U. S. 339 (1960).

IV

Even if the Court's view of the law were correct, its disposition of the case is not. At a minimum, the Court should vacate the decision of the District Court and remand for further consideration. As previously indicated, the Court finally recognizes today that considerations such as respecting political subdivisions and avoiding contests between incumbent Representatives might justify small population variances. Indeed, the Court indicates that "any number of consistently applied legislative policies" might do so. *Ante* at 462 U. S. 740. There is evidence in the record to suggest that the New Jersey Legislature was concerned with such considerations. [Footnote 3/16] The Court itself notes:

"many of the problems that the New Jersey Legislature encountered in drawing districts with equal population stemmed from the decision . . . not to divide any municipalities between two congressional districts."

Ante at 462 U. S. 733, n. 5. But even if there were no evidence in the record, the State should be given a chance to defend its plan on this basis. Surely, the Court cannot rely on the fact that appellants have advanced only one justification for the plan's population deviations -- preserving the voting strength of racial minority groups. Relying on *Kirkpatrick* and *White v. Weiser, supra,* appellants no doubt concluded that other justifications were foreclosed, and that the introduction of such proof would be futile.

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[Footnote 3/1]

By 1962, 35 out of 42 States had variances among their districts of over 100,000. *Wesberry v. Sanders,* 376 U. S. 1, 376 U. S. 20-21 (1964) (Harlan, J. dissenting). The Court has recognized the significance of the fact that "enormous variations" in district size were at issue in the early legislative apportionment cases. *Gaffney v. Cummings,* 412 U. S. 735, 412 U. S. 744, and n. 9 (1973)

[Footnote 3/2]

District Courts have upheld or selected plans with similar deviations. *See, e.g., Doulin v. White,* 535 F.Supp. 450, 451 (ED Ark.1982) (court ordered implementation of plan with 0.78% deviation despite alternative plan with deviation of 0.13%).

[Footnote 3/3]

U.S. Bureau of the Census, Users' Guide, 1980 Census of Population and Housing 100 (Mar.1982). The National Academy of Sciences has estimated that the national undercount in the 1970 census was 2.5%. Panel on Decennial Census Plans, Counting the People in 1980: An Appraisal of Census Plans 2 (1978). One estimate is that the undercount error in the 1980 census is likely to be more than 2 million people nationwide, App. 103 (Dr. Trussel), and may

be as high as 5 million. J. Passel, J. Siegel, & J. Robinson, Coverage of the National Population in the 1980 Census, by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis (Nov.1981) (Record Doc. No. 31).

[Footnote 3/4]

The Court, after professing to "[a]ssum[e] for purposes of argument that each of [Dr. Trussel's] statements is correct," *ante* at 462 U. S. 735-736, proceeds in the following paragraph to denigrate his calculation as guesswork because the margin of statistical imprecision, *i.e.*, the undercounting of persons, cannot be known precisely. The failure to quantify uncertainty exactly does not excuse pretending that it does not exist. When the question is whether the range of error is 1% or 2% or 2.5% and the deviation at hand is no larger than 0.6984%, the question is more academic than practical. Moreover, if a fixed benchmark were required, the margin of error officially recognized by the Census Bureau -- last estimated at 2.3% -- could easily be selected.

The Court also makes much of the fact that the precise amount of variation in undercounting among districts cannot be known with certainty. The relevant point, however, is that these district-to-district variances make it impossible to determine with statistical confidence whether opting for the plan with the smallest maximum deviation is ameliorating or aggravating actual equality of population among the districts. In addition, the count of individuals per district depends upon the Census Bureau's selection of geographic boundaries by which to group data.

"Data from the 1980 census have been compiled for congressional districts by equating component census geographic areas to each district and summing all data for areas coded to the district. Where the smallest census geographic area was split by a congressional district boundary, the census maps for the area were reviewed to determine in which district the majority of the population fell, and the entire area was coded to that district."

U.S. Bureau of Census, Congressional Districts of the 98th Congress A-1 (1983) (preliminary draft). Thus, completely aside from undercounting effects, it is obvious that even absolute numerical equality between the census figures for congressional districts does not reflect districts of equal size.

Finally, the Court dismisses the entire concept of statistical error with the sophistic comment that,

"[e]ven if one cannot say with certainty that one district is larger than another merely because it has a higher census count, one *can* say with certainty that the district with a larger census count is more likely to be larger than the other district than it is to be smaller or the same size."

Ante at 462 U. S. 738. The degree of that certainty, however, is speculative. The relevant consideration is not whether District Four is larger than District Six, but how much larger,

and, how much less larger under the selected plan *vis-a-vis* an alternative plan. Moreover, variable undercounting and differences between census units and district lines may result in other districts having higher maximum deviations.

The general point is that, when the numbers become so small, it makes no sense to concentrate on ever finer gradations when one cannot even be certain whether doing so increases or decreases actual population variances.

[Footnote 3/5]

In New Jersey, for example, population growth during the 1970's enlarged some districts by up to 26%, while other congressional districts lost up to 8.7% of their 1970 population. U.S. Bureau of Census, Congressional Districts of the 98th Congress 32-3 (1983). *See also Gaffney v. Cummings,* 412 U.S. at 412 U. S. 746, n. 11.

JUSTICE STEVENS makes the same point.

"Given the birth rate, the mortality rate, the transient character of modern society, and the acknowledged errors in the census, we all know that such differences may vanish between the date of the census and the date of the next election. Absolute population equality is impossible to achieve."

Ante at 462 U. S. 752 (concurring opinion).

[Footnote 3/6]

In New Jersey, for example, the population 18 years old and over differs significantly among the congressional districts. In 1978, District 10 had but 282,000 such individuals, while District 2 had 429,000. U.S. Bureau of Census, State and Metropolitan Area Data Book 549 (1979). *See also Gaffney v. Cummings, supra,* at 412 U. S. 747, n. 13.

[Footnote 3/7]

Throughout the Nation, approximately 71% of the voting age population registers to vote. U.S. Bureau of Census, State and Metropolitan Area Data Book 567 (1982).

[Footnote 3/8]

As a result of all these factors, as well as the failure of many registered voters to cast ballots, the weight of a citizen's vote in one district is inevitably different from that in others. For example, the total number of votes cast in the 1982 New Jersey congressional races differed significantly between districts, ranging from 92,852 in District 10 to 186,879 in District 9. 41 Congressional Quarterly 391 (1983).

[Footnote 3/9]

States with larger deviations are Indiana (2.96%); Alabama (2.45%); Tennessee (2.40%); Georgia (2.00%); Virginia (1.81%); North Carolina (1.76%); New York (1.64%); Kentucky (1.39%); Washington (1.30%); Massachusetts (1.09%); New Mexico (0.87%); Arkansas (0.78%). States with similar maximum deviations are Ohio (0.68%); Nevada (0.60%); Oklahoma (0.58%); West Virginia (0.49%). Council of State Governments & National Conference of State Legislatures, 1 Reapportionment Information Update 6-7 (Nov. 12, 1982).

[Footnote 3/10]

The Court's language suggests that not only must the maximum variance in a plan be supported, but that also every deviation from absolute equality must be so justified. *Ante* at 462 U. S. 740. Consider the staggering nature of the burden imposed: each population difference between any two districts in a State must be justified, apparently even if none of the plans before the legislature or commission would have reduced the difference. *See* n. 11, *infra*.

