

The Mandate of Equipopulous Congressional Districting: *Karcher v. Daggett*¹ — Article I, section 2 of the United States Constitution requires that members of the House of Representatives be chosen “by the People of the several States.”² The Supreme Court has interpreted this requirement to mean not only that Representatives must be elected by popular vote,³ but also that each person’s vote must be given equal weight.⁴ Accordingly, states must draw congressional voting districts containing equal numbers of people, and districting plans are subject to judicial review to insure that this constitutional requirement is met.⁵

In the recent case of *Karcher v. Daggett*⁶ the Supreme Court reviewed and found unconstitutional New Jersey’s latest congressional redistricting plan.⁷ In a five-to-four decision, the Court reaffirmed its holding in *Kirkpatrick v. Preisler*⁸ that no avoidable⁹ population deviations among districts may be considered de minimis¹⁰ — so small as to not be worthy of judicial attention.¹¹ Any avoidable variance,¹² the Court held, must be

¹ 462 U.S. 725 (1983).

² U.S. CONST. art. I, § 2, cl. 1. Article I, section 2 provides, in relevant part: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States” *Id.* “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers” U.S. CONST. art. I, § 2, cl. 3.

³ *Wesberry v. Sanders*, 376 U.S. 1, 8-9 (1964).

⁴ *Id.* at 7-8. This requirement is the well known “one person-one vote” standard first promulgated by the Court in *Gray v. Sanders*, 372 U.S. 368, 381 (1963) where the standard was held applicable to statewide primary elections. *Wesberry* was the first Supreme Court case to apply that standard to congressional elections. *Wesberry*, 376 U.S. at 7-8.

The basis of the standard is that if one voting district has more voters than another district the votes of those in the larger district are “weighted” less since both voting districts only elect one representative. This mathematical undervaluation, or diluting, of votes is proscribed by the “one person-one vote” standard. *Reynolds v. Sims*, 377 U.S. 533, 563 (1964).

⁵ *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

⁶ 462 U.S. 725 (1983).

⁷ The terms “districting” and “apportionment” will be used interchangeably throughout this casenote. Districting refers to a state legislature’s actual drawing of the district lines. Note, *Reapportionment VIII, Gerrymandering*, 79 HARV. L. REV. 1226, 1283 (1966) [hereinafter cited as Harvard Note]. The number of people placed in each district is the apportioning. *Id.* This use of “apportioning” should be distinguished from the use of the term in article I, section 2 of the Constitution. The reference to apportioning in article I, section 2 refers to the allocating of the number of United States Representatives among the states by Congress. See *Karcher v. Daggett*, 462 U.S. 725, 744-46 (1983) (Stevens, J., concurring).

⁸ 394 U.S. 526, 531 (1969).

⁹ The Court attached no special meaning to the term “avoidable,” but merely indicated that any population deviations that could have been lessened by a good faith effort to achieve absolute population equality would be unacceptable. *Karcher*, 462 U.S. at 729-31.

¹⁰ The term “de minimus” is shorthand for the Latin phrase “*de minimus non curat lex*,” which means, “the law does not care for, or take notice of, very small or trifling matters.” BLACK’S LAW DICTIONARY, 388 (5th ed. 1979).

¹¹ *Karcher*, 462 U.S. at 729-33 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969)). *Kirkpatrick* involved a Missouri congressional redistricting plan in which the average district’s population deviation from the “ideal” size voting district was 1.6%. *Kirkpatrick*, 394 U.S. at 529. The maximum population deviation was 5.97%. *Id.* By contrast, the average deviation in the New Jersey plan invalidated in *Karcher* was .13%, or about a 726 person variance from the ideal district size of 526,059. *Karcher*, 462 U.S. at 727-29. The maximum deviation in the New Jersey plan was 0.69%. *Id.*

The “ideal” district size is derived by dividing the total number of the inhabitants of a state by its

justified by the state as necessary to achieve a legitimate state policy.¹³

At issue in *Karcher* was New Jersey's 1982 congressional redistricting plan.¹⁴ Due to population changes reflected in the 1980 decennial census, New Jersey's number of United States Representatives decreased from fifteen to fourteen.¹⁵ Consequently, the New Jersey Legislature was required to redistrict the state and reapportion the state's population equally within the new districts.¹⁶ The "ideal" district size for New Jersey's new districting plan would have been 526,059 people per district.¹⁷ On the average, the districts in the plan adopted by the New Jersey Legislature deviated from this figure by 0.1384%, or about 726 people.¹⁸ The largest district contained 527,472 people and the smallest district had 523,798 people, the difference between them being 3,674 people, or 0.6984% of the ideal district size.¹⁹ The New Jersey Legislature also had before it at least three other plans with smaller interdistrict population disparities.²⁰ For various reasons,

total number of United States Representatives. The maximum deviation figure is derived by adding the percentage by which the smallest district deviates from the ideal district size to the percentage by which the largest district deviates from the ideal district size. The average deviation is the sum total of each district's percentage deviation divided by the number of districts. See, e.g., *Kirkpatrick*, 394 U.S. at 528-29.

¹² At one point in the *Karcher* majority opinion, the Court stated that only "significant" variations need be justified. *Karcher*, 462 U.S. at 729-31. This qualification appears to be inconsistent with the Court's holding that no level of population deviation will be considered de minimis. *Id.* at 733-35. These holdings would be consistent only if any variance was a significant variance, in which case the qualifier "significant" is meaningless. If the Court were to find that a state's plan had a variance, but that it was not significant and did not require justification, this finding would amount to a holding that that variance was de minimis. The *Karcher* Court made clear that variances of 0.69% or above are significant and not de minimis. *Id.* at 739-41. The Court made no attempt to explain whether any variances between 0% and 0.69% would not be significant. The Court's holding that no population variances that could be avoided are de minimis indicates, however, that consistent with *Karcher*, any avoidable variance must be deemed significant. *Id.* at 733-35. It is possible, however, that the Court's use of the term "significant" may subsequently be interpreted to sanction some population variances between 0% and 0.69%.

¹³ *Id.* at 729-31.

¹⁴ *Id.* at 727-29. See 1982 N.J. Laws, ch. 1.

¹⁵ *Karcher*, 462 U.S. at 727.

¹⁶ *Id.* The New Jersey Legislature eventually adopted the apportionment plan introduced by Democratic Senator Matthew Feldman, President pro tem of the State Senate, although it had before it other plans with smaller population deviations. *Daggett v. Kimmelman*, 535 F. Supp. 978, 982 (1982), *aff'd sub nom.*, *Karcher v. Daggett*, 462 U.S. 725 (1983). The Feldman plan was signed into law January 19, 1982 on outgoing Democratic Governor Brendan Byrne's last day in office. *Id.* at 980. Byrne was succeeded by Republican Governor Thomas Kean. The other proposed plans included the Roeck plan with a maximum deviation of 0.325% and 0.296% as amended; the Di Francesco plan with a maximum deviation of 0.125%; and the Hardwick plan with a maximum deviation of 0.451%. *Id.* at 982.

The Roeck plan, submitted by Rutgers University professor Ernest C. Roeck, Jr., received what the district court termed a "remarkable reply" from the Speaker of the New Jersey Assembly, Christopher Jackman. *Id.* at 981. Jackman responded to Roeck, in essence, that since the Democrats had become the dominant party in New Jersey, they had a duty to see that this dominance was reflected in New Jersey's representation to Congress, and that the Democratic leadership had no intention of subjugating its partisan concerns in the districting process. *Id.* at 989, App. B.

¹⁷ *Karcher*, 462 U.S. at 727-29.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Daggett v. Kimmelman*, 535 F. Supp. 978, 982 (1982), *aff'd sub nom.*, *Karcher v. Daggett*, 462 U.S. 725 (1983); see also *supra* note 16.

however, these plans were not accepted.²¹

The districting plan adopted by the New Jersey Legislature was challenged by concerned citizens and interested groups as violating article I, section 2 of the Constitution.²² The plaintiffs brought suit in the United States District Court for the District of New Jersey²³ against various state officers,²⁴ alleging that a maximum interdistrict population deviation of 0.69% rendered the plan unconstitutional, and requesting that use of the plan be enjoined.²⁵ Among the plaintiffs were all Republican members of Congress from New Jersey.²⁶ The Republican plaintiffs introduced substantial evidence that the New Jersey plan resulted from political gerrymandering by the Democratically controlled New Jersey Legislature.²⁷ The plaintiffs recognized, however, that no precedent existed declaring political gerrymandering unconstitutional, and consequently the only claim before the district court was that the New Jersey plan was a numerical malapportionment in violation of article I, section 2.²⁸

Relying on *Kirkpatrick v. Preisler*, the district court held that no avoidable population variances were de minimis,²⁹ and that the burden was, therefore, on the state to justify the reducible variances in its districting plan.³⁰ Two justifications for the plan were offered by the state defendants — preserving minority voting strength, and accounting for projected population shifts throughout the decade.³¹ Both of these justifications were rejected by the district court.³² Because the court found no causal relation between the preservation of minority voting strength and the population deviations in the plan, it refused to accept the first justification the state proposed.³³ The court rejected the second justification after finding that the defendants had failed to document their claims of population shifts thoroughly and sufficiently.³⁴ Consequently, the court held that the plan was unconstitutional because the population variances were avoidable and not justified, and enjoined the

²¹ See *Daggett*, 535 F. Supp. at 982. The district court found that the New Jersey Legislature leadership was only "aspirationally" concerned with achieving mathematical equality. *Id.* The leadership, the district court stated, believed that population equality was not the only criterion, but should be balanced with other concerns. *Id.* The district court noted that the legislators felt that recognition should also be given to preserving preexisting districts and municipal boundary lines. *Id.* The legislators also considered partisan concerns, the court found. *Id.*; see also *supra* note 16.

²² *Id.* at 980.

²³ A three-judge district court was convened pursuant to 28 U.S.C. 2284(a) (1982).

²⁴ The defendants were the Governor, Attorney General, and the Secretary of State of New Jersey. *Daggett*, 535 F. Supp. at 980. Suit in a federal court against the state itself, without the state's consent, is barred by the eleventh amendment. See *Ex Parte Young*, 209 U.S. 123 (1908). State officers, however, can be sued to enjoin the denial of federal constitutional rights. *Shapiro v. Maryland*, 336 F. Supp. 1205, 1207-08 (D.C. Md. 1972). See generally Annot., 27 A.L.R. 2d 29, 38 (1976).

²⁵ *Daggett*, 535 F. Supp. at 980-81.

²⁶ *Id.* at 980.

²⁷ *Id.* at 980-83. For a definition of gerrymandering, see *infra* note 209. See also *supra* note 16; *infra* notes 226-27 and accompanying text; *infra* note 261.

²⁸ *Daggett*, 535 F. Supp. at 980-83.

²⁹ *Id.* at 981-82 (citing *Kirkpatrick*, 394 U.S. at 530-31).

³⁰ *Id.* at 982.

³¹ *Id.* at 982-83. The defendants did not pursue the second justification — to account for the projected population shifts throughout the decade — before the Supreme Court. *Karcher*, 462 U.S. at 741-43 & n.12.

³² *Daggett*, 535 F. Supp. at 982-83.

³³ *Id.*

³⁴ *Id.* at 983.

defendant state officers from conducting any elections under the plan.³⁵ The injunction, however, was stayed by Justice Brennan pending appeal to the Supreme Court.³⁶

On June 22, 1983 the Supreme Court affirmed the district court's holding³⁷ that the New Jersey plan was unconstitutional.³⁸ Like the court below, the Supreme Court found that the interdistrict population deviations in the plan were avoidable and reasoned that the state was therefore required to justify the population differences in its plan. The Court concluded that the state had failed to meet the burden of justifying its plan.³⁹ Although the Court, in an apparent change from prior law, recognized that certain state policies could justify some population deviations in a congressional districting plan,⁴⁰ it found that the only justification for the plan offered by the defendants before the Supreme Court — preserving minority voting strength⁴¹ — was not the reason for the population disparities in the New Jersey plan.⁴² Rather, the Court affirmed the district court's determination that no causal connection existed between New Jersey's attempts to preserve minority voting strength and the population deviations in the districting plan.⁴³ Accordingly, the Court held that New Jersey's 1982 reapportionment plan violated article I, section 2 of the Constitution.⁴⁴

In the area of voting equality, the *Karcher* decision is one of major importance because it is the Court's seminal decision of this decade regarding congressional districting. The Court's willingness to invalidate a plan with a less than one percent interdistrict population disparity indicates that numerical exactitude will continue to be the pre-eminent criterion in evaluating congressional districting plans. The *Karcher* decision thus reaffirms and tightens the mandate of equipopulous districting — the so-called "one person-one vote" standard⁴⁵ — for congressional districting plans. *Karcher* is also significant in that it modifies *Kirkpatrick v. Preisler*, a 1969 Supreme Court decision,⁴⁶ in part, and now allows certain state policy justifications for a mathematically inexact districting plan previously unacceptable under *Kirkpatrick*.⁴⁷

In addition, the *Karcher* opinions indicate the possibility of a future change in the law regarding the different treatment by the Court of state legislative and congressional districting plans.⁴⁸ Currently, the constitutionality of state legislative districting plans is considered under the equal protection clause of the fourteenth amendment, while the

³⁵ *Id.*

³⁶ 455 U.S. 1303 (1982) (Brennan, J., Circuit Justice). Due to Justice Brennan's stay of the district court order, New Jersey's 1982 congressional elections were held under the disputed districting plan. Of the fourteen congressional seats up for election, nine were won by Democrats, and five by Republicans. 41 CONG. Q. 391 (1983). In the 1980 New Jersey congressional elections, held under a previous districting plan, of the fifteen congressional seats up for election, eight were won by Democrats, and seven by Republicans. *Id.*

³⁷ The Supreme Court took direct review from the district court pursuant to 28 U.S.C. § 1253 (1982).

³⁸ *Karcher*, 462 U.S. at 742-44.

³⁹ *Id.*

⁴⁰ *Id.* at 739-41. See also *infra* note 253; *infra* notes 338-41 and accompanying text.

⁴¹ See *supra* note 31.

⁴² *Karcher*, 462 U.S. at 742-44.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *supra* notes 2-5 and accompanying text.

⁴⁶ 394 U.S. 526 (1969).

⁴⁷ *Karcher*, 462 U.S. at 739-41; see also *infra* notes 338-41 and accompanying text.

⁴⁸ See *infra* notes 355-69 and accompanying text.

constitutionality of congressional districting plans is adjudged under article 1, section 2.⁴⁹ For reasons later discussed, this differing treatment has resulted in stricter constitutional standards for congressional districting plans.⁵⁰ A careful reading of the several opinions in *Karcher* indicates that for the first time a majority of the Court may be willing to eliminate the dichotomous judicial treatment of congressional districting cases and state legislative districting cases.⁵¹ Similar treatment of congressional and state legislative districting cases would mean greater deference to the states in the Court's treatment of congressional districting plans.⁵² Lastly, the *Karcher* opinions suggest that in the future the Court will be willing to address the previously unconsidered issue of the constitutionality of political gerrymandering — the manipulation of district lines for partisan gain⁵³ — in congressional districting.⁵⁴

The first section of this casenote will trace the development of judicial review of legislative districting plans. Next, it will discuss and analyze the *Karcher* decision, focusing on whether the decision advances the policy behind the one person-one vote standard — "fair and effective representation for all citizens."⁵⁵ Finally, the casenote will consider briefly the major districting issues left unresolved by *Karcher*.

