Reapportionment in the 1970's - A Pennsylvania Illustration

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REAPPORTIONMENT IN THE 1970'S—
A PENNSYLVANIA ILLUSTRATION

Martin H. Belsky*

In Commonwealth ex rel. Spector v. Levin,1 the Pennsylvania Supreme Court dismissed, in a four-to-three order2 and later opinion,3 challenges to a reapportionment plan for the Pennsylvania State Senate and House of Representatives prepared by the Pennsylvania State Legislative Reapportionment Commission. An appeal from that order and opinion was dismissed "for want of a substantial federal question" by the United States Supreme Court on October 10, 1972.4 A complaint under the Civil Rights Act challenging the reapportionment plan was later dismissed by a three-judge court on May 8, 1973.5 Thus ended this author's journey through the "political thicket"6 of reapportionment in Pennsylvania. This article seeks to analyze that litigation experience and to relate it to the present state of reapportionment

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2. On February 7, 1972, the Pennsylvania Supreme Court entered the following Order:

AND NOW, this seventh day of February, 1972, upon consideration of the above appeals, we find that the Final Reapportionment Plan of the Pennsylvania State Legislative Reapportionment Commission filed on December 29, 1971, is in compliance with the mandates of the Federal and Pennsylvania Constitutions and therefore shall have the force of law. Hence it is ordered that said Plan filed on December 29, 1971, shall be used in the forthcoming Primary and General Elections of 1972 and thereafter shall remain in force and effect until constitutionally altered.

448 Pa. at 4-5.

Four Justices supported this decision. Chief Justice Jones, Justices Pomeroy and Manderino dissented. The order noted that opinions were to follow.

3. On June 5, 1972, the opinion of the court, by Justice Roberts, was filed. Chief Justice Jones, Justices Pomeroy and Manderino also filed their separate dissenting opinions on that date. The official reporter contains both the February 7, 1972 per curiam order and the later opinions. 448 Pa. 1.


law as detailed in the Pennsylvania Supreme Court decision and in the later rulings of the United States Supreme Court.²

Reapportionment in the 1960's—The Constitutional Standards

On March 26, 1962, the United States Supreme Court held for the first time in Baker v. Carr ⁸ that a claim asserted under the equal protection clause of the fourteenth amendment of the United States Constitution challenging the validity of an apportionment of seats in a state legislature was justiciable. A little more than two years later, the Court in Reynolds v. Sims ⁹ delineated the standards to be followed in enforcing such claims.

(a) "[T]he Equal Protection Clause requires that a state make an honest and good faith effort to construct districts in both houses of its legislature, as nearly of equal population as is practicable. . . ." ¹⁰

(b) A state may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative reapportionment scheme. . . . Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines may be little more than an open invitation to partisan gerrymandering. . . . [But] the overriding objective must be substantial equality of population among the various districts. . . .¹¹

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⁸ 369 U.S. 186 (1962). The Court specifically rejected the argument that the case involved a "non justiciable 'political question,'" 369 U.S. at 209, and distinguished prior cases precluding such review as being challenges based solely on the "guarantee [by the United States] to every State in the Union [of] a Republican Form of Government." U.S. Const. art. IV, § 4:

Just as the Court has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question, so has it held, and for the same reasons, that challenges to congressional action on the ground of inconsistency with that clause present no justiciable question.


Just two years earlier, the Court gave broad hints of the Baker decision in Gomillion v. Lightfoot, 364 U.S. 339 (1960) where it upheld a fifteenth amendment challenge to racially gerrymandered redistricting.

When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.


10. Id. at 577. A citation to the earlier decision of Gray v. Sanders, 372 U.S. 368, 381 (1963) suggested that this meant "one person, one vote." 377 U.S. at 558.

11. Id. at 570-79.
(c) [D]ivergences from a strict population standard... based on legitimate considerations incident to the effectuation of a rational state policy... are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. 12

In short, districts must be, as nearly as possible, equal in population. Secondarily, states may continue to follow other legitimate goals of political-subdivision integrity, compactness and contiguity. But they must be able to justify any deviation from a "strict population standard" as part of a rational state policy.

State and federal courts were directed to fashion appropriate and timely "remedial devices" to enforce compliance by the states with the requirement of equal population districting. 13 While there would be additional refinements of the standards by the Supreme Court, 14 the

12. Id. at 579.
13. Id. at 585-87. State legislatures, of course, also had the responsibility to reapportion districts for the United States House of Representatives. Wesbury v. Sanders, 376 U.S. 1 (1964), decided just a few months prior to Reynolds, seemed to indicate that standards for congressional redistricting would be the same as those for the state legislatures. See R. Dixon, Democratic Representation at 446-47 (1968); Dixon, Legislative Apportionment and the Federal Constitution, 27 Law & Contemp. Prob. 329 (1962).