[Footnote 3/11]

Even by choosing the plan with the smallest deviation, a legislature or commission cannot be assured of avoiding constitutional challenge. In this case the Court does not find that the 0.6984% deviation was avoidable because there were other plans before the New Jersey Legislature with smaller maximum variations. Nor does the Court counter appellants' position, supported by evidence in the record, that these alternative plans had other disqualifying faults. Instead, the Court tries its own hand at redistricting New Jersey, and concludes that, by moving around 13 New Jersey subdivisions, the maximum deviation could be reduced to 0.449%. *Ante* at 462 U. S. 739-740, n. 10. The message for state legislatures is clear: it is not enough that the chosen plan be superior to any actual plans introduced as alternatives, the plan must also be better than any conceivable alternative a federal judge can devise.

[Footnote 3/12]

Unlike population deviations, political gerrymandering does not lend itself to arithmetic proof. Nevertheless, after reviewing the recent redistricting throughout the country, one commentator offered the following assessment:

"The nobly aimed 'one-man, one-vote' principle is coming into increasing use as a weapon for state legislators bent on partisan gerrymandering. From California to New Jersey and points in between, Republicans and Democrats alike are justifying highly partisan remaps by demonstrating respect for the 1964 Supreme Court mandate that population of congressional districts within states must be made as equal as possible. Meanwhile, other interests at stake in redistricting -- such as the preservation of community boundaries and the grouping of constituencies with similar concerns -- are being brushed aside. . . . The emphasis on one-man, one-vote not only permits gerrymandering, it encourages it. In many states, it is

impossible to approach population equality without crossing city, county and township lines. Once the legislature recognizes that move must be made, it is only a short step further to the drawing of a line that dances jaggedly through every region of the state. Local interests, informed that it is no longer legally permissible to draw a whole-county congressional map in most states, are far less likely to object than they were in the past. . . . The court's decision to reject a tiny deviation in favor of an even smaller one may further encourage the hairsplitting numbers game that has given rise to partisan gerrymanders all over the country."

Congressional Quarterly, Inc., State Politics and Redistricting 1-2 (1982). *See also* Engstrom, The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation, 1976 Ariz.State L.J. 277, 278 ("Not only has the Court failed to develop effective checks on the practice of gerrymandering, but, in pursuing the goal of population equality to a point of satiety, it has actually facilitated that practice"); Baker, One Man, One Vote, and "Political Fairness," 23 Emory L.J. 701, 710 (1974) (hereafter Baker) ("Priority was typically given to miniscule population variations at the expense of any recognition of political subdivisions. Charges of partisan gerrymandering were more widespread than in past decades for two major reasons: the extent of redistricting activity among all fifty states, and the lack of emphasis on former norms of compactness and adherence to local boundary lines").

In the eyes of some commentators, the experience of New York in the aftermath of *Wells v. Rockefeller* is instructive.

"Subsequent congressional districting in New York became a possible prototype for the 'equal-population gerrymander.' Whereas the former district pattern nullified by the Supreme Court had been the result of bipartisan compromise with each major party controlling one house, by 1970, the Republicans held both legislative houses, as well as the governorship. The assistant counsel to the senate majority leader (and chief coordinator of the redistricting) candidly remarked: 'The Supreme Court is just making gerrymandering easier than it used to be.' Not only was New York City subjected to major cartographic surgery, but upstate cities were also fragmented, with portions being joined to suburban and rural areas in an attempt to dilute concentrations of Democrats."

Baker, at 712-713. Yet, under the new plan, no district deviated by more than than 490 persons from the average, and the configuration of district boundaries revealed generally compact and contiguous contours. Baker, Gerrymandering: Privileged Sanctuary or Next Judicial Target?, in Reapportionment in the 1970s, p. 138 (N. Polsby ed.1971). Ironically, David Wells, the plaintiff who successfully challenged the former district pattern, returned to federal court in February, 1970, to ask if the old plan could be restored. *See* Dixon, "One Man, One Vote -- What Happens Next?," 60 Nat.Civic Rev. 259, 265 (1971).

[Footnote 3/13]

See also Mahan v. Howell, 410 U. S. 315, 410 U. S. 341 (1973)(BRENNAN,J., concurring in part and dissenting in part) ("What our decisions have made clear is that certain state interests that are pertinent to legislative reapportionment can have no possible relevance to congressional districting. Thus, the need to preserve the integrity of political subdivisions as political subdivisions may, in some instances, justify small variations in the population of districts from which state legislators are elected. But that interest can hardly be asserted in justification of malapportioned congressional districts. *Kirkpatrick v. Preisler, supra*").

[Footnote 3/14]

As the law has developed, our congressional cases are rooted in Art 1, § 2, of the Constitution while our legislative cases rely upon the Equal Protection Clause of the Fourteenth Amendment. I am not aware, however, of anything in the respective provisions which justifies, let alone requires, the difference in treatment that has emerged between the two lines of decisions. Our early cases were frequently cross-cited, and the formulation "as nearly of equal population as is practicable" appears in *Reynolds v. Sims,* 377 U.S. at 377 U. S. 589, as well as in *Wesberry v. Sanders,* 376 U.S. at 376 U. S. 7-8. The differing paths the cases have taken since *Kirkpatrick* must result from that decision's rejection of the legitimacy of considering nonpopulation factors in congressional redistricting. *See Mahan v. Howell,* 410 U.S. at 410 U. S. 341 (BRENNAN, J., concurring in part and dissenting in part). With today's long-awaited overruling of that holding in *Kirkpatrick,* any remaining justification disappears for such a marked difference in our approach to congressional and legislative reapportionment.

[Footnote 3/15]

Experience in the legislative apportionment field following our allowance of a range of *de minimis* variance is convincing proof that we need not fear that the goal of equal population in the districts will receive less than its due. JUSTICE BRENNAN's prediction that tolerating *de minimis* population variances would "jeopardize the very substantial gains" made in equalizing legislative districts, *White v. Regester,* 412 U. S. 755, 412 U. S. 781 (1973) (concurring in part and dissenting in part), has not been proved, and, indeed, the prediction is refuted by an analysis of the legislative redistricting undertaken after the 1980 census. *See* Council of State Governments & National Conference of State Legislatures, 1 Reapportionment Information Update 6 (Nov. 12, 1982).

[Footnote 3/16]

See, e.g., Feldman Deposition, at 91-94 (Record Doc. No. 39) (concern with fairness to incumbents); Jackman Deposition, at 91-92 (Record Doc. No. 40) (concern with preserving political subdivisions).

JUSTICE POWELL, dissenting.

I join JUSTICE WHITE's excellent dissenting opinion, and reaffirm my previously expressed doubt that

"the Constitution -- a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions -- could be read to require a rule of mathematical exactitude in legislative reapportionment."

White v. Weiser, 412 U. S. 783, 412 U. S. 798 (1973) (concurring opinion). I write separately to express some additional thoughts on gerrymandering and its relation to apportionment factors that presumably were not thought relevant under *Kirkpatrick v. Preisler,* 394 U. S. 526 (1969).