In analyzing the *Karcher* decision, this casenote will question whether the Court's insistence upon absolute mathematical precision follows from the Court's prior decisions, and whether *Karcher* is a desirable extension of precedent. The casenote will suggest that although the Court's refusal to acknowledge a de minimis level of population deviation follows from its holding in *Kirkpatrick v. Preisler*, the demand for statistical exactitude can obscure consideration of other factors equally important to fair districting. The casenote submits, however, that the *Karcher* test for congressional districting, because it allows states to deviate from equipopulous districts for reasons approved by the Court, on the whole forwards the policy of fair and effective representation. Nevertheless, additional judicial criteria must be developed to supplement the Court's strict numerical test for evaluating congressional districting plans to neutralize political gerrymandering and realize the policy goal of fair and effective representation more fully.

I. THE HISTORY OF THE "ONE PERSON-ONE VOTE" STANDARD

The Supreme Court has held that voting districts for congressional and state legislative elections must contain equal numbers of people so that each person's vote is of equal weight.⁵⁶ This "one person-one vote" standard⁵⁷ is founded in a concern with the fundamental importance of the right to vote.⁵⁸ The right to vote freely is essential in a democratic society,⁵⁹ because it is the right which protects all others.⁶⁰ Without the ability

⁴⁹ See *infra* section I.

⁵⁰ *Id.*

⁵¹ See *infra* notes 355-69 and accompanying text.

⁵² See *infra* notes 355-69 and accompanying text.

⁵³ *Karcher*, 462 U.S. at 786-88 (Powell, J., dissenting) (citing *Kirkpatrick*, 394 U.S. at 555 (Fortas, J., concurring)). See also *infra* note 209.

⁵⁴ See *infra* notes 370-407 and accompanying text.

⁵⁵ *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

⁵⁶ *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Reynolds*, 377 U.S. at 575-76.

⁵⁷ *Gray v. Sanders*, 372 U.S. 368, 381 (1963). See also *supra* note 4.

⁵⁸ See, e.g., *Reynolds*, 377 U.S. at 555 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *Wesberry*, 376 U.S. at 17-18.

⁵⁹ *Reynolds*, 377 U.S. at 555.

⁶⁰ *Id.* at 562 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

to exercise the franchise, citizens would have difficulty avoiding intrusion upon their other valuable civil liberties.⁶¹ Consequently, any deprivation or dilution of the vote is of grave concern,⁶² and must be prevented by assuring "equal representation for equal numbers of people."⁶³ To achieve this ideal of voting equality, the Supreme Court has required that states draw equipopulous voting districts;⁶⁴ and qualified voters may enforce this requirement by challenging a districting plan which is not equally apportioned.⁶⁵

The formulation of a "one person-one vote" standard was not possible, however, until after the Supreme Court's landmark decision in *Baker v. Carr*.⁶⁶ Before *Baker*, voter challenges to malapportioned districting plans were generally considered nonjusticiable controversies, because districting was viewed as a "political question" to be left to the legislatures.⁶⁷ Justice Brennan's majority opinion in *Baker* firmly repudiated that view.⁶⁸ In *Baker*, Tennessee voters alleged that the state's legislative districts were malapportioned, in violation of the equal protection clause of the fourteenth amendment.⁶⁹ The malapportionment, the plaintiffs contended, was due to the Tennessee Legislature's failure to redistrict the state in over sixty years despite substantially varying population growth among the state's districts in the intervening years.⁷⁰ The *Baker* Court held that only an issue involving the separation of powers among the three branches of the federal government could invoke the political question doctrine.⁷¹ Districting involves action by a state legislature, the Court noted, and not a coequal branch of government.⁷² Accordingly, the Court held, voter complaints of districting malapportionment present justiciable causes of action.⁷³ The *Baker* decision thus established that districting plans were subject to judicial review, although the Court in *Baker* did not reach the merits of the Tennessee voters' complaint.⁷⁴

Justice Frankfurter, in his oft noted dissent in *Baker*, argued strongly that the Court was entering into a "political thicket" devoid of judicially manageable standards.⁷⁵ Justice Frankfurter contended that districting involved essentially political issues and therefore

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Wesberry*, 376 U.S. at 18.

⁶⁴ *Karcher*, 462 U.S. at 729-31; *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

⁶⁵ *Karcher*, 462 U.S. at 729-31; *Kirkpatrick*, 394 U.S. at 530-31.

⁶⁶ 369 U.S. 186 (1962).

⁶⁷ This view was a result of the Supreme Court's decision in *Colegrove v. Green*, 328 U.S. 549 (1946). This case was decided four-to-three, and it is not clear whether the case was dismissed for lack of subject matter jurisdiction, non-justiciability, or for want of equity. *Id.* at 551-56. A series of per curiam decisions dismissing apportionment cases without comment and simply citing *Colegrove* followed. See cases cited in *Baker v. Carr*, 369 U.S. 186, 202-03 (1962).

In *Baker*, Justice Brennan concluded that *Colegrove* did not bar the Court from hearing apportionment cases, because *Colegrove*, as well as several of the per curiam decisions, was merely a refusal of the Court to exercise its equity powers. *Id.* at 203, 234-35. Justice Brennan then distinguished the remaining per curiam cases from *Baker*. *Id.*

⁶⁸ *Id.* at 208-37.

⁶⁹ *Id.* at 187-88.

⁷⁰ *Id.* at 191-92.

⁷¹ *Id.* at 210.

⁷² *Id.* at 226.

⁷³ *Id.* at 197-98.

⁷⁴ *Id.*

⁷⁵ *Id.* at 277-78 (Frankfurter, J., dissenting) (citing *Colegrove v. Green*, 328 U.S. 549, 556 (1946)).

the Court should exercise restraint and leave districting concerns to the legislatures.⁷⁶ Courts, according to Justice Frankfurter, possess the ability to apply legal criteria to judicial questions, but do not have the institutional competence to examine questions of political policy.⁷⁷

The answer to Justice Frankfurter's concern over creating a workable judicial standard was subsequently provided in *Gray v. Sanders*.⁷⁸ In *Gray*, the Court for the first time held that each person's vote must count mathematically as much as any other's.⁷⁹ The plaintiff voters in *Gray* challenged the use of county units as the bases for counting votes in a statewide Democratic primary election.⁸⁰ Under this system, the vote of a citizen counted for less as the population of his county increased.⁸¹ The plaintiffs claimed that the vote counting system diluted their urban votes because the votes of citizens in the less populated rural counties counted proportionally more than those of citizens in the heavily populated urban counties.⁸² Finding the Democratic Committee's holding of a primary election to be "state action" for purposes of the fourteenth amendment,⁸³ the Court held that the vote counting method unconstitutionally "weighted" the votes of rural voters.⁸⁴ "The conception of political equality," the Court stated, "can mean only one thing — one person, one vote."⁸⁵ Despite Justice Harlan's argument in dissent that a variety of factors are important to voting equality,⁸⁶ the *Gray* Court adopted mathematical population equality among voting districts as the judicially manageable standard which the courts were to apply in reviewing voting cases.⁸⁷

After *Gray*, political parties were required to accord equal weight to all votes in statewide primary elections.⁸⁸ *Gray* was not, however, a districting case in that it did not involve a state legislature's drawing of legislative voting district lines.⁸⁹ The one person-one vote rationale developed in *Gray* was subsequently extended by the Court to apply to legislative districting.⁹⁰ The Court applied the one person-one vote standard to legislative districting cases under two distinct constitutional provisions.⁹¹ In cases involving a state legislature's apportioning of congressional voting districts, the Court considered the issue of voting equality under article I, section 2 of the Constitution.⁹² Cases involving the drawing of district lines for state legislative seats, on the other hand, were examined by the Court under the equal protection clause of the fourteenth amendment.⁹³ This difference in analysis led to dichotomous results between the two lines of cases.

⁷⁶ *Id.* (Frankfurter, J., dissenting).

⁷⁷ *Id.* at 327-30 (Frankfurter, J., dissenting).

⁷⁸ 372 U.S. 368 (1963).

⁷⁹ *Id.* at 381.

⁸⁰ *Id.* at 370.

⁸¹ *Id.* at 372.

⁸² *Id.* at 371.

⁸³ *Id.* at 374.

⁸⁴ *Id.* at 380-81.

⁸⁵ *Id.* at 381.

⁸⁶ *Id.* at 385 (Harlan, J., dissenting) (citing *MacDougall v. Green*, 335 U.S. 281, 283-84 (1948)).

⁸⁷ *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

⁸⁸ *Id.*

⁸⁹ See *supra* note 7.

⁹⁰ See *infra* notes 94-107 and accompanying text.

⁹¹ See *infra* notes 94-107 and accompanying text.

⁹² *Wesberry*, 376 U.S. at 7-9.

⁹³ *Reynolds*, 377 U.S. at 560.

The first case to apply the one person-one vote standard of *Gray* to congressional districting was *Wesberry v. Sanders*.⁹⁴ The *Wesberry* Court held that "as nearly as is practicable" congressional voting districts must be of equal population.⁹⁵ Plaintiff voters in *Wesberry*, residents of Georgia's Fifth Congressional District, alleged that their votes were unconstitutionally diluted because the Fifth District had a population more than twice that of the average Georgia congressional district.⁹⁶ Justice Black, speaking for the Court, held that article I, section 2 of the Constitution was controlling with respect to the voting requirements for congressional elections.⁹⁷ After a review of the constitutional history of article I, section 2, Justice Black concluded that the Constitution requires equipopulous congressional districts so that each person's vote counts equally in electing a Representative to Congress.⁹⁸ Accordingly, the Court held Georgia's congressional districting plan to be an unconstitutional malapportionment.⁹⁹

Subsequent to *Wesberry*, the Court expanded the reach of the one person-one vote standard to state legislative districting in *Reynolds v. Sims*.¹⁰⁰ *Reynolds* involved a challenge to the districting scheme for seats in the Alabama State Legislature.¹⁰¹ Alabama legislative voting districts had not been reapportioned since 1900 and had become grossly malapportioned by 1962 due to uneven population growth in the various districts.¹⁰² The *Reynolds* Court held that the equal protection clause of the fourteenth amendment applies to state legislative districting,¹⁰³ and that the existing malapportionment of the voting districts unconstitutionally diluted the franchise of voters in the larger districts.¹⁰⁴ The Court found such a dilution or debasement of the weight of a citizen's vote to be as effective a denial of the right to vote as the outright prohibition of the franchise.¹⁰⁵ Rejecting an analogy to the United States Congress, wherein only one of the houses is chosen by population, the Court held that *both* houses of a state legislature must be composed of representatives elected from equipopulous districts.¹⁰⁶ The *Reynolds* Court emphasized that in apportionment litigation, population was to be the starting point of consideration and the controlling criterion of constitutionality under the equal protection clause.¹⁰⁷

The Court in *Reynolds* noted, however, that "mathematical nicety [was] not a constitu-

⁹⁴ 376 U.S. 1 (1964).

⁹⁵ *Id.* at 7-8.

⁹⁶ *Id.* at 2-3.

⁹⁷ *Id.* at 7-9.

⁹⁸ *Id.* at 7-8, 18.

⁹⁹ *Id.*

¹⁰⁰ 377 U.S. 533 (1964).

¹⁰¹ *Id.* at 537.

¹⁰² *Id.* at 540. Interdistrict population variances ranged from 41-1 in the Alabama Senate, and 16-1 in the Alabama House. *Id.* at 545. The smallest state senate district contained 15,417 people while the largest contained over 600,000 people. *Id.* at 546.

¹⁰³ *Id.* at 560.

¹⁰⁴ *Id.* at 568.

¹⁰⁵ *Id.* at 555.

¹⁰⁶ *Id.* at 571-77. Alabama pointed out that in the United States Senate all states are allowed two Senators regardless of the disparities in population among the states. *Id.* Consequently, Alabama argued, a state should also be free to base membership of one house of its legislature on geographic rather than population concerns. *Id.* The *Reynolds* Court does an unsatisfactory job of refuting this "federal analogy," arguing only that different historical considerations underlie the requirements for membership in the Senate and the state legislatures. *Id.*

¹⁰⁷ *Id.* at 567.

tional requisite" under the fourteenth amendment.¹⁰⁸ Moreover, the Court stated that certain rational state policies might justify some deviations from equal population among voting districts.¹⁰⁹ Permissible state policies mentioned by the Court that could be used to justify some population disparities included maintaining the integrity of political subdivisions, and providing for compact and contiguous districts.¹¹⁰ The goal of legislative apportionment, proclaimed Chief Justice Warren, is "the achieving of fair and effective representation for all citizens."¹¹¹

The Supreme Court refined the *Reynolds* formulation regarding state legislative districting in *Swann v. Adams*.¹¹² In *Swann*, voters challenged a Florida Legislature redistricting plan in which population deviations among districts ranged as high as 25% in the Florida Senate, and 33% in the Florida House.¹¹³ The Court found that the interdistrict population deviations in the Florida plan were unconstitutionally large and must be justified by some valid state policy.¹¹⁴ When Florida failed to justify its plan, the Court held that the plan's malapportionment violated the equal protection clause.¹¹⁵ Significantly, however, the *Swann* Court reaffirmed the dicta in *Reynolds* that "mathematical nicety" was not required in apportioning districts for state legislatures and stated that "some" population variances, although not variances as high as those in the Florida plan, could be dismissed as de minimis.¹¹⁶ *Swann* thus clarified the scope of review for state legislative apportionment plans. A state plan with interdistrict population deviations would not violate the fourteenth amendment if those deviations were either considered de minimis or justified by an acceptable, rational state policy.

Although the *Swann* decision signaled some judicial leniency regarding slightly malapportioned state legislative districting plans evaluated under the fourteenth amendment, the Court's subsequent decision in *Kirkpatrick v. Preisler*¹¹⁷ evidenced that congressional districting plans would be reviewed more strictly under article I, section 2. The Missouri redistricting plan challenged in *Kirkpatrick* contained a maximum population deviation among districts of 5.97% and an average deviation of 1.6%.¹¹⁸ Justice Brennan, writing for the Court, interpreted the standard established in *Wesberry* — that congressional districts must be of equal population as nearly as is practicable — to require that any population deviations be deemed unconstitutional unless the deviations were unavoidable despite a good faith effort to achieve *absolute* equality.¹¹⁹ In the instant case,

¹⁰⁸ *Id.* at 569.

¹⁰⁹ *Id.* at 577-81.

¹¹⁰ *Id.* at 578.

¹¹¹ *Id.* at 565-66.

¹¹² 385 U.S. 440 (1967).

¹¹³ *Id.* at 442.

¹¹⁴ *Id.* at 444. In *Swann*, acceptable justifications included recognition of political subdivisions, natural or historic boundary lines, or maintenance of compact and contiguous districts. *Id.* (citing *Reynolds*, 377 U.S. at 578-79).

¹¹⁵ *Swann*, 385 U.S. at 443-44.

¹¹⁶ *Id.* at 444. Beyond stating that some population variances would be considered de minimis, the Court in *Swann* did not consider what percentage level of deviation this de minimis line would be. The Court merely stated that variations of 30% or 40% would not be de minimis. *Id.*

In *Kilgarin v. Hill*, 386 U.S. 120 (1967), the Court further clarified the *Swann* rule and held that maximum deviations of 26% would not be considered de minimis. *Id.* at 122. *Kilgarin*, decided per curiam one month after *Swann*, rejected a malapportioned plan redistricting the Texas House of Representatives. *Id.* at 121-22. See also *infra* note 152 and accompanying text.

¹¹⁷ 394 U.S. 526 (1969). See generally 19 DE PAUL L. REV. 152 (1969).

¹¹⁸ *Kirkpatrick*, 394 U.S. at 529.