In Wesbury, voters in the Fifth Congressional District of Georgia challenged the apportionment of population in that district under art. I, §2 of the United States Constitution, which provides that "the House of Representatives shall be composed of Members chosen every second year by the People of the several States..." The United States Supreme Court adopted the Baker reasoning, and held the issue justiciable. Adopting the language later found in Reynolds, the Court stated:

We hold that, construed in its historical context, the command of art. I, §2, that Representatives be chosen "by the People of the several States" means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.

376 U.S. at 7-8. The Court cited the Federalist Papers to support its conclusion that the constitutional provision "could have fairly [been] taken... to mean, 'one person, one vote.'" 376 U.S. at 18.

Later Chief Justice Warren, in Reynolds, 377 U.S. at 560-61 relied on Wesbury to support his conclusion as to state reapportionment, while recognizing that Wesbury was grounded on a different provision in the Constitution:

Nevertheless, Wesbury clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

14. Refinements concentrated on interpreting the requirement of an "honest and good faith effort" at equal districting and on what had to be shown to indicate that deviations from population inequality were based on "legitimate considerations incident to the effectuation of a rational state policy." In Swann v. Adams, 385 U.S. 440 (1967), the United States Supreme Court rejected a plan for the Florida legislature with deviations of 15.09 per cent and 18.3 per cent in the Senate and House respectively. In interpreting "substantial equality of population" in light of the requirements of "honest and good faith efforts" and of "legitimate considerations" to justify any deviations, the Court held that no deviations would be permissible unless special justification was shown.

[T]he Constitution permits "such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

385 U.S. at 444. In illustrating such factors, the Court returned to Reynolds and noted
desire was to prod the legislatures to affirmative action under these
guidelines and to allow the federal district and state appellate courts to
intervene with judicial relief "only when a legislature fails to reappon-
tion according to federal constitutional requisites in a timely fashion
after having had an adequate opportunity to do so." 15

Reapportionment in the 1960's—The Pennsylvania Experi-
ence

As early as 1874, the Pennsylvania Constitution had mandated
that the legislature be apportioned on the basis of district population
equality. In addition, it required districts to be composed of "compact
and contiguous territory." 16 Prior to 1964, however, there were few
and limited attempts to implement these provisions. 17 Only after Baker
and Reynolds, on January 14, 1964, was the Pennsylvania Supreme

[V]ariations from a pure population standard might be justified by such state
policy considerations as the integrity of political subdivisions, the maintenance
of compactness and contiguity in legislative districts or the recognition of
natural or historical boundary lines.


On the same day as the Swann decision, the Court nullified a Missouri congres-
sional districting plan with a maximum deviation of 9.9 per cent. In so doing the
Court simply cited Swann, indicating a prevalent practice to use the state legislative
and congressional districting standards interchangeably. Kirkpatrick v. Preisler, 385
U.S. 450 (1967). Thereafter, the Missouri Legislature enacted a new congressional
districting plan with a maximum deviation from population equality of 3.13 per cent.
Citing the precedents and standards of Reynolds, Swann and other state legislative
reapportionment decisions, the Court nullified the new statute and attempted again
to explain its standards.

[T]he command of Art. I, § 2, that States create congressional districts
which provide equal representation for equal numbers of people permits only
the limited population variances which are unavoidable despite a good-faith
effort to achieve absolute equality, or for which justification is shown.

394 U.S. at 531. The Court rejected any de minimus approach by stressing

[T]he "as nearly as practicable" standard requires that the State make a
good-faith effort to achieve precise mathematical equality [citing Reynolds].
Unless population variances among congressional districts are shown to have
resulted despite such effort, the State must justify each variance, no matter
how small.

394 U.S. at 530-31.

We can see no nonarbitrary way to pick a cutoff point at which popula-
tion variances suddenly become de minimis. Moreover, to consider a certain
range of variances de minimis would encourage legislators to strive for that
range rather than for equality as nearly as practicable. The District Court
found, for example, that at least one leading Missouri legislator deemed it
proper to attempt to achieve a 2% level of variance rather than to seek
population equality.

Equal representation for equal numbers of people is a principle designed
to prevent debasement of voting power and diminution of access to elected
representatives. Tolerance of even small deviations detracts from these
purposes.

394 U.S. at 531.

15. 377 U.S. at 586.


17. In 1938, the Dauphin County Court applied article II, §§16 & 17 and required the
redistricting of certain senatorial and house districts to make them more con-
tiguous. See Lyne v. Lawrence, 45 Dauph. 322 (Pa. C.P. 1938); Shoemaker v.
Court asked to review Pennsylvania legislative apportionment in *Butcher v. Bloom.*

On March 30, 1962, Pennsylvania electors sued the Secretary of the Commonwealth (George I. Bloom), seeking to preclude elections of state legislators under existing apportionment statutes. The Dauphin County Court did not stay the election but retained jurisdiction and allowed the legislature to enact new and appropriate legislation at its next session. After reapportionment legislation was enacted on January 9, 1964, plaintiffs petitioned the Pennsylvania Supreme Court to take immediate jurisdiction, which it did on January 15, 1964. The case was remanded to the Dauphin County Court for a hearing and findings of fact. After the hearing judge filed his report on March 19, 1964, oral argument was heard by the supreme court on April 7, 1964.