I

The Court, following *Kirkpatrick,* today invalidates New Jersey's redistricting plan solely because various alternative plans, principally the one proposed by Professor Reock, had what the Court views as "appreciably smaller population deviations between the largest and smallest districts." *Ante* at 462 U. S. 728. Under all of the plans, the maximum population variances were under 1%. I view these differences as neither "appreciable" nor constitutionally significant. As JUSTICE WHITE demonstrates, *ante* at 462 U. S. 769-772 (dissenting opinion), the Court's insistence on precise mathematical equality is self-deluding, given the inherent inaccuracies of the census data and the other difficulties in measuring the voting population of a district that will exist for a period of 10 years. *See Kirkpatrick, supra,* at 462 U. S. 538 (Fortas, J., concurring) (pursuit of precise equality "is a search for a will-o'-the-wisp"). Moreover, it has become clear that *Kirkpatrick* leaves no room for proper legislative consideration of other factors, such as preservation of political and geographic boundaries, that plainly are relevant to rational reapportionment decisions, [Footnote 4/1] *See Gaffney*

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v. Cummings, 412 U. S. 735, 412 U. S. 749 (1973); *Mahan v. Howell,* 410 U. S. 315, 410 U. S. 329 (1973). As JUSTICE WHITE correctly observes, *ante* at 462 U. S. 775-776, a decade of experience has confirmed the fears of the *Kirkpatrick* dissenters that an uncompromising emphasis on numerical equality would serve to encourage and legitimate even the most outrageously partisan gerrymandering, *see* 394 U.S. at 394 U. S. 551-552 (Harlan, J., dissenting); *id.* at 394 U. S. 555 (WHITE, J., dissenting). The plain fact is that, in the computer age, this type of political and discriminatory gerrymandering can be accomplished entirely consistently with districts of equal population. [Footnote 4/2]

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I therefore continue to believe that the Constitution permits variations from

"theoretical 'exactitude' in recognition of the impracticality of applying the *Kirkpatrick* rule as well as in deference to legitimate state interests."

White v. Weiser, supra, at 412 U. S. 798 (POWELL,J., concurring). Certainly when a State has adopted a districting plan with an average population deviation of 0.1384%, and a maximum deviation of 0.6984%, it has complied with the Constitution's mandate that population be apportioned equally among districts.

II

The extraordinary map of the New Jersey congressional districts prompts me to comment on the separate question of gerrymandering -- "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes," *Kirkpatrick, supra,* at 394 U. S. 538 (Fortas, J., concurring). I am in full agreement with JUSTICE WHITE's observation more than a decade ago that gerrymandering presents "a far greater potential threat to equality of representation" than a State's failure to achieve

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"precise adherence to admittedly inexact census figures." *Wells v. Rockefeller,* 394 U. S. 542, 394 U. S. 555 (1969) (dissenting opinion). I also believe that the injuries that result from gerrymandering may rise to constitutional dimensions. As JUSTICE STEVENS observes, if a State's electoral rules

"serve no purpose other than to favor one segment -- whether racial, ethnic, religious, economic, or political -- that may occupy a position of strength at a particular point in time, or to disadvantage a politically weak segment of the community, they violate the constitutional guarantee of equal protection."

Ante at 462 U. S. 748 (concurring opinion). Moreover, most gerrymandering produces districts "without any regard for political subdivision or natural or historical boundary lines," *Reynolds v. Sims,* 377 U. S. 533, 377 U. S. 578-579 (1964), a result that is profoundly destructive of the apportionment goal of "fair and effective representation," *id.* at 377 U. S. 565. A legislator cannot represent his constituents properly -- nor can voters from a fragmented district exercise the ballot intelligently -- when a voting district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State. [Footnote 4/3] The map attached to the Court's opinion [omitted] illustrates this far better than words can describe.

I therefore am prepared to entertain constitutional challenges to partisan gerrymandering that reaches the level of discrimination described by JUSTICE STEVENS. *See ante* at 462 U. S. 748 (concurring opinion). I do not suggest that the shape of a

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districting map itself invariably is dispositive. Some irregularity in shape is inevitable, with the degree of irregularity depending primarily on the geographic and political boundaries within the State, as well as the distribution of its population. Moreover, political considerations, even partisan ones, are inherent in a democratic system. A court therefore, should not "attemp[t] the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Gaffney,* 412 U.S. at 412 U. S. 754. Finally, I do not suggest that a legislative reapportionment plan is invalid whenever an alternative plan might be viewed as less partisan or more in accord with various apportionment criteria. The state legislature necessarily must have discretion to accommodate competing considerations.

I do believe, however, that the constitutional mandate of "fair and effective representation," *Reynolds, supra,* at 377 U. S. 565, proscribes apportionment plans that have the purpose and effect of substantially disenfranchising identifiable groups of voters. Generally, the presumptive existence of such unconstitutional discrimination will be indicated by a districting plan the boundaries of which appear on their face to bear little or no relationship to any legitimate state purpose. As JUSTICE STEVENS states, "dramatically irregular shapes may have sufficient probative force to call for an explanation," *ante* at 462 U. S. 755 (concurring opinion); "drastic departures from compactness are a signal that something may be amiss," *ante* at 462 U. S. 758; and "[e]xtensive deviation from established political boundaries is another possible basis for a *prima facie* showing of gerrymandering," *ibid.* In such circumstances, a State should be required to provide a legitimate and nondiscriminatory explanation for the districting lines it has drawn. *See Reynolds, supra,* at 377 U. S. 568 (the apportionment "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone").

In this case, one cannot rationally believe that the New Jersey Legislature considered factors other than the most

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partisan political goals and population equality. It hardly could be suggested, for example, that the contorted Districts 3, 5, and 7 reflect any attempt to follow natural, historical, or local political boundaries. [Footnote 4/4] Nor do these district lines reflect any consideration of the likely effect on the quality of representation when the boundaries are so artificial that they are likely to confound the Congressmen themselves. As Judge Gibbons stated eloquently in his dissent below:

"The apportionment map produced by P. L.1982, c. 1 leaves me, as a citizen of New Jersey, disturbed. It creates several districts which are anything but compact, and at least one district which is contiguous only for yachtsmen. While municipal boundaries have been maintained, there has been little effort to create districts having a community of interests. In some districts, for example, different television and radio stations, different newspapers, and different transportation systems serve the northern and southern localities. Moreover, the harshly partisan tone of Speaker Christopher Jackman's letter to Ernest C. Reock, Jr. is

disedifying, to say the least. It is plain, as well, that partisanship produced artificial bulges or appendages of two districts so as to place the residences of Congressmen Smith and Courter in districts where they would be running against incumbents."

Daggett v. Kimmelman, 535 F.Supp. 978, 984 (NJ 1982).

This summary statement by Judge Gibbons, a resident of New Jersey, is powerful and persuasive support for a conclusion

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that the New Jersey Legislature's redistricting plan is an unconstitutional gerrymander. *Cf. ante* at 462 U. S. 764, n. 33 (STEVENS, J., concurring). Because this precise issue was not addressed by the District Court, however, it need not be reached here. As to the issue of population equality, I dissent for the reasons set forth above and in JUSTICE WHITE's dissenting opinion.

[Footnote 4/1]

The Court holds that

"[a]ny number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."

Ante at 462 U. S. 740. Although it is remarkable that the Court thus silently discards important features of *Kirkpatrick* while simultaneously invoking *stare decisis* to defend the remainder of that decision, *see ante* at 462 U. S. 778-780 (WHITE,J., dissenting), I welcome this change in the law. It is to be hoped that this new standard will be applied with a strong measure of deference to the legitimate concerns of the State. *See ante* at 462 U. S. 760, n. 26 (STEVENS,J., concurring) (recognizing that courts should "give greater weight to the importance of the State's interests and the consistency with which those interests are served than to the size of the deviations").