¹¹⁹ *Id.* at 531.

the Court held, the existence of other reapportionment proposals with smaller population deviations established that the variances in the Missouri plan were not unavoidable,¹²⁰ and therefore, the burden shifted to the defendants to justify the population variances.¹²¹ The Court explicitly rejected the contention that, without more, some population disparities were per se acceptable as de minimis, stating that "the state must justify each variance, no matter how small."¹²² Any avoidable variances, the Court held, would require the state to show that the variances were the necessary results of effecting a rational state policy.¹²³ The Court proceeded, however, to reject most possible justifications a state might offer.¹²⁴ Missouri claimed that its variances resulted from its attempts to consider partisan concerns, to avoid fragmenting political subdivisions, and to create compact districts.¹²⁵ The Court found Missouri's goals "legally unacceptable" reasons for failing to achieve population equality.¹²⁶

Any doubt that congressional and state legislative districting cases were to be adjudged differently under article I, section 2 and the fourteenth amendment respectively, was resolved by the Court's decision in *Mahan v. Howell*.¹²⁷ In *Mahan*, the Supreme Court held that a plan apportioning districts for the Virginia Legislature did not violate the fourteenth amendment¹²⁸ despite a maximum population deviation of 16.4%.¹²⁹ The Court held that the plan was justified by the state's efforts to maintain the integrity of political subdivisions¹³⁰ — a justification rejected for congressional plans in *Kirkpatrick*.¹³¹ The Court stated that although population is the sole criterion for determining the validity of congressional districting plans under article I, section 2, broader latitude is to be afforded the states under the equal protection clause.¹³² The Court reasoned that because states will usually have more state legislative than congressional seats, allowing states to use political subdivision lines to a greater extent in state legislative districting was reasonable.¹³³ Furthermore, since local concerns are addressed more often at the state level, and local governments are frequently charged with carrying out responsibilities

¹²⁰ *Id.* at 531-32.

¹²¹ *Id.* at 532.

¹²² *Id.* at 530-31.

¹²³ *Id.*

¹²⁴ *See id.* at 533-36; *see also id.* at 537 (Fortas, J., dissenting) ("[The Court] then proceeds to reject, *seriatim*, every type of justification that has been — possibly, every one that could be — advanced.").

The *Kirkpatrick* Court did not, however, reject all possible justifications. For instance, the majority in *Kirkpatrick* stated that a state's attempts to account for projected population shifts throughout the decade could justify some population variances as long as these projected shifts were thoroughly and sufficiently documented. *Id.* at 535. *See also infra* notes 338-41 and accompanying text.

¹²⁵ *Kirkpatrick*, 394 U.S. at 533-36.

¹²⁶ *Id.* In *Wells v. Rockefeller*, 394 U.S. 542 (1969), a New York congressional districting case decided the same day as *Kirkpatrick*, the Court applied the *Kirkpatrick* test to invalidate a plan with a 13.1% maximum population deviation. *Id.* at 546.

¹²⁷ 410 U.S. 315 (1973).

¹²⁸ *Id.* at 324-25.

¹²⁹ *Id.* at 319.

¹³⁰ *Id.* at 329.

¹³¹ *Kirkpatrick*, 394 U.S. at 533-34.

¹³² *Mahan*, 410 U.S. at 322.

¹³³ *Id.* at 321 (citing *Reynolds*, 377 U.S. at 578).

delegated by the state, according political subdivisions as political subdivisions some voice in the state houses is important, the Court noted.¹³⁴

The emerging dichotomy between the two lines of cases — the congressional and the state legislative districting cases — was further evidenced in *Gaffney v. Cummings*.¹³⁵ According to the Court, the plaintiffs in *Gaffney* failed to make out even a prima facie violation of the fourteenth amendment in challenging a Connecticut Legislature reapportionment plan with a maximum population deviation of 7.83% among districts of the Connecticut House.¹³⁶ Deviations of this size, the Court considered, were too small to even necessitate justification by the state.¹³⁷ Noting that the more stringent *Kirkpatrick* standard prohibited any such deviations from being considered de minimis in congressional districting cases,¹³⁸ the Court stated that more flexibility was to be accorded states in districting for their state legislatures.¹³⁹ Factors other than pure numerical equality are also important to fair and effective representation, the Court reasoned.¹⁴⁰

In *White v. Regester*,¹⁴¹ decided on the same day as *Gaffney*, the Court raised to 9.9% the level of maximum population deviation in state legislative districting plans that it would consider de minimis.¹⁴² The *Regester* Court reaffirmed the reasoning of *Gaffney*, and held that the deviations of almost 10% in a plan reapportioning districts of the Texas House of Representatives were acceptable without justification by the state.¹⁴³

A congressional districting case, *White v. Weiser*,¹⁴⁴ was also decided by the Supreme Court along with *Gaffney* and *Regester*. At issue in *Weiser* was a congressional redistricting plan containing population deviations substantially less than those found de minimis with respect to state legislative plans in *Gaffney* and *Regester*. The plaintiffs in *Weiser* challenged a Texas congressional redistricting plan with an average deviation from the "ideal" district size of .745%, and a maximum interdistrict population deviation of 4.13%, as being an unconstitutional malapportionment in violation of article I, section 2.¹⁴⁵ Although these deviations were significantly less than the deviations found unacceptable in *Kirkpatrick v. Preisler*,¹⁴⁶ Texas' plan was nonetheless rejected by the *Weiser* Court.¹⁴⁷ Stressing that more mathematically balanced alternative plans were available to the Texas Legislature,¹⁴⁸ the Court held that the population disparities in Texas' plan were not unavoidable.¹⁴⁹ The Court also found that the justifications offered by the state were

¹³⁴ *Id.* at 321-22 (citing *Reynolds*, 377 U.S. at 580-81). The Court pointed out, however, that at some point population deviations will simply be too high even to be justified by state policy. *Id.* at 329. The Court noted that, despite justification, the 16.4% maximum deviation in *Mahan* "may well approach tolerable limits." *Id.* But see *Brown v. Thomson*, 462 U.S. 835, 840-42 (1983) (state legislative districting plan justified despite a maximum deviation of 89%); see *infra* note 152.

¹³⁵ 412 U.S. 735 (1973).

¹³⁶ *Id.* at 737, 740-41.

¹³⁷ *Id.*

¹³⁸ *Id.* at 741-42.

¹³⁹ *Id.* at 743-44.

¹⁴⁰ *Id.* at 748-49.

¹⁴¹ 412 U.S. 755 (1973).

¹⁴² *Id.* at 763.

¹⁴³ *Id.*

¹⁴⁴ 412 U.S. 783 (1973).

¹⁴⁵ *Id.* at 785-86.

¹⁴⁶ The deviations in *Kirkpatrick* were: average deviation — 1.6%; maximum deviation — 5.97%. *Kirkpatrick*, 394 U.S. at 529.

¹⁴⁷ *White v. Weiser*, 412 U.S. 783, 790 (1973).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

insufficient to support the chosen plan,¹⁵⁰ and, consequently, held that the plan was unconstitutional.¹⁵¹

After *Weiser*, two major distinctions in the treatment under the one person-one vote standard between the article 1, section 2 districting cases and the fourteenth amendment cases could be discerned. First, in state legislative districting cases following the *Reynolds-Swann-Regester* line, the Court would consider some population variances allowable as de minimis. This de minimis level for state legislative districting plans would fall somewhere between the 9.9% deviation found acceptable in *Regester*, and the 16.4% deviation the state was required to justify in *Mahan v. Howell*.¹⁵² In congressional districting cases following the *Wesberry-Kirkpatrick-Weiser* line, however, the Court would consider no population variances to be de minimis. Second, certain state policies could justify some population disparities in state legislative districting plans.¹⁵³ The *Kirkpatrick v. Preisler* decision, however, ruled out most state policy justifications for malapportioned congressional districting plans.¹⁵⁴

Karcher v. Daggett clarifies in part and changes in part the application of the one person-one vote standard in congressional districting cases. *Karcher* reaffirms that a rule of mathematical equality will be strictly applied in evaluating congressional districting plans.¹⁵⁵ The *Karcher* decision also further tightens this mandate by holding that the rule will be applied to districting plans with maximum population deviations of less than one percent.¹⁵⁶ A state may, however, under *Karcher*, justify some population deviations in its congressional districting plan as necessary for achieving a legitimate state policy.¹⁵⁷ Concerning a state's justification of its redistricting plan, *Karcher* liberalizes congressional apportionment law by allowing previously unacceptable state policy justifications for mathematically inexact congressional redistricting plans.¹⁵⁸ The next section of this case-note will examine in detail these aspects of the *Karcher* majority opinion as well as consider the concurring and dissenting opinions in the case.

¹⁵⁰ *Id.* at 791-92.

¹⁵¹ *Id.* at 792.

¹⁵² In *Brown v. Thomson*, 462 U.S. 835 (1983), decided the same day as *Karcher*, the Court cited *White v. Regester* for the proposition that "as a general matter" maximum population deviations of less than 10% in state legislative districting plans are considered de minimis and do not require justification. *Brown*, 462 U.S. at 842-44 (citing *White v. Regester*, 412 U.S. 755, 764 (1973)).

Brown involved a Wyoming state legislative districting plan that was upheld despite a maximum population deviation of 89% in State House districts. *Id.* at 846-48. The Court was at pains to explain the seemingly incongruous result of accepting Wyoming's plan but rejecting New Jersey's plan for having a 0.69% maximum deviation. The Court thus stressed the narrowness of its holding in *Brown*, stating that it did not adjudge the constitutionality per se of an 89% deviation. *Id.* The Court claimed only to allow that Wyoming's allocating one state representative to each county was constitutional even though the State's smallest county had a population less than half of the average voting district. *Id.* This state policy of ensuring each county a representative, the Court held, justified the minimal disparate impact that this apportionment had on the other voters in the state. *Id.*

¹⁵³ See *supra* text accompanying notes 109-10.

¹⁵⁴ See *supra* notes 124-26 and accompanying text; see also *infra* notes 338-41 and accompanying text.

¹⁵⁵ *Karcher*, 462 U.S. at 729-33.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 739-41.

¹⁵⁸ See *infra* notes 251-54 and accompanying text.

II. *KARCHER V. DAGGETT*

In *Karcher*, the Supreme Court, in an opinion by Justice Brennan, affirmed the district court's holding that New Jersey's 1982 congressional redistricting plan was unconstitutional.¹⁵⁹ The Supreme Court stated that in a congressional districting case, the plaintiffs initially have the burden of showing that the interdistrict population variances in the challenged plan could have been reduced by a good faith effort to draw districts of equal population.¹⁶⁰ If the plaintiffs are successful in showing avoidable population variances, the Court held, the state would then bear the burden of justifying its choice of the more mathematically inexact districting plan by asserting legitimate state interests served by the plan in the second level of judicial inquiry.¹⁶¹ In *Karcher*, the Court found, the interdistrict population deviations in the New Jersey plan were not the unavoidable results of a good faith effort to achieve absolute equality.¹⁶² Furthermore, the defendants had failed to justify the population variances in the plan, the Court stated.¹⁶³ Accordingly, the Court held that New Jersey's plan violated article I, section 2 of the Constitution.¹⁶⁴

To meet their burden of showing avoidable population deviations in the New Jersey plan, the *Karcher* plaintiffs introduced evidence of other plans available to the New Jersey Legislature which were more mathematically exact than the adopted plan.¹⁶⁵ The *Karcher* Court, however, found it unnecessary to base its holding on the existence of the other plans.¹⁶⁶ The Court reasoned that simply by shifting certain municipalities from one district to another, the deviations in the New Jersey plan could have been avoided.¹⁶⁷

The state defendants contended that, even if the deviations in the adopted plan were avoidable, the deviations were so small that the Court should consider them insignificant and uphold the plan.¹⁶⁸ The defendants noted that the margin of error in the census, the undercount, was larger than the deviations in the New Jersey plan.¹⁶⁹ Since the inaccuracy of the census is greater than one percent, the defendants reasoned, the deviations of less than one percent in the New Jersey plan should be considered de minimis.¹⁷⁰ The *Karcher* Court rejected the argument that the deviations in the adopted plan were so small as to be insignificant.¹⁷¹ *Kirkpatrick*, the Court noted, had already dismissed the contention that some population variances in congressional districting plans should be acceptable per se as de minimis.¹⁷² Moreover, the Court stated, that the percentage of census undercount

¹⁵⁹ *Karcher*, 462 U.S. at 727.

¹⁶⁰ *Id.* at 729-31.

¹⁶¹ *Id.*

¹⁶² *Id.* at 737-41.

¹⁶³ *Id.* at 742-44.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 737-39.

¹⁶⁶ *Id.* at 737-41.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 729-31.

¹⁶⁹ As noted, the maximum deviation in the New Jersey plan was 0.69%. *Id.* at 727-29. The defendants introduced an affidavit of Dr. James Trussell, a Princeton University demographer, which concluded that "the undercount in the 1980 census [was] likely to be above one percent." *Id.* at 735-37. The Court noted that other estimates of the national undercount in previous censuses ranged from 2.5% to 3.3%. *Id.* at 736 n.7. The margin of error officially recognized by the Census Bureau is 2.3%. *Id.* at 770-71 n.4 (White, J., dissenting).

¹⁷⁰ *Id.* at 729-33.

¹⁷¹ *Id.*

¹⁷² *Id.* (citing *Kirkpatrick*, 394 U.S. at 530).

was larger than the deviations in the challenged plan should not make the avoidable population deviations any more acceptable for two reasons.¹⁷³ First, although the census is less than perfect, the Court noted, it is the best population data available, and should be used as the benchmark of real relative population levels.¹⁷⁴ Second, the Court continued, to the extent the undercount is distributed evenly among districts, it becomes irrelevant because the existence of an undercount in the census only indicts districting accuracy insofar as the undercount varies among districts.¹⁷⁵ The Court found, however, that the relative distribution of the undercount had not been shown.¹⁷⁶ In sum, because the defendants had not shown with any precision relevant flaws in the census data, the Court concluded that the census itself must remain the apportioning standard.¹⁷⁷

In addition to the insufficiency of the defendants' statistical argument, the Court gave three reasons for rejecting a de minimus approach. First, the Court stated, using a standard other than absolute equality would lead to erosion of the constitutional guarantee of equal representation.¹⁷⁸ To regard some population deviations as per se acceptable, the Court contended, would be to reject the premise of *Wesberry* and *Kirkpatrick* that only population equality among districts reflects the goal of voting equality expressed in article I, section 2.¹⁷⁹ Legislators might strive to achieve the de minimus level rather than equality, the Court postulated.¹⁸⁰ Moreover, the Court reasoned, no non-arbitrary stopping point exists at which to draw the line.¹⁸¹ As between "equality or something-less-than equality," only the former will suffice, the Court stated.¹⁸² Second, the Court concluded that, given the state of computer technology, drawing districts of equal population is relatively simple.¹⁸³ Third, the Court noted that the *Wesberry-Kirkpatrick* line of cases recognizes that different weight is accorded to local interests in deciding districting cases under the fourteenth amendment rather than article I, section 2.¹⁸⁴ Local interests assume greater importance in cases involving state legislative districts evaluated under the fourteenth amendment, the Court recognized.¹⁸⁵ With congressional districting, however, the concerns of national representation outweigh these local interests, the Court reasoned, and hence population equality must be the controlling criterion under article I, section two.¹⁸⁶

Having found that the population deviations in the New Jersey plan were neither unavoidable nor de minimus, the Court held that the burden then shifted to the state to justify its plan.¹⁸⁷ According to the Court, the state must show, with specificity, that the

¹⁷³ *Id.* at 735-39.

¹⁷⁴ *Id.* at 737-39.

¹⁷⁵ *Id.* at 735-37.

¹⁷⁶ *Id.* The Court noted that Dr. Trussell's affidavit showed that undercount distribution is "impossible" to determine except on a national scale. *Id.*

¹⁷⁷ *Id.* at 737-39.

¹⁷⁸ *Id.* at 729-33.

¹⁷⁹ *Id.* at 731-33.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* The majority apparently regarded one of the benefits of a rule of absolute equality as providing a definitive, clear cut standard. "If we accept [that a 0.69% deviation is de minimis]," the Court questioned, "how are we to regard deviations of 0.8%, 0.95%, 1%, or 1.1%?" *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 739-41.

deviations in its plan were necessary to achieve a legitimate state objective.¹⁸⁸ If the state could make such a showing, the Court noted, the plan would be upheld.¹⁸⁹ A court's review of a districting plan would be flexible, the Court stated, and depend upon a case-by-case analysis.¹⁹⁰ To determine whether a plan's deviations were justifiable, the Court continued, a court should weigh the size of the interdistrict population deviations against the importance of the state interest asserted.¹⁹¹ The availability of alternative means of achieving the state's objective should also be considered, the Court added.¹⁹²

The Court considered that state policies potentially justifying some minor population variances could include making districts compact, respecting political subdivision lines, preserving prior districts, and avoiding contests between incumbents.¹⁹³ In *Karcher*, the court found that the proffered justification — preserving minority voting strength — was unsubstantiated; however, the Court did not state that preserving minority voting strength was not a legitimate state interest.¹⁹⁴ The Court noted that the defendants asserted that they had attempted to preserve the voting strength of minority groups in the Tenth District.¹⁹⁵ According to the Court, however, the most malapportioned districts were the Fourth and Ninth (the two largest), and the Third and Sixth (the two smallest).¹⁹⁶ None of these four districts, the Court observed, bordered on the Tenth District.¹⁹⁷ Preserving minority voting strength in the Tenth District could not justify the population variances in noncontiguous malapportioned districts, the Court found.¹⁹⁸ Consequently, the Court concluded that the district court was correct in finding no causal relationship between the deviations in the plan and the purported justification.¹⁹⁹ The deviations, the Court reasoned, could not be considered necessary to achieve a legitimate state objective.²⁰⁰ Accordingly, the Court held New Jersey's districting plan unconstitutional.²⁰¹

In sum, the *Karcher* Court applied a two-part test in analyzing whether New Jersey's redistricting plan was unconstitutional under article 1, section 2. First, the plaintiffs are required to show that the population deviations in the challenged plan could have been reduced with a good faith effort to achieve precise mathematical equality among districts.²⁰² If the plaintiffs succeed in showing avoidable population deviations, the burden then shifts to the state to justify the deviations in its plan.²⁰³ In the second level of judicial inquiry, the state must justify the population deviations in its plan as necessary for

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 739-42.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 739-41. Other than stating that some "minor" population deviations could be justified by state policy, the Court gave no indication of how large justifiable population deviations could be. *Id.* At some point, population deviations will be too high even to be justified by state policy. See *Mahan v. Howell*, 410 U.S. 315, 329 (1973).

¹⁹⁴ *Karcher*, 462 U.S. at 742-44.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 729-31.

²⁰³ *Id.*

achieving some legitimate state policy.²⁰⁴ If the state fails to make this showing, the plan will be found unconstitutional.²⁰⁵

Justice Stevens wrote separately in concurrence and provided the decisive vote for the Court's holding.²⁰⁶ He agreed with the majority that in light of the Court's holding in *Kirkpatrick v. Preisler*, *stare decisis* required the rejection of New Jersey's claim that the deviations in its plan were *de minimus*.²⁰⁷ He also agreed that the deviations were avoidable, and that the state had failed to provide adequate justification.²⁰⁸ Justice Stevens, however, also considered the constitutional implications of political gerrymandering,²⁰⁹ and took issue with the Court's *Wesberry-Kirkpatrick-Karcher* formulation of the one person-one vote standard.²¹⁰ In *Wesberry*, Justice Stevens noted, the Court had first held the requirement of article I, section 2 that Representatives be elected "by the People of the several States," to mean that congressional districts be apportioned equally.²¹¹ Justice Stevens argued that reading this one person-one vote standard into article I, section 2 is unsound.²¹² He contended that article I, section 2 speaks only to apportionment of congressional representatives *among* the states by Congress and says nothing of the composition of districts *within* a state.²¹³ Justice Stevens concluded that the one person-one vote standard of voting equality should instead be applied to congressional districting via

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 744-46 (Stevens, J., concurring).

²⁰⁷ *Id.* (Stevens, J., concurring).

²⁰⁸ *See id.* at 761-63 (Stevens, J., concurring).

²⁰⁹ Gerrymandering has been defined as "districting along unnatural lines to achieve partisan advantage or some other unfair objective." Harvard Note, *supra* note 7, at 1283. Justice Powell refers to gerrymandering as "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Karcher*, 462 U.S. at 786-88 (Powell, J., dissenting) (quoting *Kirkpatrick*, 394 U.S. at 538 (Fortas, J., concurring)). Numerical malapportionment is not gerrymandering as such, but rather a means to that end. The one person-one vote standard, therefore, by preventing numerical malapportionments, eliminates one method by which to gerrymander. The one person-one vote standard does not, however, proscribe gerrymandering per se. It requires equipopulous districts and nothing more. *See id.* at 729-31, 734-35 n.6.

The numerical "voting equality" of the one person-one vote standard should be contrasted with what has been called "representation equity." *See Wallace v. House*, 515 F.2d 619 (5th Cir. 1975). The right of representation equity is the right to be free of infringements on group voting power, such as districting that prevents a group from voting as a single unit by separating the group among various districts. *See generally* Annot., 27 A.L.R. FED. 29, 40-49 (1976). A right to representation equity would protect, for example, against discriminatory dilution of the voting strength of cognizable groups such as blacks and hispanics. *See id.*

Justice Stevens considered gerrymandering to occur when one racial, ethnic, religious, economic, or political group is favored in the districting process at the expense of another. *Karcher*, 462 U.S. at 748-50 (Stevens, J., concurring). In Justice Stevens's view, however, *all* gerrymandering is political gerrymandering since what is at stake is the existence of the particular group's *political* power. *Id.* at 748-51 (Stevens, J., concurring) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 88 (1980) (Stevens, J., concurring)). Justice Stevens noted that neither the one person-one vote standard, nor any other current judicial standard protects against such gerrymanders in congressional districting. *Id.*

²¹⁰ *Id.* at 744-65 (Stevens, J., concurring).

²¹¹ *Id.* at 744-46 (Stevens, J., concurring) (citing *Wesberry*, 376 U.S. at 18).

²¹² *Id.* at 745-46 & n.4 (Stevens, J., concurring).

²¹³ *Id.* at 744-46 (Stevens, J., concurring). For the pertinent text of article I, section 2 *see supra* note 2.

the fourteenth amendment, which requires a state to govern impartially, and would surely apply to action by state officials creating congressional voting districts.²¹⁴

The advantage of grounding the Court's reasoning in the fourteenth amendment, Justice Stevens contended, is that the Court could consider harms to voting equality other than mathematical vote dilution.²¹⁵ What concerned Justice Stevens was not that the Court's insistence on numerical equality was incorrect, but that it is inadequate.²¹⁶ The command of article I, section 2 protects only against numerical malapportionment, Justice Stevens noted.²¹⁷ Under the Court's reasoning, Justice Stevens argued, a districting plan could be acceptable if it achieved mathematical equality even though it distorted the weight of votes through political gerrymandering.²¹⁸ According to Justice Stevens, the limited reach of article I, section 2 prohibiting only numerical malapportionment was especially relevant in *Karcher* because the New Jersey plan showed obvious signs of gerrymandering.²¹⁹ Justice Stevens would, therefore, supplement the command of mathematical equality with an additional test to protect voting equality in congressional districting from forms of discriminatory vote dilution other than numerical malapportionment, such as political gerrymandering.²²⁰ Such a test, assessing the fairness of apportionment plans in numerical and other relevant respects, Justice Stevens asserted, could be applied through the equal protection clause of the fourteenth amendment.²²¹

Justice Stevens proposed a three part objective test to consider other types of vote dilution.²²² Under the test, to make a prima facie showing of discriminatory vote dilution plaintiffs must show, first, that they belong to a politically salient class whose geographic distribution could have been considered in districting; second, that their proportionate voting strength had been adversely affected by the plan; and third, that sufficient objective indicia of discrimination exists.²²³ Justice Stevens stated that this third requirement could be met by showing that the challenged plan radically departed from traditional neutral districting criteria, for example, that the plan disregarded political subdivi-

²¹⁴ *Karcher*, 462 U.S. at 746-48 (Stevens, J., concurring).

²¹⁵ *Id.* at 746-50 (Stevens, J., concurring). Article I, section 2 protects only against numerical malapportionment, as Justice Stevens noted. *Id.* at 750-53 (Stevens, J., concurring). See, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964). If the fourteenth amendment were applicable to congressional districting, Justice Stevens argued, any type of discriminatory vote dilution would be proscribed. *Karcher*, 462 U.S. at 746-55 (Stevens, J., concurring). Justice Stevens reasoned that since the fourteenth amendment requires the state to act evenhandedly, discrimination in the districting process is prohibited. *Id.* at 746-50 (Stevens, J., concurring).

Justice Stevens contended that discriminatory districting can be accomplished by means other than numerically devaluing the weight of a person's vote. *Id.* at 744-46 (Stevens, J., concurring). Justice Stevens argued that districting plans, even if mathematically exact, which favor one political, religious, racial, ethnic, or economic group at the expense of another, also discriminatorily dilute the weight of votes. *Id.* at 748-53 (Stevens, J., concurring). Accordingly, Justice Stevens would hold that numerical vote dilution is only one form of discrimination against rights of voting equality forbidden by the equal protection clause. *Id.* The other forms of discriminatory vote dilution would be unconstitutional as well, Justice Stevens argued. *Id.*

²¹⁶ *Id.* at 751-53 (Stevens, J., concurring). See also *supra* note 215.

²¹⁷ 462 U.S. at 750-53 (Stevens, J., concurring). See also *supra* note 215.

²¹⁸ See *Karcher*, 462 U.S. at 750-53 (Stevens, J., concurring). For a definition of gerrymandering see *supra* note 209.

²¹⁹ 462 U.S. at 761-65 (Stevens, J., concurring).

²²⁰ *Id.* at 750-55 (Stevens, J., concurring).

²²¹ *Id.* at 746-50 (Stevens, J., concurring).

²²² *Id.* at 753-55 (Stevens, J., concurring).

²²³ *Id.*

sion lines, contained irregularly shaped districts, or was malapportioned.²²⁴ Once plaintiffs had established a prima facie case, Justice Stevens concluded, the burden would then shift to the state to justify its plan's infirmities as necessary to achieve a legitimate state policy.²²⁵

If the above test had been applied in the present case, Justice Stevens inferred that New Jersey Republicans would have had a cause of action under the fourteenth amendment for vote dilution through political gerrymandering.²²⁶ Justice Stevens stated that the New Jersey plan was designed to increase the number of Democrats and to decrease the number of Republicans that New Jersey's voters would send to Congress.²²⁷ Justice Stevens noted that the case was tried in the district court only on the issue of an alleged article I, section 2 malapportionment, however, and not on a fourteenth amendment theory.²²⁸ He settled, therefore, for concurring in the majority's holding that the New Jersey plan was an unconstitutional malapportionment.²²⁹

Justice White wrote a dissenting opinion in which Chief Justice Burger, and Justices Powell and Rehnquist concurred.²³⁰ The dissenters argued that the population deviations in the New Jersey plan were only "trifling," and consequently, the plan should be upheld.²³¹ The majority's application of the one person-one vote standard to invalidate the plan was an "unreasonable" and "draconian" response, the dissenters claimed, in light of the minute disparities in the plan.²³²

The dissenters argued that the Court's previous holdings did not require the *Karcher* result, reasoning that the early districting cases must be read in the context of when they were decided.²³³ At the time *Wesberry v. Sanders* and *Reynolds v. Sims* were decided, the dissenters noted, severe malapportionments existed, with interdistrict population variances of over 50% being common.²³⁴ Those cases, however, disavowed mathematical precision as a "practical impossibility" and an "[un]workable constitutional requirement," they added.²³⁵ Although the Court later found the smaller deviations in *Kirkpatrick* and *White v. Weiser* unacceptable, those deviations were still many times larger than the

²²⁴ *Id.* at 753-59 (Stevens, J., concurring).

²²⁵ *Id.* at 750-51 (Stevens, J., concurring).

²²⁶ *Id.* at 761-65 (Stevens, J., concurring). See also *infra* note 227.

²²⁷ 462 U.S. at 763-65 (Stevens, J., concurring). Justice Stevens noted that both houses of the New Jersey State Legislature were controlled by the Democratic party, and that the districting plan at issue was signed into law on an outgoing Democratic Governor's last day in office before being succeeded by a Republican Governor. *Id.* at 761-65 (Stevens, J., concurring). He contended that other districting plans were rejected for political reasons, citing a letter of partisan tone by the Democratic New Jersey Assembly Speaker. *Id.* at 763-65 (Stevens, J., concurring). A copy of the above letter is provided in *Daggett*, 535 F. Supp. at 989 App. B; see also *supra* note 16. Justice Stevens also stated that the New Jersey plan drastically departed from standards of compactness, calling the district shapes "bizarre" and "uncouth." *Karcher*, 462 U.S. at 761-63 (Stevens, J., concurring). He cited commentators who had given some districts such nicknames as "the Swan" and "the Fishhook." *Id.* (Stevens, J., concurring) (citing 40 CONG. Q. 1190, 1194-95 (1982)). For a picture of the New Jersey districting map, see *Karcher v. Daggett*, 103 S. Ct. 2653, 2666 (1983); see also 40 CONG. Q. 1190, 1190-99 (1982) (discussing the "bizarre" configurations of the New Jersey map).

²²⁸ *Karcher*, 462 U.S. at 744-46 (Stevens, J., concurring).

²²⁹ *Id.*

²³⁰ *Id.* at 765-67 (White, J., dissenting).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 765-69 (White, J., dissenting).

²³⁴ *Id.* at 765-67 (White, J., dissenting).

²³⁵ *Id.* at 767-69 (White, J., dissenting) (citing *Reynolds*, 377 U.S. at 589).

deviations in the present case, the dissenters noted.²³⁶ Precedent thus did not require the Court to reject New Jersey's plan, the dissenters concluded.²³⁷

The one person-one vote mandate of mathematical equality among districts should not be taken to mean that even "statistically insignificant" population deviations will be found unacceptable, the dissenters continued.²³⁸ The numbers involved in *Karcher* were statistically insignificant, the dissenters contended, for two reasons. First, the dissenters reasoned, because the census cannot claim to be accurate within less than a percentage point, there is no proof that the minor deviations in the New Jersey plan even exist.²³⁹ To strive for mathematical equality beyond that which can even be measured, the dissenters stated, "is an exercise in illusion."²⁴⁰ Second, continued the dissenters, when compared with other variable factors of the voting population, the deviations in *Karcher* were of no real consequence.²⁴¹ Therefore, the dissenters concluded that because the population variances in question could not be shown to have any significant effect on fair representation, they should be dismissed as de minimus.²⁴²

Additionally, the dissenters argued that the majority's decision will necessitate further judicial intrusion into what is admittedly a legislative matter.²⁴³ The Court has repeatedly held, the dissenters noted, that reapportionment is primarily a political and legislative task.²⁴⁴ The dissenters pointed out that, as of the time of the *Karcher* decision, twelve other states had districting plans with population deviations greater than those in the New Jersey plan.²⁴⁵ Allowing constitutional challenge even to plans with variances of less than one percent, the dissenters contended, renders any plan open to attack from "anyone with a complaint and a calculator."²⁴⁶ According to the dissenters, by dismissing

²³⁶ *Id.* The plan in *Kirkpatrick* had a maximum population deviation of 5.97%, and an average deviation of 1.6%. *Kirkpatrick*, 394 U.S. at 529. The plan in *Weiser* had a maximum deviation of 4.13% and an average deviation of 0.74%. *White v. Weiser*, 412 U.S. 783, 785 (1973). The *Karcher* plan had a maximum deviation of 0.69%, and an average deviation of 0.13%. *Karcher*, 462 U.S. at 727-29.