[Footnote 4/2]

An illustration is the recent congressional redistricting in Illinois. After the Illinois Legislature had failed to enact a reapportionment plan, a three-judge District Court chose among four plans varying from 0.02851% to O. 14797% in maximum deviation. Following *Kirkpatrick,* the majority of the court chose the plan with the smallest deviation, one that was a "Democratic plan" designed to maximize Democratic voting strength at the expense of Republicans. *See In re Illinois Congressional Districts Reapportionment Cases,* No. 81-C-3915 (ND Ill.1981), *summarily aff'd sub nom. Ryan v. Otto,* 454 U.S. 1130 (1982). A commentator noted:

"The Democratic victory was due in part to a sophisticated computer program that made possible the creation of districts having almost exactly equal population. The most populous district has only 171 more people than the least populous one. That accuracy seemed to impress the court, which expressed no concern that the new district lines divided cities and carved up counties all over the state."

Illinois Map is Unpleasant Surprise for the GOP, 40 Congressional Quarterly 573 (1982). *See also Carstens v. Lamm,* 543 F.Supp. 68, 73-74, and 84, n. 39 (Colo.1982) (three-judge District Court reviewed five major redistricting plans, including the Republican legislature's plan with a difference between largest and smallest districts of seven persons, *i.e.,* a maximum deviation of 0.0015%, and the Democratic Governor's plan with a 15-person difference, *i.e.,* a maximum deviation of 0.0031%); *O'Sullivan v. Brier,* 540 F.Supp. 1200, 1202 (Kan.1982) (three-judge District Court asked to choose between a Democratic plan with a 0.11% maximum deviation and a Republican plan with a 0.09% maximum deviation).

These cases also illustrate an additional unfortunate side effect of *Kirkpatrick:* the increasing tendency of state legislators and Governors -- who have learned that any redistricting plan is "vulnerable to after-the-fact attack by anyone with a complaint and a calculator," *ante* at 462 U. S. 778 (WHITE, J., dissenting) -- to spurn compromise in favor of simply drawing up the most partisan plan that appears consistent with the population equality criterion. No longer do federal district courts merely review the constitutionality of a State's redistricting plan. Rather, in many cases, they are placed in the position of choosing a redistricting plan in the first instance.

[Footnote 4/3]

In *Carstens v. Lamm, supra,* the three-judge District Court noted that preserving an entire city as one voting district facilitated "voter identity":

"Most voters know what city and county they live in, but fewer are likely to know what congressional district they live in if the districts split counties and cities. If a voter knows his congressional district, he is more likely to know who his representative is. This presumably would lead to more informed voting."

543 F.Supp. at 98, n. 78. It also is likely to lead to a Representative who knows the needs of his district and is more responsive to them.

[Footnote 4/4]

It may be noted, for example, that the plan adopted by New Jersey (the Feldman Plan) divided the State's 21 counties into 55 fragments. The plan proposed by Professor Reock, introduced by Assemblyman Hardwick, created 45 county fragments, and the existing congressional districts divided the counties into 42 fragments. *See* App. 123 (Appendix A to Affidavit of Samuel A. Alito, Executive Director of the Office of Legislative Services of the New Jersey Legislature).

Oral Argument - March 02, 1983

甲第76号証の抄訳

Karcher 対 Daggett 事件、462 U.S. 725 (1983)

米国連邦最高裁判所

Karcher 対 Daggett 事件、462 U.S. 725 (1983)

Karcher 対 Daggett

第 81-2057 号

1983 年 3 月 2 日審理

1983 年 6 月 22 日判決

462 U.S. 725

ニュージャージー地区の米国連邦地方裁判所からの上告

判決要旨

1980 年度国勢調査の結果、ニュージャージー州議会は、下院議員選挙区の再区割を実施した。再区割案は 14 の地区を対象とするものであり、これらの選挙区の平均人口は 526,059 人、各区は、平均して、「理想的」数値とは 0.1384%の差があった。最大区（第 4 区）の人口は 527,472 人、最小区（第 6 区）の人口は 523,798 人であり、その差は、基準区の 0.6984%であった。個人のグループが提起した、再区割案の有効性を争う訴訟において、連邦地方裁判所は、小差とはいえ、選挙区間の人口格差が有権者の平等を達成するための誠実な努力の結果ではなかったという理由で、再区割案は、憲法第 1 条 2 項に違反すると判示した。

下記のとおり判決する：

1. 憲法第1条2項の「平等な代表」の基準（"equal representation" standard）は、下院議員選挙区が、実施可能な限り、人口の均一化を達成するよう区割りされることを要求している。区割法を争う当事者は、選挙区間の人口格差が、均一な人口の選挙区にしようとする誠実な努力によって減少若しくは排除可能であったことの立証責任を負う。もし、原告がこの立証責任を果たしたならば、州は、選挙区間の意味のある人口格差は、ある適法な目標を達成するために必要であったことの立証責任を負わなければならない。Kirkpatrick 対 Preisler 事件 394 U.S. 526、White 対 Weiser 事件 412 U.S. 783、Pp. 462 U.S. 730-731（和訳：米国連邦最高裁判決集 462 巻 730～731 頁））参照。

2. ニュージャージー州の区割案は、本来、単に選挙区間の最大人口格差が、利用可能な国勢調査のデータにおける予測可能な過少計上（undercount）よりも少ないという理由で、人口の均一化達成のための誠実な努力がなされた結果とみなされてはならない。Pp. 462 U.S. 731-740。

(a) 下院議員選挙区割の「実際上可能な限り」という基準は、

「個別の事案の状況を考慮しない、人口格差を許容する、「固定の数値基準」の採用とは相容れない。」

上記 Kirkpatrick 事件、394 U.S. 530。上記 Kirkpatrick 事件及び Wesberry 対 Sanders 事件、376 U.S. 1、において詳説された人口均一化の原則のみが、第1条 2 項の法意を反映するものである。回避が可能であって、正当化を要することなく第1条2項の基準に適合するとみなされるような、「些細な口格差」（*de minimis* population variations）は存在しない。Pp. 462 U.S. 731-734。

(b) 理想的な選挙区規模からの人口の偏差は、その差が、国勢調査の数値におけ

る予測可能な過少計上（undercount）以下である場合には、法的には機能的にゼロと等価であるとみなすべきであるという主張には、何の根拠もない。国勢調査システムが、システム上で実際の人口を過少評価した範囲を正しく確定することができると想定しても、関連性はないであろう。国勢調査の数値は、完全ではないにしても、唯一信頼できる、選挙区の「実際」の相対的人口レベルの指標を提供するものであり、人口の均一化を達成しようとする誠実な試みの唯一の根拠を提供する。Pp. 462 U.S. 735-738。

(c) 本件における人口格差は、人口の均一化を達成しようとする誠実な試みによって回避できたか、又は大幅に減少させることができたはずである。隣接する選挙区間で、人口が判明している全行政区画の人口を隣接区に移動させるという単純な方策に採っていれば、選挙区を数字の上での均一化に更に近づけることになったであろう。かくして、地方裁判所は、原告が、再区割案は実際上可能な限りの人口の均一化を達成していないことの立証責任を果たしたとの認定につき、間違った判断をしていない。Pp. 462 U.S. 738-740。

3. 連邦地方裁判所は、被告らが、再区割案における人口の偏差は、一貫しかつ差別的でない立法方針を達成するために必要であったということの立証責任を果たしていない、と適切に認定した。州は、その選挙区案における特別な偏差が、特定の目的のために必要であったことを、具体的に証明しなければならない。主張される第一の正当化事由は、マイノリティ（少数派の）人種グループの投票価値の保持であったが、上告人は、特定の人口格差が、マイノリティ（少数派の）人種グループの投票価値の保持に必要であったことを証明できていない。Pp. 462 U.S. 740-744。