²³⁷ *Karcher*, 462 U.S. at 767-69 (White, J., dissenting).

²³⁸ *Id.*

²³⁹ *Id.* at 769-70 (White, J., dissenting) (citing affidavit of Dr. James Trussell, demographer).

²⁴⁰ *Id.* (quoting affidavit of Dr. James Trussell, demographer).

²⁴¹ *Id.* at 771-73 & nn.5-8 (White, J., dissenting). For example, noted Justice White, population growth during the decade could be very high in one district but very low in another. *Id.* at 771-73 & n.5 (White, J., dissenting). Also, he pointed out, many people do not vote or register to vote. *Id.* at 771-73 & n.7 (White, J., dissenting). Additionally, Justice White noted, the number of residents of voting age could differ substantially among districts. *Id.* at 771-73 & n.6 (White, J., dissenting). Any of these factors, Justice White argued, could dramatically differ the weight of votes, and produce far greater and more significant disparities than the 0.69% deviation the Court finds intolerable. *Id.* at 771-73 & n.8 (White, J., dissenting). For instance, Justice White noted, in the 1982 New Jersey congressional elections only 92,852 voters cast ballots in District Ten, while 186,879 voted in District Nine. *Id.* at 771-73 n.8 (White, J., dissenting). Consequently, the votes of those in District Ten counted more than double the votes in District Nine, he concluded. *See id.*

²⁴² *Id.* at 771-73 (White, J., dissenting).

²⁴³ *Id.* at 775-76 (White, J., dissenting).

²⁴⁴ *Id.* *See, e.g.,* *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Burns v. Richardson*, 384 U.S. 73, 92 (1966); *Reynolds*, 377 U.S. at 586. *See also infra* note 324.

²⁴⁵ *Karcher*, 462 U.S. at 771-73 & n.9 (White, J., dissenting). States with plans with larger maximum interdistrict population deviations than the New Jersey plan, at the time of *Karcher*, were: 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%); and Arkansas (0.78%). *Id.* at 773 n.9 (White, J., dissenting) (citing Council of State Governments and National Conference of State Legislatures, 1 REAPPORTIONMENT INFORMATION UPDATE 6 (Nov. 12, 1982)).

²⁴⁶ *Id.* at 777-79 (White, J., dissenting).

cases with insignificant deviations, the Court could avoid unnecessary judicial involvement in the districting process.²⁴⁷

Most importantly, the dissenters urged, since the population variances involved in *Karcher* are so small, the majority's decision does little to forward the goal of fair and effective representation for all citizens.²⁴⁸ In the view of the dissenters, legislators could draw grossly gerrymandered districts that are numerically equal with the aid of computers.²⁴⁹ To the extent the Court insists on this single factor, the dissenters concluded, gerrymandering will be encouraged, because legislators will be invited to ignore other important, neutral factors to achieve numerical exactness.²⁵⁰

Regarding the justifications states could offer to account for mathematical disparities among districts, the dissenters agreed with the Court's acceptance of certain state policy justifications for a deviant plan.²⁵¹ The dissenters pointed out that several of these justifications had been held legally unacceptable in *Kirkpatrick*.²⁵² The dissenters welcomed this "overruling" of that part of *Kirkpatrick*,²⁵³ agreeing with the Court that state policies such as preserving traditional subdivisions and providing for compact and contiguous districts are legitimate concerns justifying some interdistrict population variances.²⁵⁴ In light of the change on the justifications issue, the dissenters continued, the case should be remanded to the district court to give the state an opportunity to offer justification for its plan's population disparities.²⁵⁵ The state had not offered any of the justifications now accepted by the Court, the dissenters contended, because, relying on *Kirkpatrick* and *White v. Weiser*, the state had reasonably concluded that such justifications would not be acceptable.²⁵⁶

Justice Powell wrote separately in dissent to stress some particular concerns regarding gerrymandering.²⁵⁷ Justice Powell agreed with Justice White that the deviations in the

²⁴⁷ *Id.* at 777-82 (White, J., dissenting).

²⁴⁸ *Id.* at 765-67 (White, J., dissenting).

²⁴⁹ *Id.* at 775-76 (White, J., dissenting).

²⁵⁰ *Id.* The dissenters argued that under *Karcher*, legislators will disregard neutral criteria such as existing political boundaries and compact districts, to district for political gain. *Id.* Legislators can then justify this "equipopulous gerrymandering," the dissenters contended, by claiming that they were trying to meet *Karcher's* strict mandate of equality. *Id.*

²⁵¹ *Id.* at 779-80 (White, J., dissenting).

²⁵² *Id.* (citing *Kirkpatrick*, 394 U.S. at 534-36); see also *supra* notes 123-26 and accompanying text.

²⁵³ *Karcher*, 462 U.S. at 779-80 (White, J., dissenting).

The majority disagreed that it had overruled that part of *Kirkpatrick*. *Id.* at 741-42 & n.11. The majority pointed out that *Kirkpatrick* had held that some state policies could justify a deviant plan. *Id.* In *Kirkpatrick* the state's justifications were rejected not because they were impermissible considerations, the majority contended, but because they were unsubstantiated. *Id.*

The language of *Kirkpatrick* favors the dissenters in this argument. The Court in *Karcher* approved the state policy justifications of making districts compact, respecting municipal boundaries, and avoiding contests between incumbents. *Id.* at 739-41. As to the first of these three justifications the Court in *Kirkpatrick* had stated, "a state's preference for pleasingly shaped districts can hardly justify population variances." *Kirkpatrick*, 394 U.S. at 536. The *Kirkpatrick* Court had found the other two justifications "legally unacceptable" reasons for not achieving exact equality. *Id.* at 533-34.

²⁵⁴ *Karcher*, 462 U.S. at 779-80 (White, J., dissenting).

²⁵⁵ *Id.* at 782-83 (White, J., dissenting).

²⁵⁶ *Id.* New Jersey offered none of the justifications rejected by the Court in *Kirkpatrick* but later approved in *Karcher*. See *supra* note 253. Evidence was presented that such factors were considered by the New Jersey Legislature. See, e.g., *Karcher*, 462 U.S. at 733 n.5, 742-43 n.12; *Daggett*, 535 F. Supp. at 982. The *Karcher* majority noted, however, that the defendants' brief presented only the justification of preserving minority voting strength. *Karcher*, 462 U.S. at 742-43 n.12.

²⁵⁷ *Id.* at 784 (Powell, J., dissenting).

New Jersey plan were insignificant and that the plan should be upheld.²⁵⁸ He reiterated the sentiment in Justice White's dissent that the search for numerical equality within fractional percentages is "self-deluding," and ineffective as a barrier to gerrymandering.²⁵⁹ Justice Powell also concurred with Justice Stevens' analysis of the constitutionality of political gerrymandering, agreeing that such an abuse of the districting process could operate to violate the equal protection clause.²⁶⁰ Lastly, Justice Powell noted that the evidence in *Karcher* presented a persuasive case that New Jersey's plan was an unconstitutional partisan gerrymander, but that this issue was not presented.²⁶¹

In sum, the test for congressional districting plans the *Karcher* Court adopted requires that congressional voting districts be of absolutely equal population.²⁶² The four dissenters contended that some small population deviations are insignificant, cause no harmful vote dilution, and should be considered de minimus.²⁶³ All nine Justices agreed that certain valid state policies could justify some interdistrict population deviations.²⁶⁴ The dissenters argued that because the Court's holding regarding state policy justifications for a deviant plan represented a change in the law, the case should be remanded to the district court to allow New Jersey to offer justification.²⁶⁵

Justice Stevens, in a separate concurrence, stated that he joined in the Court's opinion because *stare decisis* required the *Karcher* holding.²⁶⁶ Throughout his opinion, however, Justice Stevens expressed more of a concern with the overall fairness of a plan than with its mathematical computations.²⁶⁷ Justice Stevens argued that the Court should apply the equal protection clause of the fourteenth amendment to proscribe district gerrymandering.²⁶⁸ Justice Powell, in a separate dissent, endorsed this suggestion of Justice Stevens.²⁶⁹ The next section of this casenote undertakes a detailed analysis of the four *Karcher* opinions, considering fully the major districting issues presented by *Karcher*.

III. AN ANALYSIS: *KARCHER* AND THE GOAL OF "FAIR AND EFFECTIVE REPRESENTATION"

The purpose of the one person-one vote standard is to achieve "fair and effective representation for all citizens."²⁷⁰ This section of the casenote will compare the merits of the several opinions in *Karcher*, and consider which positions most fully comport with this policy goal. First, the section will examine the issue of mathematical exactitude and discuss whether the *Karcher* majority's strict mandate of absolute population equality, or the dissent's argument for a de minimus line, is preferable in light of the one person-one vote policy. The section will then consider the justifications issue, on which all members of

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 786-88 (Powell, J., dissenting).

²⁶¹ *Id.* at 788-90 (Powell, J., dissenting). Justice Powell stated, "one cannot rationally believe that the New Jersey Legislature considered factors other than the most partisan political goals and population equality." *Id.* (Powell, J., dissenting).

²⁶² *Id.* at 733-35.

²⁶³ *Id.* at 780-82 (White, J., dissenting).

²⁶⁴ *Id.* at 739-41; *id.* at 779-80 (White, J., dissenting).

²⁶⁵ *Id.* at 782-83 (White, J., dissenting).

²⁶⁶ *Id.* at 744-46 (Stevens, J., concurring).

²⁶⁷ *See id.* at 746-59 (Stevens, J., concurring).

²⁶⁸ *Id.* at 746-50 (Stevens, J., concurring).

²⁶⁹ *Id.* at 786-89 (Powell, J., dissenting).

²⁷⁰ *Reynolds*, 377 U.S. at 565-66.

the Court agree, and analyze whether allowing a state to justify a deviant districting plan by state policy forwards fair and effective representation. The section will conclude with a brief discussion of the two major districting issues remaining after *Karcher* — the dichotomous treatment of state legislative and congressional districting cases, and the constitutionality of political gerrymandering in congressional districting.

A. The Issue of Mathematical Exactitude

In *Karcher*, the Justices split five-to-four on the determinative question of whether the Court's prior holdings in *Kirkpatrick v. Preisler*²⁷¹ and *White v. Weiser*²⁷², if followed, would require finding New Jersey's districting plan unconstitutional.²⁷³ The dissenters noted that the plans invalidated in *Kirkpatrick* and *Weiser* had larger population deviations than did the New Jersey plan.²⁷⁴ Consequently, the dissenters argued, following *Kirkpatrick* and *Weiser* should not necessarily lead to invalidating New Jersey's plan.²⁷⁵

Although the dissent's reasoning is technically correct, such a narrow reading of *Kirkpatrick* and *Weiser* ignores the plain language of the two cases. In *Kirkpatrick*, the Court faced and squarely rejected the claim that some population deviations should be per se acceptable as de minimus.²⁷⁶ This holding was expressly reaffirmed by the *Weiser* Court.²⁷⁷ Accordingly, simply because the deviations considered in *Karcher* were smaller does not mean that the New Jersey plan passes muster under the *Kirkpatrick* holding. The *Kirkpatrick* Court held that article I, section 2 required *absolute* equality; only "unavoidable" deviations were acceptable.²⁷⁸ In *Karcher*, the state did not contend that the variances in the New Jersey plan were unavoidable. Other plans with smaller population variances were available to the New Jersey Legislature.²⁷⁹ In addition, the Court suggested changes to the plan which would have reduced its population disparities.²⁸⁰ The New Jersey plan, therefore, could not have been accepted without directly overruling the language of *Kirkpatrick*.

Thus, the *Karcher* holding of absolute interdistrict population equality was in line with precedent. The further question to be addressed, however, is how desirable the *Karcher* holding is in view of the policy behind the one person-one vote standard. Assessing the significance of the stringent mathematical test the Court adopts is crucial because the *Karcher* opinion is now the benchmark to which state legislatures must refer in devising their congressional districting plans.²⁸¹ The Court's decision in *Karcher*, then, will

²⁷¹ 394 U.S. 526 (1969).

²⁷² 412 U.S. 783 (1973).

²⁷³ See *Karcher*, 462 U.S. at 727; *id.* at 767-69 (White, J., dissenting).

²⁷⁴ *Id.* at 767-69 (White, J., dissenting); see *supra* note 236.

²⁷⁵ 462 U.S. at 767-69 (White, J., dissenting).

²⁷⁶ *Kirkpatrick*, 394 U.S. at 530.

²⁷⁷ *White v. Weiser*, 412 U.S. 783, 790 & n.8 (1973).

²⁷⁸ *Kirkpatrick*, 394 U.S. at 530-31.

²⁷⁹ *Karcher*, 462 U.S. at 727-29.

²⁸⁰ *Id.* at 737-41.

²⁸¹ Even though the Court held five-to-four in favor of an absolute equality standard, Justice Stevens's decisive vote did not come down unequivocally in support of mathematical exactitude. Although concurring with the majority on this issue, Justice Stevens stated that absolute population equality is an impossibility. *Id.* at 751-53 (Stevens, J., concurring). In fact, he questioned how significant the variances in the New Jersey plan actually were. *Id.* Justice Stevens joined the Court's holding, in the main, because *stare decisis* required it. *Id.* at 744-46 (Stevens, J., concurring). Yet Justice Stevens's opinion indicates that his concerns are elsewhere. He supports the use of a

directly affect the quality of the vote of citizens in all fifty states, and indirectly, the composition of the House of Representatives. The most important point to be considered, therefore, is the dissenters' charge that the majority's position of absolute population equality among districts will not promote fair and effective representation.²⁸²

When the Court first entered the arena of legislative reapportionment, Justice Frankfurter, dissenting in *Baker v. Carr*, objected that the Court was entering a "political thicket" without guiding judicial standards.²⁸³ The Court solved this problem by creating a standard, one person-one vote, which required equipopulous districts.²⁸⁴ This numerical standard established a judicially manageable criterion that reshaped an essentially political problem into a legal issue.²⁸⁵ As Justice Stevens noted in *Karcher*, this standard is manageable "because judges can multiply and divide."²⁸⁶ The standard, however, was created to address problems of egregious malapportionment.²⁸⁷ For example, the congressional districts at issue in *Wesberry v. Sanders* varied from populations of 272,154 to 823,680.²⁸⁸ Similarly, the State Senate districts in *Reynolds v. Simms* ranged from 15,417 people to over 600,000 people.²⁸⁹ The *Reynolds* Court correctly found it unfair that some citizens would have the equivalent of two, five, or twenty votes to another person's one vote.²⁹⁰

In contrast, the *Karcher* Court applied the one person-one vote standard to invalidate a plan with district populations ranging from 523,798 to 527,472 — a maximum disparity of 0.69%.²⁹¹ In view of the history of the one person-one vote standard, the dissenters contended that the Court had simply taken the standard too far.²⁹² The deviations in *Karcher*, the dissenters argued, were so small that they were insignificant.²⁹³ The *Karcher*

numerical standard because it provides a neutral criterion by which to judge a districting plan, but he is more concerned with the overall fairness of a plan than with its mathematical shortcomings. *See id.* at 750-53 (Stevens, J., concurring). Indeed, Justice Stevens considered that, as a sole criterion, numerical equality may in fact be counterproductive. *Id.* at 751-53 (Stevens, J., concurring). An overemphasis on mathematical precision, he argued, fails to take into account other criteria equally important to fair districting. *Id.* Additional neutral criteria such as subdivision boundaries and district configurations should also be considered, Justice Stevens contended. *Id.* at 755-59 (Stevens, J., concurring). Justice Stevens also argued that judicial standards should be adopted to prevent gerrymandering. *Id.* at 746-50 (Stevens, J., concurring).