535 F.Supp. 978、原判決を支持する。

BRENNAN 判事が、MARSAHLL、BLACKMUN、STEVENS 及び O'CONNOR

判事らと共に法廷意見を述べた。STEVENS 判事が同意意見を提出。後記 p.462 U.S. 744。WHITE 判事が、BURGER 主席判事、並びに POWELL 及び REHNQUIST 判事らと共に反対意見を提出。後記 p.462 U.S. 765。POWELL 判事が反対意見を提出。後記 p.462 U.S. 784。

BRENNAN 判事が法廷意見を述べた。

この上告により提示された問題は、連邦下院議員選挙区のための選挙区割案は、最大区の人口と最小区の人口の差が 1%以内の場合に、更なる正当化事由を要することなく、憲法第 1 条 2 項を充足するか否かという問題である。3 名の合議体による地方裁判所は、ニュージャージー州の 1982 年度選挙区再区割案が、選挙区間の人口格差は、小差ではあるが、人口の均一化を達成するための誠実な努力がなされた結果ではないという理由で、Kirkpatrick 対 Preisler 事件 394 U.S. 526 (1969)及び White 対 Weiser 事件、412 U.S. 783 (1973)の判例に基づき違憲と宣言した。当裁判所は、これを支持する。

I

1980 年に実施された 10 年毎の国勢調査の結果が発表された後に、合衆国下院の書記官が、ニュージャージー州知事に、同州が権利を持つ下院議員数は、15 名から 14 名に減じられたと通知した。従って、ニュージャージー州議会は、同州における連邦下院議員選挙区の再区割をしなければならなくなった。同州の第 199 回州議会は、再区割議案 2 件を通過させた。一件は州知事が拒否し、二件目は立法化されたが、ニューアーク市では、マイノリティの投票価値を希釈したと感じた人々の間に深刻な不満をもたらすこととなった。App.83-84、86-90 参照。これに応じて、1982 年 1 月に招集された第 200 回州議会は、下院議員選挙区割の問題に戻り、州議会上院の臨時議長であった Feldman 上院議員が提出した議案（S-711）をすばやく通過させた。この議案が、本件において問題となっている選挙区割案となった。本議案は、1982 年 1 月 19 日に州知事によって

署名され、Pub.L.1982 法となった（以下、「Feldman 案」という）。その結果の選挙区割地図を以下に添付する。

議会が検討した各選挙区割案と同様に、Feldman 案は、各選挙区の平均人口526,059 人（1980 年の国勢調査により決定された。）の 14 区からなるものであった。[脚注１] 各選挙区の人口は均等ではなかった。平均して、各選挙区は、「理想的」数値とは、0.1384%又は 726 人の差があった。トレントンを含む最大区である第 4 区は、人口 527,472 人であり、ミドルセックス郡（county）の大部分を含む最小区である第 6 区は、人口 523,798 人であった。この二つの選挙区の差は、3,674 人又は平均選挙区の 0.6984% であった。その他の選挙区の人口も様々であった。州の北東端の地方バーゲン郡の大部分を含む第 9 区の人口は527,349 人である一方で、大西洋沿いの第 3 区の人口は、524,825 人のみであった。App. 124。

議会には、最大区と最小区の人口格差がこれより明らかに少ない選挙区割案が提出されていた。連邦地方裁判所の最も注意を引いた案は、Rutgers University の政治学教授であり、Bureau of Government Research の局長である Ernest Reock, Jr.博士が考案したものであった。Hardwick 議員が第 200 回州議会に提出した Reock 案は、最大人口格差 2,375 人又は平均値の 0.4514%であった。同上 133。

Feldman 案が立法化されて間もなく、ニュージャージー州選出の全ての現職共和党議員を含む、様々な利害関係を持つ個人のグループが、選挙区割案は、憲法第１条２項に違反するとの宣言[脚注 2]及び同法に基づく連邦下院議員予備選挙の差止命令を請求した。28 U.S.C. 2284(a)に従って、3 名の合議体による地方裁判所において裁判が開かれた。地方裁判所は、1982 年 2 月 26 日に審理を行ったが、その際に、当事者らは、多くの証言録取書及び宣誓供述書を提出し、略式裁判(summary judgment)を申し立て、略式裁判の申立が拒絶された場合の、

更なる証拠の提出権を放棄した。

その後間もなく、連邦地方裁判所は、「Feldman 案は違憲」と宣言する意見及び命令を発した。略式裁判の申立を拒絶し、本件全体を正式審理として、連邦地方裁判所は、Feldman 案における人口格差が、「絶対的均一化を達成するための誠実な努力にも拘わらず回避不能」ではなかったと判示した。前述の Kirkpatrick 事件、394 U.S. 531 参照。当裁判所は、10 年毎に実施される国勢調査の統計上の誤差以下の差は、「数学的な平等と機能的に等価」であるという上告人の主張を退けた。Daggette 対 Kimmelman 事件、535 F. Supp.978, 982-983 (NJ 1982)。裁判所はまた、上告人は、人口格差は、議会のマイノリティの投票価値の保持という目標及び予測される人口の変動により正当化される、との主張を立証していないと判示した。同上。連邦地方裁判所は、上告人が Feldman 案に基づき予備選挙及び総選挙を実施することを禁じたが、その命令は、当最高裁判所への上告の期間中停止され、455 U.S.1303 (1982) (BRENNAN, J.判示、担当判事)、当最高裁判所は、権利上訴管轄（probable jurisdiction）を認めた。457 U.S. 1131 (1982)。

II

第 1 条 2 項は、連邦下院議員選挙区の区割に関する「高水準の正当性及び常識」、即ち、「同数の人々のための平等な代表」を定めるものである。Wesberry 対 Sanders 事件、376 U.S. 1、376 U.S. 18 (1964)。しかしながら、正確な数学的な平等を不完全な世界において達成することは不可能である。従って、「平等な代表」の基準は、「実際上可能な限り」人口の均一化を達成するよう選挙区を区割りすべき、とする要求の範囲で実施される。同上 7-8、18 参照。Kirkpatrick 対 Preiser 事件において詳述するとおり、

「『実際上可能な限り』の基準は、州が、正確な数学的な平等を達成するために誠実な努力を払うよう要求する。Reynolds 対 Sims 事件、377 U.S. 533、377 U.S.

577 (1964)参照。このような努力にもかかわらず、連邦下院議員選挙区間の人口格差が生じる結果となったことが立証されない限り、州は、如何に小差であろうとも一つ一つの格差を正当化しなければならない。」

394 U.S. at 394 U.S.530-531。従って、第1条2項は、

「絶対的平等達成のための誠実な努力にかかわらず不可避であるか又は正当性が証明される人口格差のみを認める。」

同上。394 U.S.531。Accord. White 対 Weiser 事件、412 U.S. at 412 U.S. 790。

このように、二つの基本的な問題が、下院議員選挙区の区割りを定める州法における人口格差に関する訴訟を形成している。まず、第一に、裁判所は、選挙区間の人口格差は、均一人口の選挙区の区割りをするための誠実な努力により、減少し得たか又は全く排除し得たかという点を検討しなければならない。選挙区割法を争う当事者は、この問題点に関して立証責任を負わなければならず、その差が回避可能であったことを立証しない場合には、区割案が確定する。ただし、原告らが、人口格差は、平等達成のための誠実な努力の結果ではなかったと証明できれば、州は、選挙区間の意味のある格差の一つ一つがある適法な目標達成のために必要であったことの立証責任を負わなければならない。Kirkpatrick 事件、394 U.S., 394 U.S. 532、cf. Swann 対 Adams 事件、385 U.S. 440、385 U.S. 443-444 (1967)。