In view of the concerns expressed in his concurring opinion, Justice Stevens's critical vote cannot be counted as inextricably supporting of absolute equality. On the whole, Justice Stevens's opinion may indicate a willingness to be more flexible towards a plan's mathematical imprecisions if other enforceable judicial standards are available to protect against unfair districting. Since the four dissenters also disfavor numerical exactitude, *id.* at 765-69 (White, J., dissenting), a future shift in emphasis by the Court away from an absolute equality standard is possible. *See also infra* notes 355-69 and accompanying text.

²⁸² 462 U.S. at 765-67 (White, J., dissenting).

²⁸³ *Baker v. Carr*, 369 U.S. 186, 277-78 (1962) (Frankfurter, J., dissenting) (citing *Colegrove v. Green*, 328 U.S. 549, 556 (1946)).

²⁸⁴ *See supra* notes 78-87 and accompanying text.

²⁸⁵ Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 666 (1982).

²⁸⁶ *Karcher*, 462 U.S. at 750-51 (Stevens, J., concurring).

²⁸⁷ *Id.* at 765-69 (White, J., dissenting).

²⁸⁸ *Wesberry*, 376 U.S. at 2.

²⁸⁹ *Reynolds*, 377 U.S. at 545-46.

²⁹⁰ *Id.* at 562.

²⁹¹ *Karcher*, 462 U.S. at 727-29.

²⁹² *Id.* at 765-69 (White, J., dissenting).

²⁹³ *Id.* at 767-69 (White, J., dissenting).

decision adds no protection against vote dilution, the dissenters reasoned, because at this level no dilution has occurred in any meaningful sense.²⁹⁴ Consequently, the dissenters concluded, such deviations should be deemed *de minimus*.²⁹⁵

The majority's position favoring an absolute equality standard is, however, a sound one in principle. A rule of absolute equality cannot, in itself, harm the quality of the vote. As the majority pointed out, equality is preferable to something less than equality.²⁹⁶ Justice Stevens observed that, all other things being equal, the plan most closely approaching population equality would be the fairest plan.²⁹⁷ If the *Karcher* mandate of mathematical exactitude fails to promote fair and effective representation, therefore, it must be because of some incidental effects of its application. The dissenters acknowledged as much, agreeing that in theory an absolute equality standard is acceptable, but arguing that in practice it operates undesirably.²⁹⁸

The dissenters articulated two main criticisms of the application of an absolute equality standard. First, the dissenters claimed, it encourages gerrymandering;²⁹⁹ and second, it leads to unjustified judicial intrusion into the legislative task of districting.³⁰⁰ The dissenters' first contention is that legislators will disregard other objectively neutral criteria, such as subdivision and geographical boundaries, to achieve numerical equality.³⁰¹ Disregarding these criteria, the dissenters asserted, will result in district lines being drawn through established communities.³⁰² Consequently, the dissenters continued, localized groups with similar concerns can be fragmented among districts, leaving them without a consolidated voice.³⁰³ Legislators are then invited to gerrymander by choosing which groups will be fragmented and have their voting strength reduced, the dissenters concluded.³⁰⁴ Legislators will be able to justify this "equipopulous gerrymandering," the dissenters added, by claiming to be obeying the mandate of population equality.³⁰⁵ The dissenters contended that application of a *de minimus* standard would eliminate this ability of states to justify a gerrymander in the name of absolute population equality.³⁰⁶

The majority agreed that a rule of absolute equality may do little to prevent gerrymandering, observing that the objective of achieving population equality is "far less ambitious" than addressing the constitutionality of gerrymandering.³⁰⁷ A strict equality standard does, however, force a state to justify its deviations with specific reasons, the majority argued, and this requirement could act as a check on gerrymandering.³⁰⁸ The majority emphatically denied that this standard could actually encourage gerrymandering, noting that nothing stops the states from legislating against the practice.³⁰⁹

²⁹⁴ *Id.* at 771-73 (White, J., dissenting).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 731-33.

²⁹⁷ *Id.* at 751-53 (Stevens, J., concurring).

²⁹⁸ *Id.* at 775-76 (White, J., dissenting).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 777-79 (White, J., dissenting).

³⁰¹ *Id.* at 776-77 & n.12 (White, J., dissenting).

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 779-80 (White, J., dissenting).

³⁰⁷ *Id.* at 734-35 n.6.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

The majority's point here is well taken. Gerrymandering is not so much a function of the demand for population equality as it is a result of the lack of other standards to prevent unfair districting practices.³¹⁰ Accordingly, although an absolute equality standard does nothing to prevent gerrymandering, it should not be faulted as promoting gerrymandering. Rather, emphasis should be given to the adoption of additional judicial criteria to proscribe gerrymandering.³¹¹

Similarly, the dissent's de minimus standard would add nothing to the law to inhibit gerrymandering. Gerrymanders could also, of course, be constructed which do not rely upon achieving absolute equality for their justification.³¹² In the absence of other standards, a de minimus rule would merely find some plans as per se acceptable despite possible gerrymandering.³¹³ To ensure fair representation, judicial standards which consider a districting plan in all relevant aspects, and not solely its numerical proportions, are needed.³¹⁴

³¹⁰ See, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). The *Kirkpatrick* Court argued that the demand for absolute equality does not encourage gerrymandering but rather makes gerrymandering more difficult by removing one of the means, malapportionment, by which to gerrymander. *Id.* at 534 n.4.

See also Backstrom, Robins & Eller, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 MINN. L. REV. 1121 (1978) [hereinafter cited as Backstrom]. The authors expressly rejected the suggestion that a standard of absolute equality encourages gerrymandering. *Id.* at 1126. They argued that the standard does not stop gerrymandering, but it does make it more difficult. *Id.*; See also Baker, *One Man, One Vote, and "Political Fairness"* — Or, How the Burger Court Found Happiness By Rediscovering *Reynolds v. Sims*, 23 EMORY L.J. 701 (1974) [hereinafter cited as Baker]. Baker argued that more flexible standards are needed to achieve fair representation. *Id.* at 708-16. A "sterile and mechanistic" mathematical application of the one person-one vote standard is not the answer to gerrymandering, he contended. *Id.* Baker suggested that more attention should be paid by state legislatures to local boundary lines and compactness of districts. *Id.*

³¹¹ See *infra* note 314.

³¹² See generally Backstrom, *supra* note 310; DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 456-99 (New York, Oxford University Press, 1968) [hereinafter cited as DIXON].

³¹³ For example, the result in *Karcher* urged by the dissent would have upheld the New Jersey plan without consideration of whether it was a political gerrymander. *Karcher*, 462 U.S. at 782-83 (White, J., dissenting). That such an outrageous gerrymander as the New Jersey plan could be acceptable under currently enforceable judicial standards is striking evidence of the need for the application of additional judicial standards to prevent gerrymandering.

³¹⁴ See *id.* at 746-50 (Stevens, J., concurring). Justice Stevens argues that the one person-one vote standard must be supplemented with judicial criteria under the fourteenth amendment to protect against legislative gerrymanders. *Id.*; see *supra* notes 222-25 and accompanying text. See also Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277 [hereinafter cited as Engstrom]. Engstrom noted that reliance on population equality, without more, cannot prevent gerrymandering. *Id.* at 278-79. He criticized *Kirkpatrick v. Preisler* for rejecting adherence to political subdivision lines and compactness as justifications for a districting plan. *Id.* Attention to these criteria would not eliminate gerrymandering, he contended, but it would place some constructive restrictions on the ability to gerrymander. *Id.* Engstrom argued that judicial standards under the fourteenth amendment's guarantee of equal protection are needed to prevent gerrymandering. *Id.* at 296, 314-19; see also Edwards, *The Gerrymander and "One Man, One Vote"*, 46 N.Y.U. L. REV. 879 (1971) [hereinafter cited as Edwards]. Edwards considered the one person-one vote standard to be a significant gain towards voting equality. *Id.* at 879. He contended, however, that it does not prevent manipulation of district lines through gerrymandering. *Id.* at 879-80. The Court should apply the equal protection standard

The dissenters' second criticism of the application of a rule of absolute equality was that it causes unnecessary judicial involvement in the legislative process of districting.³¹⁵ The dissenters noted that a plaintiff need only show that a plan's deviations could have been lessened to make out a *prima facie* case under this standard.³¹⁶ Any state plan with more than one congressional district will have reducible deviations, the dissenters contended.³¹⁷ If deviations of even less than one percent are actionable, the dissenters concluded, nearly every state plan is now subject to legal attack.³¹⁸ The dissenters would avoid this problem by dismissing minor deviations as *per se* acceptable.³¹⁹ The dissenters suggested a *de minimus* level of maximum population deviation of around 5%.³²⁰

More litigation and judicial involvement in districting result from a standard of absolute equality than from a *de minimus* standard. At the time of the *Karcher* decision, twelve states had congressional districting plans with maximum population deviations greater than the challenged deviation in the New Jersey plan.³²¹ Moreover, *perfect* numerical equality is virtually impossible to achieve in states having several districts.³²² After *Karcher*, therefore, almost every state's congressional districting plan is now subject to legal challenge as being in violation of the one person-one vote standard.³²³ The dissenters' *de minimus* standard, on the other hand, would regard plans with deviations of less than 5% as *per se* acceptable and thus nonlitigable on the claim of numerical malapportionment.

The issue to be resolved, then, is whether the judicial involvement in districting which *Karcher* allows is justified to preserve fair and effective representation, or whether the dissent's call for judicial restraint is a preferable approach. As the dissenters correctly pointed out, the Court has consistently stated that districting is primarily a legislative function.³²⁴ State legislatures are delegated the districting task by article 1, section 4 of the

of the fourteenth amendment to prohibit gerrymandering as invidiously discriminatory, Edwards argued. *Id.* To determine whether there has been a violation of equal protection by the state legislature, Edwards contended, the Court should promulgate minimum anti-gerrymandering standards. *Id.* at 893-97. He suggested that these standards should include compactness and contiguity of districts, and avoidance of fragmenting political subdivisions. *Id.*

³¹⁵ *Karcher*, 462 U.S. at 771-75 (White, J., dissenting). The dissenters argued that the *Kirkpatrick* demand for absolute equality has already led to extensive litigation. *Id.* at 777-79 (White, J., dissenting). They contended that, as a result, the courts have drawn 25 to 35% of current congressional district lines. *Id.* (citing American Bar Association, Congressional Districting 20 (1981)).

³¹⁶ *Id.* at 771-75 (White, J., dissenting).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 780-82 (White, J., dissenting).

³²⁰ *Id.* (Justice White suggested that a five percent *de minimis* level seemed reasonable but that he was "not wedded" to an exact figure).

³²¹ See *supra* note 245.

³²² *Karcher*, 462 U.S. at 751-53 (Stevens, J., concurring); *id.* at 767-79 (White, J., dissenting) (citing *Wesberry*, 376 U.S. at 17-18).

³²³ *Id.* at 773-75 (White, J., dissenting).

³²⁴ See, e.g., *id.* at 777-79 (White, J., dissenting) (citing *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973)) ("Nor is the goal of fair and effective representation furthered [when reapportionment] is recurrently removed from legislative hands and performed by federal courts . . ."). See also *Connor v. Finch*, 431 U.S. 407 (1977), wherein the Court stated:

[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies [with] population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. In the wake of a legislature's failure . . .

Constitution.³²⁵ The Court has repeatedly noted that legislatures are better suited to devise districting plans because districting involves political and policy choices more appropriate for legislative than judicial determination.³²⁶ State legislatures, the Court has held, are more capable than courts of identifying traditional state policies and reconciling them in the districting process.³²⁷ Districting should only become a judicial concern, therefore, if the state, in districting, has failed to ensure citizens fair and effective representation by adopting a plan which allows for harmful vote dilution.³²⁸

In the one person-one vote cases, the Court has recognized that numerical malapportionment is one form of vote dilution that can deprive citizens of fair representation.³²⁹ The dissenters in *Karcher* argued, however, that the one person-one vote standard does not presume that *all* vote dilution through numerical malapportionment is harmful.³³⁰ The dissenters contended that gross numerical malapportionments certainly are harmful,³³¹ but that the malapportionment in *Karcher* was insignificant.³³² At some point, the dissenters argued, population deviations among districts become so small that they can only be considered meaningless, and do not produce any harmful vote dilution.³³³ Consequently, the Court's intrusion into the districting process to eliminate variances of less than one percent does nothing to protect fair representation and is unjustified, the dissenters concluded.³³⁴ The majority disagreed, finding that the 0.69% deviations in *Karcher* resulted in significant vote dilution and had to be reduced.³³⁵

The dissenters' position on this issue appears the more reasonable. Little added protection of the vote is afforded by eliminating extremely small population disparities through a hypertechnical application of constitutional standards. Fractional percentages of population deviation do not produce a constitutionally significant harm. Moreover, any marginal benefit which accrues by reducing these deviations is outweighed by the need, consistently recognized by the Court, to keep districting a primarily legislative task. Judicial intervention to proscribe variances of less than one percent cannot, therefore, be justified. A de minimus level should be adopted to avoid such unwarranted judicial involvement in the districting process. Given the proficiency of computers, however, the dissent's 5% de minimus suggestion may allow unnecessarily large deviations.³³⁶ A slightly lower de minimus level of perhaps one or two percent is thus an attractive solution and should be employed as the numerical standard in congressional districting cases.

however, a federal court is left with the unwelcome obligation of performing in the legislature's stead

Id. at 414-15; *Reynolds*, 377 U.S. at 586 ("reapportionment is primarily a matter for legislative consideration and determination.").

³²⁵ U.S. CONST. art. I, § 4, cl. 1 Article I, section 4 provides, in relevant part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ." See *Wesberry*, 376 U.S. at 29-34 (Harlan, J., dissenting).

³²⁶ See *supra* note 324.

³²⁷ *Connor v. Finch*, 431 U.S. 407, 414-15 (1977).

³²⁸ *Id.*

³²⁹ See, e.g., *Reynolds*, 377 U.S. at 555.

³³⁰ *Karcher*, 462 U.S. at 767-69 (White, J., dissenting).

³³¹ *Id.* at 765-67 (White, J., dissenting).

³³² *Id.* at 767-69 (White, J., dissenting).

³³³ *Id.*

³³⁴ *Id.* at 765-67 (White, J., dissenting).

³³⁵ *Id.* at 742-44.

³³⁶ See, e.g., Engstrom, *supra* note 314, at 281-83. Engstrom points out that with the aid of computers, districts can be drawn with exceptional mathematical precision. *Id.*

The benefits of the adoption of a low de minimus rule are twofold. First, every districting plan would not be immediately subject to attack if it failed to achieve perfect equality. Such an approach, as noted, would place districting plans properly in legislative hands more often. Numerical malapportionment would become a judicial concern only when the vote dilution produced a significant harm. Second, if population deviations were so low as to be insignificant and de minimus, litigation, if it occurred, would force courts to address the real issues. The other considerations important to fair districting would not be obscured by an excessive search for mathematical exactitude. As Justices Stevens' and Powell's opinions in *Karcher* indicated, arguably the pertinent issue in *Karcher* was not the propriety of the numerical apportionments but the possibility that political gerrymandering had occurred.³³⁷ If a de minimus standard had been in effect in *Karcher*, this issue would more likely have been addressed. The *Karcher* plaintiffs would not have been able to claim that the 0.69% deviation in *Karcher* violated the one person-one vote standard because this deviation would have been deemed de minimus. The plaintiffs, therefore, would have had to have raised the really significant issue in *Karcher* — that the New Jersey plan was an unconstitutional political gerrymander.

In sum, the dissenter's position in *Karcher* on the issue of mathematical exactitude more effectively forwards the policy of fair and effective representation. Neither the majority's absolute equality standard nor the dissenters' de minimus standard will stop gerrymandering. Additional standards are needed to provide a check on this harmful districting practice. The majority's position of absolute equality does, however, produce unjustified judicial intrusions into the legislative area of districting. A de minimus rule would more often leave districting concerns with the legislatures, while still protecting against harmful numerical vote dilution. It would also encourage resolution of meaningful issues when a plan's population deviations were not significant. Accordingly, a low de minimus rule should be the applicable constitutional standard in adjudication of congressional districting cases under the one person-one vote requirement.

B. The Justifications Issue

The Court's decision in *Karcher*, by overruling *Kirkpatrick v. Preisler* in part and holding that certain state policies may justify some minor deviations from absolute population equality,³³⁸ effects a significant change in congressional reapportionment law. The *Karcher* majority held that a number of state interests could be acceptable justifications for a mathematically inexact districting plan.³³⁹ Among the acceptable justifications, the Court specifically included "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."³⁴⁰ The *Kirkpatrick* Court had previously rejected the same justifications.³⁴¹

The *Karcher* Court's favorable recognition of these justifications for a deviant plan gives back to the states some of the flexibility and authority in districting an absolute

³³⁷ See *supra* notes 227 & 261 and accompanying text.

³³⁸ See *supra* notes 193 and 253.

³³⁹ *Karcher*, 462 U.S. at 739-41.

³⁴⁰ *Id.* A state's efforts to preserve minority voting strength or to account for projected population shifts among districts would, if fully substantiated, also provide legitimate justification for deviant congressional districting plans. See *id.* at 741-42 & n.11; *Kirkpatrick*, 394 U.S. at 534-35.

³⁴¹ *Kirkpatrick*, 394 U.S. at 533-36; see also *supra* note 253.

equality standard takes away. As mentioned previously, the legislature has the primary responsibility for districting and is the body best suited to the task.³⁴² The *Karcher* holding, by allowing a legislature to determine its plan in consideration of these other criteria, is consistent with the Court's previous statements that more control over districting should, in the first instance, be vested in the legislatures. Using the leeway provided in *Karcher*, legislatures can appropriately balance the concerns of state policy with the need for population equality. The four Justices in dissent stated that, moreover, the Court should give "strong deference" to a legislature's determination of the relevance and weight accorded to the other districting factors.³⁴³ Justice Stevens agreed with this contention of the dissenters and provides a majority inclined to give greater weight to a state's decision to use non-numerical districting criteria.³⁴⁴ Consequently, while the *Karcher* mandate of absolute equality is rigid, on the whole, the *Karcher* decision, by allowing for state policy justifications of a mathematically inexact plan, could lessen judicial intrusion in this area and give the legislatures greater power and discretion in districting.³⁴⁵

The *Karcher* result also lessens the criticism that the Court's insistence on absolute equality obscures consideration of other factors equally important to fair districting.³⁴⁶ The Court has never contended that fair representation is solely a function of mathematical equality, but has recognized that fair and effective representation depends on a combination of factors.³⁴⁷ For instance, giving localized groups which have a community of interest a consolidated voice in elections is an important consideration.³⁴⁸ Allowing legislatures to apportion to preserve prior districts and respect municipal boundary lines enables states to address this concern.³⁴⁹ Permitting states to justify plans due to efforts to maintain compact districts further facilitates this goal.³⁵⁰ The *Karcher* decision, then, by providing for consideration of these additional relevant districting factors succeeds in supplementing the one person-one vote mandate of numerical equality with criteria for evaluating the overall fairness of a plan. Courts now need not look at population equality in isolation, but can consider whether, in light of the state policies advanced, the plan represents a fair apportionment.

The justifications accepted in *Karcher*, in addition, may provide a check on gerrymandering. Although the Court did not hold that the enumerated state policies must be

³⁴² See *supra* notes 324-28 and accompanying text.

³⁴³ *Karcher*, 462 U.S. at 779-80 (White, J., dissenting).

³⁴⁴ *Id.* at 760 n.26 (Stevens, J., concurring).

³⁴⁵ Allowing a state to justify a districting plan gives it a much broader defense in a one person-one vote case. Consequently, plaintiffs will be less likely to bring suit. This practical result supports the conclusion that after *Karcher*, more districting decisions will be left with the legislatures.

³⁴⁶ See *Karcher*, 462 U.S. at 751-53 (Stevens, J., concurring) (Justice Stevens notes that the justifications approved by the *Karcher* Court are as important, or more important, than numerical equality in determining the overall fairness of a districting plan). See also *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) ("There are other relevant factors to be taken into account [in districting] An overemphasis on raw population figures . . . may submerge these other considerations"); *Mahon v. Howell*, 410 U.S. 315, 321-22 (1973) (the Court details the importance of respecting political subdivision boundaries in achieving a fair state legislative districting plan).

³⁴⁷ See *supra* note 346; see also *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973) ("Fair and effective representation . . . does not depend solely on mathematical equality among districts").

³⁴⁸ See, e.g., *Karcher*, 462 U.S. at 776-78 n.12 (White J., dissenting) (quoting CONGRESSIONAL QUARTERLY, STATE POLITICS AND REDISTRICTING 1-2 (1982)). See also *Dixon, supra* note 312, at 18.

³⁴⁹ See sources cited *supra* note 348.

³⁵⁰ See generally Comment, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. CHI. L. REV. 398 (1974) [hereinafter cited as *Chicago Comment*].

used by the states in districting, *Karcher* for the first time finds such policies to be legally acceptable districting criteria. State legislators can therefore be expected to use these state policies in redistricting now that they are allowed to do so. Because the state policy justifications accepted by the Court embody objective and neutral districting factors, the use of these districting criteria should inhibit the ability of legislators to use redistricting for partisan or personal gain. Moreover, because the absolute equality standard allows for a prima facie case upon a showing of any avoidable population deviation, states must be prepared to justify their plans with the state policies accepted by the *Karcher* majority.

Gerrymandering is often accomplished by fragmenting localized groups among several districts, and thereby preventing the targeted group from gaining a majority in any one district.³⁵¹ A policy of respecting subdivision boundaries, however, lessens the ability of legislators to fragment consolidated groups and thus decreases the possibility of a gerrymander. The policy of compacting districts, would also, if followed, tend to inhibit the ability to gerrymander. A compactness standard would prevent legislators from diluting opposition votes by drawing far reaching lines meandering all over the map.³⁵² Additionally, the policy of drawing district lines to avoid contests between incumbents could reduce the possibility of a political gerrymander. For example, in *Karcher*, districts were drawn by the Democratically controlled New Jersey Legislature to place incumbent Republicans in competition for the same congressional seat, thereby freeing other districts for Democratic candidates.³⁵³ If the policy of avoiding contests between incumbent Representatives had been followed, this political gerrymandering tactic would not have been employed. The justifications the Court accepts, therefore, should provide some protection from gerrymandering.³⁵⁴

Consequently, this part of the *Karcher* holding, which allows for some justifications for numerically inexact congressional districting plans, forwards the policy goal of fair and effective representation. The allowance of justifications should have the beneficial results of returning to the legislatures districting discretion, providing for additional criteria to judge the fairness of a districting plan, and inhibiting gerrymandering.

³⁵¹ See Edwards, *supra* note 314 at 893-97. See also Harvard Note, *supra* note 7, at 1283. For a district by district discussion of how this technique was employed in *Karcher* by the Democratically controlled New Jersey Legislature to maximize the Democratic vote, see 40 CONG. Q. 1190, 1190-98 (1982). This method was used in *Karcher* along with the complementary gerrymandering tactic of 'packing' a large number of adverse voters within one district. See *id.* at 1198. That is, when it is apparent that an opposition group will win a majority in a given district any of their votes over 51% are therefore "wasted." See Harvard Note, *supra* note 7, at 1283. Consequently, it is advantageous to pack a district with a surplus of like voters and thereby lessen the number of adverse voters in other bordering districts. See *id.*

³⁵² See generally Chicago Comment, *supra* note 350.

³⁵³ In *Karcher*, parts of several prior congressional districts were combined to form one new district. 40 CONG. Q. 1190, 1190 (1982). This district, the Fifth, was drawn by the Democratically controlled legislature to pair two incumbent Republicans in the same district and 'open up' a nearby district for the Democrats. *Id.* If the policy of avoiding contests between incumbents was followed, this ability to gerrymander to force two incumbents of the same party to run for the same seat would be eliminated. One of the Republican incumbents in the new New Jersey Fifth District avoided this problem by moving his residence to the Twelfth District. *Id.*

³⁵⁴ Presumably, none of the justifications accepted by the Court in *Karcher* would have enabled the New Jersey Legislature to justify its gerrymandered plan. The New Jersey Legislature flagrantly disregarded all of the neutral criteria the *Karcher* Court now permits as potential justification for a malapportioned plan. See 40 CONG. Q. 1190, 1190-98 (1982). The districts in the New Jersey plan were not compact, did not respect municipal or prior district boundaries, and were not drawn to avoid contests between incumbent representatives. See *id.*

C. The Issues Remaining

1. The Dichotomous Treatment of State Legislative and Congressional Districting Plans

A review of the several opinions in *Karcher* indicates that a majority of the Court may now be willing to consider both congressional and state legislative districting cases by the same standards. Presently, the treatment of the two lines of cases is substantially different. The one person-one vote standard has been applied with greater leniency in the state legislative districting cases heard under the fourteenth amendment, than in the congressional districting cases heard under article I, section 2.³⁵⁵ Greater variance in population and more liberality in incorporating legitimate state policies in the districting plans has been allowed in the state legislative districting cases.³⁵⁶ A merging of the two lines of decision would, therefore, be a significant development in reapportionment law.

In *Karcher*, the four dissenters, as well as Justice Stevens, criticized the distinct treatment accorded the two lines of cases.³⁵⁷ The dissenters contended that the Court's application of the one person-one vote standard in state legislative cases has been reasonable,³⁵⁸ but that the application of this standard in congressional cases has been too rigid.³⁵⁹ State interests weigh more heavily in applying the one person-one vote standard in state legislative than in congressional districting cases, the dissenters acknowledged.³⁶⁰ The dissenters recognized that state legislative districts are more intertwined with local concerns and that local concerns are more usually addressed in the state legislatures than in the Congress.³⁶¹ The dissenters argued, however, that the concerns relevant in congressional and state legislative districting are the same, differing only in degree.³⁶² Furthermore, the dissenters added, since *Karcher* now allows state policy justifications for congressional districting plans, no reason remains for a marked difference in the treatment of the two lines of cases.³⁶³ The dissenters therefore suggested "bringing together" the state legislative and congressional cases.³⁶⁴

The dissenters did not state that this merger would mean applying the one person-one vote standard to congressional districting cases through the fourteenth amendment,³⁶⁵ although Justice Stevens prefers that approach.³⁶⁶ Presumably, the dissenters would still apply the one person-one vote standard to congressional cases through article I, section 2.³⁶⁷ Bringing together the two lines of cases does suggest, however, that the standard would be applied in a similar fashion in both lines of cases.³⁶⁸ Applying a consistent standard would mean, the dissenters indicated, that the much stricter treatment of congressional cases which marked the distinction between the two lines of cases

³⁵⁵ See *supra* notes 135-54 and accompanying text.

³⁵⁶ See *supra* notes 135-54 and accompanying text.

³⁵⁷ *Karcher*, 462 U.S. at 780-82 & n.14 (White, J., dissenting); *id.* at 744-48 (Stevens, J., concurring).

³⁵⁸ *Id.* at 779-80 (White, J., dissenting).

³⁵⁹ *Id.* at 765-67 (White, J., dissenting).

³⁶⁰ *Id.* at 780-82 (White, J., dissenting).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at 782 n.14 (White, J., dissenting).

³⁶⁴ *Id.* at 780-82 (White, J., dissenting).

³⁶⁵ See *id.* at 782 n.14 (White, J., dissenting).

³⁶⁶ *Id.* at 746-48 (Stevens, J., concurring).

³⁶⁷ See *id.* at 782-83 & n.14 (White, J., dissenting).

³⁶⁸ See *id.*

would be eliminated.³⁶⁹ The position of the five Justices — the four dissenters and Justice Stevens — therefore, may signal a greater liberality in the application of the one person-one vote standard in future congressional districting cases.

A merger of the two lines of cases would be a positive development in reapportionment law for three reasons. First, it would bring a logical consistency to the Court's treatment of state legislative and congressional districting cases. Second, it would allow for a more reasonable numerical standard than the demand for perfect equality in congressional districting. Last, similar treatment of the two lines of cases would give states more flexibility in making determinations of applicable state policies to account for in their congressional districting plans.

2. The Constitutionality of Political Gerrymandering in Congressional Districting

In addition to suggesting a future merger of the state legislative and congressional districting cases, the *Karcher* opinions indicate that claims of political gerrymandering may now be cognizable in congressional districting cases. The concurring opinion of Justice Stevens, and the dissenting opinions suggested that harmful vote dilution effected through political gerrymandering should be addressed under the fourteenth amendment in congressional districting cases.³⁷⁰ Gerrymandering can cause harmful vote dilution by decreasing the voting strength of a targeted group through a manipulation of districting lines.³⁷¹ The deleterious effects of gerrymandering on fair and effective representation are well recognized.³⁷² Gerrymandering has been called a far greater threat than numerical malapportionment to equality of voting rights.³⁷³ The Court has yet to hold, however, that the gerrymandering of congressional voting districts is unconstitutional.³⁷⁴

An inquiry into gerrymandering is particularly pertinent to a discussion of the principal case. The district court, as well as Justices Stevens and Powell, pointed out numerous strong indicia of political gerrymandering in *Karcher*.³⁷⁵ According to Justice Stevens, the Democratically controlled New Jersey Legislature districted to decrease the number of Republicans sent to Congress from New Jersey.³⁷⁶ The majority in *Karcher* chose not to address the constitutionality of gerrymandering, noting that only the issue of numerical malapportionment was presented in the district court.³⁷⁷ The Court, therefore, rested its holding solely on New Jersey's violation of the one person-one vote standard.³⁷⁸

The application of the one person-one vote standard to congressional districting is desirable but inadequate.³⁷⁹ The one person-one vote standard is a "first prerequisite" to

³⁶⁹ *Id.* at 780-82 & n.14 (White, J., dissenting).

³⁷⁰ *Id.* at 746-50 (Stevens, J., concurring); *id.* at 782-83 (White, J., dissenting).

³⁷¹ Dixon, *The Court, the People and "One Man-One Vote"* in REAPPORTIONMENT IN THE 1970's 7, 29 (N. Polsby ed. 1971). Dixon defines gerrymandering as "discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another." *Id.* See also *supra* note 209.

³⁷² See, e.g., *Karcher*, 462 U.S. at 746-50 (Stevens, J., concurring); *id.* at 775-76 (White, J., dissenting); *id.* at 786-90 (Powell, J., dissenting); Edwards, *supra* note 314, at 879; Backstrom, *supra* note 310, at 1122; Engstrom, *supra* note 314, at 283.

³⁷³ *Wells v. Rockefeller*, 394 U.S. 542, 555 (1969) (White, J., dissenting).

³⁷⁴ See *infra* notes 385-95 and accompanying text.

³⁷⁵ *Daggett*, 535 F. Supp. at 981; *id.* at 984 (Gibbons, J., dissenting); *Karcher*, 462 U.S. at 761-65 (Stevens, J., concurring); *id.* at 784-90 (Powell, J., dissenting).

³⁷⁶ 462 U.S. at 763-65 (Stevens, J., concurring).

³⁷⁷ *Id.* at 727, 734-35 n.6.

³⁷⁸ *Id.* at 742-44.