III

本件における上告人らの主たる主張は、前記の第一の問題に向けられるものである。上告人らは、異なる選挙区間の最大の人口格差は、入手可能な国勢調査において予測可能な過少計上(undercount)数よりも小さいという理由により、Feldman 案が、それ自体、人口の平等性を達成するための誠実な努力の賜物と

みなされるべきであると主張する。

Kirkpatrick 事件では、ほぼ同じ内容の主張が真っ向から否定された。

「『実際上可能な限り』のアプローチの貫徹は、個々の特定の事例の状況を考慮することなく人口格差を許容する固定的な数値基準の採択と矛盾する。」（394U.S. 394 U.S.530、White 対 Weiser 事件 412U.S.790, n.8 及び 412U.S.792-793 を参照）。『人口均一化以外の基準を採用し、かつ利用可能な最良の国勢調査を利用する（394U.S.532 を参照）ということ』は、「平等な代表」という米国連邦憲法上の理想を巧妙に蝕んでいく可能性がある。州の立法者らは、一定の「僅差」レベルの人口差が容認し得るものであると理解した場合には、間違いなく、平等性よりはむしろそのレベルの達成に向けて取組むであろう。[脚注 3]同上 493U.S.531。さらに、別の基準を選択すれば、大幅な恣意性を区割り案の検討プロセスに持ち込むことになろう（同上）。本件においては、上告人は、約 0.7%の最大格差を「僅差」とみなすべきと主張している。この主張が受け入れられるならば、0.8%、0.95%、1%、1.1%の格差についてはどのように考えるべきであろうか。

絶対的平等性を含むいかなる基準も、一定の人工的な要素を含んでいる。上告人が指摘するように、国勢調査データですら完全なものではなく、非定住性という良く知られているアメリカ国民の特徴は、特定の居住地に関する人口の算出された数字が人口算出完了日のかなり前に、既に古いデータとなっているということを意味する。しかしながら、手元のデータの問題は、我々が選択し得る人口に基づく基準に等しく該当する。[脚注 4] 2 つの基準 － ①平等性の基準、又は②平等性を下回る基準 － のうち、前者（即ち、平等性の基準、訳者注）のみが憲法第 1 条第 2 項の法意を反映している。

本件における、正当化されない人口格差（たとえ当該格差が小さいものであっ

ても）の適法性を容認することは、Kirkpatrick や Wesberry の基本的な前提を拒否することを意味する。我々は、そこまで踏み込んだ上告人の提案を拒絶する。人口格差の基準に関する尋常ならざる厳格さについては過去に何度か指摘されてきた。そのような基準の尋常ならざる厳格さゆえに、我々は、絶対的な人口数の均一性が、連邦下院選挙区の至上目的であることを要求している。それ故に、憲法第 1 条第 2 項（「平等の代表」、訳者注）の法意は、連邦議会に関しては、州が、州又は州内の地方の立法府の議員選挙の「選挙区割り」をするに当たって、関係があるとみなすかもしれない地方の利益に優越する。我々は、連邦下院議員選挙区についての人口の均一基準をこれまで疑問視したことはない（412U.S.793　White 対 Weiser 事件、412U.S.755 及び 412U.S.763 White 対 Regester 事件（1973 年）、410U.S.315、410U.S.321-323 Mahan 対 Howell 事件（1973 年）を参照）。連邦下院選挙区の人口平等原則は、不当であるとか、又は社会的若しくは経済的に有害であるといった経験は証明されていない。Washington 対 Dawson&Co 事件（1924 年）264U.S.219、264U.S.237（Brandeis, J.,反対意見）、B.Cardozo 著, The Nature of the Judicial Process 150（1921 年）と比較のこと）。むしろ、この基準は、Wesberry 事件で我々が採用した時点に比べて、今日、州議会に関してさほどの困難を生じないであろう。過去 20 年間のコンピューター技術及び教育の急速な進歩により、平等な人口の隣接区を描くこと、そしてそれと同時に何であれ、州の有する二次的目標を推進することは、比較的容易になった。[脚注 5]。

最後に、何度も確認された明確な憲法解釈を不必要に放棄することは、他の事例－Florida Dept.of Health 対 Florida Nursing Home Assn.事件（450U.S.147、450U.S.153 -154）（1981 年）（Stevens, J.、同意意見）、Pollock 対 Farmers' Loan&Trust Co.事件（157U.S.429、157U.S.652）（1895 年）（white, J.、反対意見）－における我々の権威を毀損するとともに、一部の人が面倒であると考えるかもしれない他の裁定を再考するよう我々に求める多数の要請に対して暗に門戸を開くことにつながり（Cardozo、前掲 149-150）、かつ、ニュージャージー州の人口の平等性に基づく下院選挙区の区割りを追求する「法の支配」に

依拠してきた者を害することにもなろう。450U.S.154 前掲 Florida Nursing Home Assn を参照（Stevens J.、同意意見)。従って、我々は、実際には回避し得るが、正当な理由なしに第 1 条第 2 項の基準を満たすこととなる『僅差の人口格差』は存在しない、ということを再確認する。[脚注 6]

B

上告人らの理論と、Kirkpatrick 事件において我々が否定した議論との唯一の相違点は、「国勢調査の統計上の誤差は不可避である」という、あたかも、合理性と予測可能性の幻想を与える「僅差」説を上告人らが提示したことにある。上告人らは以下のとおり主張する。

「ここに見られるように、理想的な選挙区のサイズとの格差が、判明している国勢調査上の数値誤差よりも小さい場合、かかる差はゼロと機能的に等価である。」と。

上告人 18 人の上告趣意書：このアプローチには 2 つの問題点がある。第一に、上告人らの議論は、国勢調査において行なわれた実際の人口の系統的な過少計上の程度に終始しているが、実際の人口は正確に判明していない数値であり、仮に判明したとしても本件に関係のない数値である。第二に、統計上の誤差が存在したというだけでは、選挙区間の小さな格差が「平等」と機能的に等価であることにならない。

連邦地方裁判所において、また、当審において、上告人らは、プリンストン大学の人口統計学者である James Trussel 博士の宣誓供述書に専ら依拠している（App. 97-104 参照)。注意深く表現を選んだ Trussell 博士の陳述書では、10 年ごとに実施された 1950 年度、1960 年度及び 1970 年度国勢調査における過少計上に関する様々な考察が再検討されており、次の 3 つの重要な結論が導き出

されている。(1)「1980年度国勢調査における過少計上は1%を超えていた可能性が高い。」、(2)「今日までのあらゆる証拠は、過少計上率が人種、性別、年齢、収入及び学歴に左右されることが示されたため、全ての場所で同程度の過少計上が行なわれたのではないことを示している。」、また、(3)「ニュージャージー州内の過少計上の分布は（中略）不明であり、全ての市町村に均一に拡大されているであろうとみなす理由は見当たらない。」(同上103-104頁)。上告人らの主張において、これら各々の陳述が正確であるとしても、当該陳述は上告人らの主張を何ら裏付けるものではない。