³⁷⁹ See *id.* at 751-53 (Stevens, J., concurring).

fair and effective representation.³⁸⁰ By eliminating mathematical inequalities among voting districts the standard protects against dilution of an individual's vote.³⁸¹ In addition, it eliminates one means of effecting a gerrymander.³⁸² Group voting strength, however, can still be discriminatorily diluted through gerrymandering if the gerrymander is accomplished in ways other than numerical malapportionment.³⁸³ Because article I, section 2 proscribes only numerical vote dilution,³⁸⁴ the application of additional judicial criteria under the equal protection clause of the fourteenth amendment is needed to prevent this discriminatory abuse of the apportionment process in congressional districting.

The Supreme Court has to some extent placed checks on gerrymandering. The Court has held that racial gerrymandering of city boundaries violates the fifteenth amendment.³⁸⁵ Additionally, the Court has entertained, under the fourteenth and fifteenth amendments, a claim of racial gerrymandering in a congressional districting case.³⁸⁶ Presumably, then, claims of racial gerrymandering are cognizable in congressional districting cases.³⁸⁷ The Court has also stated, in state legislative districting cases, that districting plans "employed to 'minimize or cancel out the voting strength of racial or political elements of the voting population'" violate the fourteenth amendment.³⁸⁸ In *Karcher*, a majority of the Court adopted this language for the first time in a congressional districting case.³⁸⁹ Justice Stevens, in his concurring opinion in *Karcher*, argued that protection from gerrymandering should not be confined to racial groups, and set forth a comprehensive test under the fourteenth amendment for protecting all voters from gerrymandering.³⁹⁰ The equal protection clause protects *all* citizens, Justice Stevens contended, and therefore, any cognizable political group should be protected from harmful vote dilution through gerrymandering.³⁹¹ Justice Powell, in his separate dissent, fully agreed with this position.³⁹² The other three dissenters did not expressly endorse this proposal of Justice Stevens, but they noted that only an article I, section 2 question was

³⁸⁰ Chicago Comment, *supra* note 350, at 398.

³⁸¹ *Karcher*, 462 U.S. at 751-53 (Stevens, J., concurring).

³⁸² *Id.*; Backstrom, *supra* note 310, at 1126-27.

³⁸³ *Karcher*, 462 U.S. at 751-53 (Stevens, J., concurring). See also Dixon, *supra* note 312, at 456-500; sources cited *supra* note 372.

³⁸⁴ See *Wesberry*, 376 U.S. at 7-9.

³⁸⁵ *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). See also *Rogers v. Lodge*, 458 U.S. 613 (1982) (at-large system of electing members to county Board of Commissioners resulted in racially discriminatory vote dilution in violation of the fourteenth amendment).

³⁸⁶ *Wright v. Rockefeller*, 376 U.S. 52 (1964). The Court in *Wright* found that the plaintiffs had failed to show that the New York Legislature had districted along racial lines, but the Court did not state whether racially motivated congressional districting, if proven, would violate the equal protection clause or the fifteenth amendment. *Id.* at 56.

³⁸⁷ In addition, in states covered by the Voting Rights Act, 42 U.S.C. §§ 1971-1975 (1982), racial gerrymandering of district boundaries is forbidden. In a Voting Rights Act suit, the state bears the burden of showing that its new districting plan does not adversely affect the minority vote. 42 U.S.C. § 1973c; see also *Perkins v. Matthews*, 400 U.S. 379 (1971).

³⁸⁸ See, e.g., *Burns v. Richardson*, 384 U.S. 73, 88-89 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (emphasis added). Cf. *Gaffney v. Cummings*, 412 U.S. 735 (1973) (districting to achieve "political fairness" between major political parties not a violation of equal protection).

³⁸⁹ *Karcher*, 462 U.S. at 782-83 (White, J., dissenting); *id.* at 746-50 (Stevens, J., concurring).

³⁹⁰ *Id.* at 748-50 (Stevens, J., concurring).

³⁹¹ *Id.*

³⁹² *Id.* at 786-88 (Powell, J., dissenting).

presented.³⁹³ The dissenters did, however, suggest a willingness to consider a fourteenth amendment claim in a congressional districting case if one is presented.³⁹⁴ The dissenters indicated that their position in *Karcher* would have been different if the plaintiffs had demonstrated that the New Jersey plan invidiously discriminated against a racial or political group.³⁹⁵

Adoption of the test for gerrymandering advocated by Justice Stevens in his concurring opinion in *Karcher*³⁹⁶ would provide for the judicial criteria needed to address the problem of gerrymandering. Under Justice Stevens' approach, plaintiffs could establish a prima facie case of gerrymandering under the equal protection clause by demonstrating, first, that they were members of a politically distinct group of voters whose geographic distribution could have been taken into account in the districting plan; second, that their proportionate voting influence had been adversely affected by the plan; and third, that sufficient objective evidence of districting discrimination existed.³⁹⁷ Objective evidence of discrimination would include, Justice Stevens indicated, proof that the challenged plan substantially deviated from traditional neutral districting criteria, for example, that the plan contained malapportioned or unusually shaped districts, ignored political or geographic subdivision lines, fragmented localized political groups, or was adopted by a process which excluded differing viewpoints.³⁹⁸ Justice Stevens, however, would not require proof that a state legislature intentionally discriminated through gerrymandering.³⁹⁹ If the plaintiffs succeeded in establishing a prima facie case of gerrymandering, Justice Stevens stated, the state would then bear the burden of demonstrating that its plan was justified by legitimate, neutral state policies.⁴⁰⁰

The criteria which Justice Stevens advocates for districting would lead, when applied, to fairer apportionment plans in general. Consideration of district shapes, recognition of political subdivision and natural boundaries, and allowance of a balanced input into the districting process are all legitimate districting concerns which encourage the development of districts containing people who share a community of interest and which discourage the use of districting for partisan or personal purposes.⁴⁰¹ Perhaps no standards can eliminate gerrymandering, but state legislatures should not be allowed arbitrarily to disregard a host of recognized legitimate and neutral districting considerations. Just as the one person-one vote standard requires a state to justify significant numerical malapportionments, so too states should be made to answer when they depart substantially from other important and objective districting factors. Although enforcement of these additional criteria will necessitate more judicial involvement in districting, there is no reason to fear that the courts will become hopelessly enmeshed in a "political thicket." Because the districting considerations which Justice Stevens enumerates are objectively determinable and neutral factors, they provide judicially manageable criteria for evaluating appor-

³⁹³ *Id.* at 782-83 (White, J., dissenting).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 750-55 (Stevens, J., concurring).

³⁹⁷ *Id.* at 753-55 (Stevens, J., concurring).

³⁹⁸ *Id.* at 753-61 (Stevens, J., concurring).

³⁹⁹ *Id.* at 751-55 (Stevens, J., concurring); *City of Mobile v. Bolden*, 446 U.S. 55, 90-93 (1980) (Stevens, J., dissenting).

⁴⁰⁰ *Karcher*, 462 U.S. at 759-61 (Stevens, J., concurring).

⁴⁰¹ See generally *id.* at 753-61 (Stevens, J., concurring); Baker, *supra* note 310; Engstrom, *supra* note 314; Chicago Comment, *supra* note 350.

tionment plans.⁴⁰² Moreover, it is not enough, as the *Karcher* majority would have it, that the states may legislate against gerrymandering.⁴⁰³ Gerrymandering is an abuse of the legislative process, and in the face of legislative failure, extensive judicial deference merely leaves the victimized voters at the hands of the perpetrators. The continued prevalence of gerrymandering is an indication that the Court should intercede to inhibit the practice, and specifically, the Court should apply Justice Stevens' test for gerrymandering in congressional districting cases so that all relevant aspects of a districting plan could be considered, and plans containing purposeful and harmful discriminatory vote dilution could be invalidated. A requirement of intentional discrimination through gerrymandering should not, however, contrary to the suggestion of Justice Stevens, be excluded under the equal protection clause, provided the intent finding is based on objective considerations.⁴⁰⁴

Had such standards been applicable in *Karcher*, New Jersey Republicans would have had a basis to seek redress for the political gerrymandering effected by the Democratically controlled New Jersey Legislature.⁴⁰⁵ Protection from gerrymandering should be extended to major political parties because, as *Karcher* shows, in districting battles the minority political party is a likely target and victim of gerrymandering. The objection may be raised that a major political party, because of its extensive resources, is not in need of protection from discrimination in the legislative process. The existence of a politically gerrymandered districting plan, however, belies the notion that a major political party is capable of adequately protecting its own interests from legislative abuse in districting without constitutional protection. Moreover, as Justice Stevens points out in *Karcher*, the equal protection clause protects all citizens and relief from discriminatory vote dilution should be available to every cognizable political group.⁴⁰⁶ The need for standards prohibiting political gerrymandering is particularly acute in the congressional districting context, because, through gerrymandering, a majority party in a state legislature can extend its party's political dominance within the state to the state's federal representation in Congress and thereby further repress the minority group.

⁴⁰² See sources cited *supra* note 401.

⁴⁰³ See *Karcher*, 462 U.S. at 734-35 n.6.

⁴⁰⁴ See *Rogers v. Lodge*, 458 U.S. 613, 630-32 (1982) (Rehnquist, J., dissenting). Although Justice Stevens would not require a finding of intentional gerrymandering, *Karcher*, 462 U.S. at 751-55 (Stevens, J., concurring), it is unlikely that the Court will overturn the established rule that discriminatory intent is required for a violation of the equal protection clause in voting cases where group discrimination is alleged. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982) (proof of intentional discrimination is necessary to a finding that at-large elections system for county Board of Commissioners constituted unconstitutional vote dilution of black citizens under the fourteenth amendment); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (city's at-large election system did not unconstitutionally dilute Blacks' votes under the fourteenth amendment where no purposeful discrimination was shown). Nor should the Court dispense with the intent requirement, provided the finding of intent is based on objective criteria, for two reasons. First, Justice Stevens's test is sufficiently demanding that satisfaction of its *prima facie* case for gerrymandering would most likely encompass a finding of intentional discrimination. Thus, there is no inconsistency between using Justice Stevens's standard and requiring that the gerrymandering be intentional. Second, an intent requirement applied in addition to Justice Stevens's test would confine judicial review to the more egregious cases of gerrymandering and not allow the courts to become entangled in a "political thicket" of cases involving merely some disproportionate effects of districting upon a group of voters but little evidence of true legislative abuse.

⁴⁰⁵ See *supra* notes 226-27 and accompanying text.

⁴⁰⁶ *Karcher*, 462 U.S. at 748-50 (Stevens, J., concurring).

In sum, it appears from the concurring and dissenting opinions in *Karcher* that claims of invidiously discriminatory gerrymandering, racial or political, will be recognized under the fourteenth amendment in congressional districting cases. The dictates of the equal protection clause could then provide the additional judicial standards needed to neutralize this harmful abuse of the districting process. This approach should be adopted by the Court, in accordance with the guidelines provided in Justice Stevens' concurring opinion in *Karcher*, to protect more effectively the ideal of voting equality from the harms of gerrymandering, and thereby greatly enhance the prospects for achieving fair and effective representation for all citizens.⁴⁰⁷

CONCLUSION

In *Karcher*, the Supreme Court followed precedent and held that the article I, section 2 mandate of equipopulous congressional districting allows only unavoidable interdistrict population deviations. The Court in *Karcher* extended the reach of this "one person-one vote" standard to include maximum population deviations of less than one percent, but recognized that a state may justify a malapportioned districting plan by showing that the plan's population deviations were necessary to achieve certain legitimate state policies. *Karcher* thus partially overrules *Kirkpatrick v. Preisler* which had disallowed most state interests as justifications for a deviant plan.

⁴⁰⁷ The Supreme Court has recently granted review in *Davis v. Bandemer*, 105 S. Ct. 1840 (1985), a case that will squarely present the issue of political gerrymandering in the context of state legislative redistricting. The *Bandemer* plaintiffs include seven members of the Democratic Party who allege that Indiana's 1981 apportionment law redistricting the houses of the Indiana State Legislature violates the equal protection clause of the fourteenth amendment because the Republican controlled Indiana Legislature districted for partisan gain. *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984), *review granted*, 105 S. Ct. 1840 (1985). A three judge district court found that the Democratic plaintiffs had proven discriminatory vote dilution resulting from purposeful political gerrymandering and held that the plaintiffs were entitled to relief under the equal protection clause. *Id.* The district court noted that the Supreme Court had yet to address the constitutionality of political gerrymandering but the court relied extensively on Justice Stevens's concurring opinion in *Karcher*, *see supra* notes 209-27 and accompanying text, as justification for its holding. *Id.* Evidence of political gerrymandering in the Indiana plan cited by the district court included the plan's unusually shaped districts, disregard of existing political subdivisions, discriminatory use of multi-member districts, and the adverse disproportionate results of the 1982 Indiana legislative elections upon Indiana Democrats. *Id.* The district court acknowledged that the Indiana plan conformed numerically to the one person-one vote standard, but concluded that the partisan gerrymandering employed by the Indiana Legislature unconstitutionally discriminated against Indiana Democrats in violation of the equal protection clause and noted that the state had failed to provide any legitimate, rational justification for the plan. *Id.* The district court applied its ruling prospectively only, however, and allowed the 1984 Indiana legislative elections to proceed under the challenged plan. *Id.*

The *Bandemer* case presents the Supreme Court with an appropriate opportunity to set forth long overdue judicial standards to inhibit political gerrymandering. The Court should follow the initiative of the district court and adopt the guidelines for proscribing political gerrymandering under the equal protection clause cogently set forth by Justice Stevens in his concurring opinion in *Karcher*. *See supra* notes 209-27 and 396-404 and accompanying text. The Court should also support the district court's conclusion that a finding of intentional gerrymandering is required. *See supra* note 404; *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984), *review granted*, 105 S. Ct. 1840 (1985). Although the *Bandemer* case arises in the context of a state legislative districting plan, standards for political gerrymandering should be equally applicable in congressional and state legislative districting cases. *See id.* No relevant differences exist between the state legislative and congressional districting contexts that would allow for significantly different standards for political gerrymandering. *See id.* Thus, *Bandemer*, however decided, should be controlling precedent on the issue of political gerrymandering in congressional and state legislative districting cases.

The *Karcher* rule of absolute equality is in theory desirable, but in practical application it is susceptible to two criticisms. First, alone, it does little to prevent vote dilution through gerrymandering. Second, it tends to encourage judicial resolution of districting disputes, which are primarily a matter for the state legislatures. A low de minimus level of population deviation would protect against meaningful numerical vote dilution, and prevent unnecessary judicial intrusion in the districting process.

The *Karcher* result overall, however, should forward the districting goal of fair and effective representation for all citizens by allowing for proper application of state policy to justify some minor population deviations. The benefits of this part of the *Karcher* holding are several — it returns to the legislatures authority and appropriate discretion in districting, it accounts for the use of other, non-numerical criteria also important to fair districting, and it tends to discourage gerrymandering.

Two important districting issues remain after *Karcher*. First, the Court in *Karcher* and in previous cases has treated congressional and state legislative districting cases as distinct. A review of the several opinions in *Karcher* shows a majority of the Court now favoring a merger of the two lines of decisions. Such a merger would have the favorable effects of bringing consistency to the Court's treatment of the two lines of cases, and allowing the state legislatures more flexibility in considering proper congressional districting criteria. Second, the Court as yet has not considered the constitutionality of political gerrymandering in congressional districting. The *Karcher* opinions indicate that a majority of the court is now willing to consider a fourteenth amendment claim alleging that a politically gerrymandered congressional districting plan is invidiously discriminatory. Application of the requirements of the equal protection clause of the fourteenth amendment to congressional districting plans to eliminate harmful political gerrymandering would be a major step towards securing fair and effective representation for all citizens.

RICHARD K. STAVINSKI