要するに、上告人らの1パーセント基準は、科学的権威という風格を備えた魅力的な「僅差」説を提示することを試みるものに過ぎない。Trussell博士の陳述又は上告人らのその他の証拠のいずれも、ニュージャージー州における過少計上の明確な水準を明らかにするものでなく、国勢調査に関するTrussell博士の議論は、全国規模のほかには、信頼できる過少計上推計を策定することが不可能である点を明らかにするものである（同上98-101頁参照)。1980年度の過少計上が「1%を超えていた可能性が高い」というTrussell博士の結論は、従前の複数の国勢調査における過少計上、及び過少計上を減らすために1980年に採用された新しい手順がどの程度良好に機能するかに関する推測に基づくようである。よって、全国調査の過少計上水準が、下院議員選挙区の人口差を知る上での国勢調査データの使用においての限度となる、との上告人らの理論を受け入れた場合、我々は、1980年度国勢調査の最終分析が完了した際に、当該水準を1%よりも遥かに高く設定することを余儀なくされる可能性がある［脚注7]。

Trussell博士は、同上103頁で、選挙区間の人口格差において、1%の過少計上が、各選挙区に均等に分布している限り問題とならないことを認めている。国勢調査における過少計上は、過少計上が選挙区ごとに異なる場合に限り、格差の正確性に影響を及ぼす。国勢調査人口における2つの選挙区の1%の格差を過少計上により説明するためには、小さい方の選挙区における過少計上が大きい

方の選挙区の過少計上の約3倍となっていなければならない［脚注8］。この条件が該当する可能性はむろん低い。その理由は、特に、これらの選挙区が、発生する可能性の高い過少計上を補正するよう設計されていることを示す証拠を上告人らが全く提出していないことである。Trussell 博士の宣誓供述書は、過少計上率が市町村ごとに異なる可能性があることを述べているが、その相違の程度、又は多数の市町村が組み合わされた各選挙区レベルにおける当該相違の程度については論じていない。また、宣誓供述書は、過少計上率に関係する人種、性別、年齢等の各要因が選挙区ごとに異なること、又は（より重要な点として）小さい選挙区の人口が大きい選挙区の人口に比べて関係要因をより顕著に反映することも示していない［脚注9］。Trussell 博士は、ニュージャージー州内の過少計上の分布が全く判明していないことを認めている。国勢調査における系統的な過少計上は、奇妙な偶然によって、Feldman 案により区画された選挙区と統計上の関係性をいくらか有する可能性があるに過ぎない。

国勢調査においては、人口の系統的な過少計上が行われる可能性があり、過少計上率は場所によって異なる可能性がある。しかしながら、これらの事実をもってしても、未調整の国勢調査計上の数によって判断される、下院議員選挙区間の人口格差は無意味なものでない。それどころか、国勢調査データは、各選挙区について、信頼できる（完璧ではないにせよ）「実際の」相対的人口レベルに関する唯一の指標を提供している。国勢調査計上の数がより多かったことを唯一の理由として、ある選挙区が別の選挙区に比べて大きいと確信をもって言えない場合にも、国勢調査計上の数がより多かった選挙区の人口が、他の選挙区の人口と比べて、小さいか又は同じである可能性よりも、大きい可能性がよりあることは、確実性をもって言うことができる。この程度の確実性の存在は、判断をするためには、十分なものである（ニューアーク市対 Blumenthal 事件, 457 F. Supp. 30, 34 （DC 1978））。また、国勢調査の計上数は「入手可能な最良の人口データ」（Kirkpatrick, 394 U.S. at 394 U. S. 528 参照）であり、人口均一化を達成するための誠実な試みの唯一の根拠となる。国勢調査データの欠

点を根拠として人口の格差を説明しようと試みるならば、ここで達成できていない正確な裏付が必要である（同上 394 U. S. 535 参照)。

C

Feldman 案における、国勢調査に基づく人口格差は、これが選挙区間の実際の格差を反映するものであるとすると、人口偏差は、人口の平等性を達成するための誠実な努力により、回避可能であったか、又は相当程度減少させることが可能であったことは明らかである。この理由のみをもってしても、平等な人口による選挙案と「機能的に等価」なものとして Feldman 案を受け入れることは適切でない。

連邦地方裁判所は、第 200 回州議会で提出された他のいくつかの案の最大格差は、Feldman 案に比べて小さいと判示した（535 F.Supp. 982。White 対 Weiser 事件, 412 U.S. 412 U. S. 790, 及び n. 9 と比較のこと)。上告人らは、連邦地方裁判所が検討した複数の代替案について、その政治的性質が根本的に異なるものであったため、Feldman 案と対比可能ではなかった、と異議を唱えている（例えば、App. 93-96（S. H. Woodson, Jr.の宣誓供述書）（代替案がトレントン及びカムデン地区の黒人有権者の利益を保護するものでなかったと主張する。）参照)。我々は、区割りが政治的プロセスであること、又は州議会が適法な二次的目標を、当該目標が人口均一化を同時に達成するための誠実な努力に沿う限り追求しうることを一度も否定していない。にもかかわらず、連邦下院議員選挙区間の人口格差は、政治的な考慮が要求するものであるとの主張は、これらの事件において、より適切に言えば、司法審理における二次的レベルのものに属するものであり（後掲 462 U. S. 740-741 参照)、この場合、州は当該人口格差が正当であることを具体的に証明する責任を負う。

いずれにせよ、連邦地方裁判所は、自己の認定の根拠を、根本的に異なる政治

的効果を有する複数の代替案の存在に求める必要がなかった。Kirkpatrick 事件と同様に、「隣接する複数の選挙区間で一定の人口の住民が属する下位行政区画全体を移転させるという簡単な方法により、複数の選挙区が数的平等にずっと近づくこととなった」。394 U.S.,394 U.S.532。

まず、Feldman 案そのもの、及び同案の制定時に州議会が利用することのできた国勢調査データ（App. 23-34 参照）に関して、小数の市町村をある選挙区から別の選挙区に移転させるだけで同案の最大人口格差を減少させることは可能である ［脚注 10］（Swann 対 Adams 事件, 前掲 385 U.S., 385 U. S. 445-446, n. 4 も参照）。このように、Feldman 案が実際上可能な人口均一化に近付くに至らなかったことを原告が示す責任を果たしていないと認定した連邦地方裁判所に誤りはなかった。

IV

上記の議論は、それ自体、Feldman 案が違憲であることを証明するものではない。むしろ、被上告人らが Feldman 案が人口均一化を達成するための誠実な努力の産物でなかったことの立証に成功したことは、州の適法な目標を達成するために同案における人口格差が必要であった旨の立証責任が州に移行したことを意味するに過ぎない。White 対 Weiser 事件は、州の立法政策が下院議員選挙区の人口における小差を要請するものであったとしても、当該方針が憲法上の規範に沿うものである限り、我々がこれに従う意思を有することを示している。（412 U.S. 412 U.S.795-797 参照。Upham 対 Seamon 事件, 456 U. S. 37 (1982)、Connor 対 Finch 事件, 431 U. S. 407, 431 U.S.414-415 参照（1977）と比較のこと。）一貫して適用される、数の如何を問わない立法政策（例えば、選挙区のコンパクト化、市町村の境界の遵守、従前の選挙区中心部の維持、及び現職下院議員間の競争の回避を含む。）は、幾分かの格差を正当化するものとなり得る。その基準が差別的なものでない限り（Gomillion 対 Lightfoot 事件, 364

U. S. 339 （1960）参照)、それらの全ての基準は、適切に証明されるならば、小さな人口格差を正当化する適法な目標となる。(例えば、West Virginia Civil Liberties Union 対 Rockefeller 事件, 336 F.Supp. 395, 398-400 参照 （SD W.Va.1972）（コンパクト性に関する州憲法の規定により正当化される最大格差を 0.78%とする承認案）参照。また、Reynolds 対 Sims, 377 U. S. 533, 377 U. S. 579 （1964)、Burns 対 Richardson 事件, 384 U. S. 73, 384 U. S. 89, 及び n. 16 （1966）と比較のこと)。しかしながら、州は、単に一般論に依拠するのではなく、ある程度の具体性をもって、州の案における一定の目標が特定の格差を必要としたことを示さなければならない。人口格差を正当化するために必要とされる立証は、格差の規模、州の利益の重要性、同案全体が当該州の利益を反映している整合性、及び当該州の利益を相当程度維持しつつ人口の平等性により近付くことを可能とする代替策の有無によって様々である。格差の正当化の是非に関しては、個々の事件で上記の要因に注意を払うことが必然的に必要となる。

州が、一貫して適用される適法な方針に従い、国勢調査に基づく同州の下院議員選挙区の人口における小差を正当化しうる可能性は、Kirkpatrick 自体でも認められている。同事件において、ミズーリ州は、選挙区ごとの適格な有権者数の差、又は予想される人口変動によって同事件の人口格差が正当化されるという理論を提唱し、反対意見派の WHITE 裁判官はこれに賛成している（後掲 462U.S. 771-772 参照）（394 U.S. 394 U. S. 534-535 参照)。我々がこの主張を認めなかったのは、これらの要因が区割りプロセスにおいて容認できない考慮であったという理由によるものでなく、むしろ、生じた格差の規模、及びミズーリ州が「せいぜい（中略）人口総数に基づき無計画な調整をスキームに加えたに過ぎず」、かつ、全ての選挙区について同一要因をもって説明する「いかなる努力も」行わず、その認定事項を徹底的に文書で証明せず、また「州全体で系統的な、場当たり的でない態様で」認定事項を適用しなかったという理由によるものである（同上 394 U. S. 535)。[脚注 11]。

連邦地方裁判所は、上告人らが、本件における人口格差を正当化しなかったことを正しく認定している。連邦地方裁判所及び当上告審での主張で、上告人らは、Feldman 案の人口格差の唯一の正当化理由、すなわち人種的マイノリティ（少数派）グループの投票価値の保持、を強調するに過ぎなかった。[脚注 12] 上告人らは、ニューアーク市第 10 区において大多数の黒人有権者を擁することの重要性について論じた、ニューアーク市長 Kenneth Gibson 及びイーストオレンジ市長 Thomas Cooke による宣誓供述書（App. 86-92 参照）、及び Feldman 案に基づくトレントン及びカムデン地区における黒人有権者の取扱いと Reock 案に基づくその取扱いとを比較した、トレントン市長候補 S. Howard Woodson, Jr. による宣誓供述書（同上 93-96 頁参照。同上 82-83 頁参照（A. Karcher の宣誓供述書））を提出した。しかしながら、連邦地方裁判所は、以下のとおり認定した。「［上告人らは、］第 10 区におけるマイノリティの投票価値の保持という目標と、他の選挙区における人口格差との間の因果関係を示すことを試みておらず、また、これを示すことができていない。（中略）我々は、第 10 区におけるマイノリティの投票価値の保持という目標が、第 4 区及び第 6 区における人口格差と何ら関係を有しないものと判示する。」

Feldman 案における最大区は第 4 区及び第 9 区であり、最小区は第 3 区及び第 6 区である（前掲 462 U. S. 728 参照）。これらの選挙区のいずれも第 10 区に隣接しておらず、そのうちの 1 つの区（第 4 区）のみが、マイノリティの投票価値の保持に関する上告人の議論において言及されているだけである。上告人らは、どの箇所をみても、マイノリティの投票価値を保持するために第 4 区を大きい人口とすることが必要であると主張していない。実際のところ、第 4 区と他の選挙区との間の格差は、マイノリティ有権者数がより少ない他の選挙区に比べて、人種的マイノリティを含む、第 4 区の全住民の票を稀釈する効果を有する。記録は、マイノリティの投票価値の保持と第 3 区及び第 6 区の小さい人口との関係について、何も言及していない。よって、連邦地方裁判所の認定は、

甲第76号証の抄訳

Karcher 対 Daggett 事件、462 U.S. 725 (1983)

米国連邦最高裁判所

Karcher 対 Daggett 事件、462 U.S. 725 (1983)

Karcher 対 Daggett

第 81-2057 号

1983 年 3 月 2 日審理

1983 年 6 月 22 日判決

462 U.S. 725

ニュージャージー地区の米国連邦地方裁判所からの上告

判決要旨

1980 年度国勢調査の結果、ニュージャージー州議会は、下院議員選挙区の再区割を実施した。再区割案は 14 の地区を対象とするものであり、これらの選挙区の平均人口は 526,059 人、各区は、平均して、「理想的」数値とは 0.1384%の差があった。最大区（第 4 区）の人口は 527,472 人、最小区（第 6 区）の人口は 523,798 人であり、その差は、基準区の 0.6984%であった。個人のグループが提起した、再区割案の有効性を争う訴訟において、連邦地方裁判所は、小差とはいえ、選挙区間の人口格差が有権者の平等を達成するための誠実な努力の結果ではなかったという理由で、再区割案は、憲法第 1 条 2 項に違反すると判示した。

下記のとおり判決する：

1. 憲法第1条2項の「平等な代表」の基準（"equal representation" standard）は、下院議員選挙区が、実施可能な限り、人口の均一化を達成するよう区割りされることを要求している。区割法を争う当事者は、選挙区間の人口格差が、均一な人口の選挙区にしようとする誠実な努力によって減少若しくは排除可能であったことの立証責任を負う。もし、原告がこの立証責任を果たしたならば、州は、選挙区間の意味のある人口格差は、ある適法な目標を達成するために必要であったことの立証責任を負わなければならない。Kirkpatrick 対 Preisler 事件 394 U.S. 526、White 対 Weiser 事件 412 U.S. 783、Pp. 462 U.S. 730-731（和訳：米国連邦最高裁判決集 462 巻 730～731 頁））参照。

2. ニュージャージー州の区割案は、本来、単に選挙区間の最大人口格差が、利用可能な国勢調査のデータにおける予測可能な過少計上（undercount）よりも少ないという理由で、人口の均一化達成のための誠実な努力がなされた結果とみなされてはならない。Pp. 462 U.S. 731-740。

(a) 下院議員選挙区割の「実際上可能な限り」という基準は、

「個別の事案の状況を考慮しない、人口格差を許容する、「固定の数値基準」の採用とは相容れない。」

上記 Kirkpatrick 事件、394 U.S. 530。上記 Kirkpatrick 事件及び Wesberry 対 Sanders 事件、376 U.S. 1、において詳説された人口均一化の原則のみが、第1条 2 項の法意を反映するものである。回避が可能であって、正当化を要することなく第1条2項の基準に適合するとみなされるような、「些細な口格差」（*de minimis* population variations）は存在しない。Pp. 462 U.S. 731-734。

(b) 理想的な選挙区規模からの人口の偏差は、その差が、国勢調査の数値におけ

「明らかな誤った認定」のテストに容易に合格するものである。

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連邦地方裁判所は、米国連邦下院選挙のためのニュージャージー州の 1982 年度区割りにおいて、Kirkpatrick 対 Preisler 事件の 2 つの『テスト』を適切に適用した。連邦地方裁判所は、同案の人口格差が、法律上、機能的に等価ではなく、かつ、利用可能な最良の国勢調査データを用いて人口均一化を達成するための誠実な努力が同案においてなされていないと正しく判示した。また、地方裁判所は、証拠による裏付けのない人口格差を正当化しようとする上告人らの試みを正当に退けた。よって、地方裁判所の判決は、ここに支持される。

（以下略）