On September 29, 1964, in a unanimous opinion by Justice Roberts, the court found the districts malapportioned and directed the legislature to prepare a new reapportionment law for the 1966 election, but allowed the 1964 elections to be conducted under the new 1964 law. The court retained jurisdiction pending legislative action.

Lawrence, 45 Dauph. 111, 31 Pa. D. & C. 681 (C.P. 1938). Neither decision discussed the issue of equal population and no other reported decisions in any Pennsylvania court discuss these constitutional provisions.


23. 415 Pa. at 443, 203 A.2d at 559.

24. Chief Justice Bell "joined in the very able Opinion which Justice Roberts has written for the Court," 415 Pa. at 468, 203 A.2d at 573. However, in a separate concurring opinion, he questioned the wisdom and bases of the reapportionment decisions by the United States Supreme Court "in the faint hope that one or more Justices of the Supreme Court of the United States may thereby be induced to change or modify their viewpoint on the subject of Reapportionment." 415 Pa. at 469, 203 A.2d at 573. See generally 415 Pa. 468-78, 203 A.2d 573-78 (concurring opinion of Chief Justice Bell).


26. Id. at 468; 203 A.2d at 573.

Should the legislature fail to enact a constitutionally valid plan of reapportionment as soon as practical, but not later than September 1, 1965, we shall take such action as may be appropriate in light of the then existing situation.
To aid the legislature in its work, the court reviewed the existing Pennsylvania constitutional provisions and construed them to be in accord with the requirements of the equal protection clause. 27

Like the United States Supreme Court in Reynolds, the Pennsylvania Supreme Court thus interpreted its state constitutional provisions to require, first, as nearly as possible, equality in population. Secondarily, the Pennsylvania Constitution would require the maintenance of the integrity of political subdivisions and compactness and contiguity in districting. However, the secondary factors must give way if necessary to the equal-population principle. 28

When the legislature failed to enact legislation in accord with Butcher I, the Pennsylvania Supreme Court adopted its own reapportionment plan on February 4, 1966. 29 The basis of that plan, in accord with its previous decision, was described in the per curiam opinion:

In the formation of the reapportionment plans herein adopted, we have been guided by the dictates of the Federal Constitution and the controlling decisions of the Supreme Court of the United States. Our primary concern has been to provide for substantial equality of population among legislative districts. At the same time, we have sought to maintain the integrity of political subdivisions and to create compact districts of contiguous territory, insofar as these goals could be realized under the circumstances of the population distribution of this Commonwealth. We believe such plans to be constitutionally valid and sound. 30

28. 415 Pa. at 462-65, 203 A.2d at 570-71; see text at notes 9-13 supra.
30. 420 Pa. 309-10, 216 A.2d 459. In his concurring opinion, Id. at 355-366, 216 A.2d at 460-63, Chief Justice Bell again criticized the mandate of the United States Supreme Court in the Reynolds decision. In a concurring and dissenting opinion, Id. at 366-75, 216 A.2d at 470-74, Justice Roberts joined in the senate districting plan reluctantly because of an additional requirement in the per curiam decision limiting the term of office of senators “from odd numbered districts in the forthcoming election to two years.” He dissented from the court’s reapportionment plan for the House of Representatives because it “permits representative districts embracing 47.03 per cent of the population of the Commonwealth to elect a majority of the ... House.” In an opinion, dissenting in part, Id. at 383-84, 216 A.2d 469-70, Justice Eagen objected to the court’s senate plan because of the “wide divergence of total population in several districts.” In a dissenting opinion, Id. at 378-83, 216 A.2d at 465-69, Justice Musmanno objected to the court plan because he saw in it “marshes of inequality, swamps of uncompactness, bogs of invidious discrimination and barren wastes of unconstitutional performance.” Nevertheless, the justices did agree on the stated requirements of any reapportionment plan: [E]ach House of a State Legislature (a) must have substantial equality of population among the various districts, or districts of as nearly equal population as is practicable and (b) that a state "may provide for compact districts of continuous territory" and (c) that there must be no invidious discrimination (emphasis in original).
One year later, the Pennsylvania Supreme Court considered a challenge to the reapportionment of councilmanic districts within the City of Philadelphia. A reapportionment ordinance, passed in September of 1966, that divided the city into districts of absolute equality of population was nevertheless challenged because it "was motivated by illegal, improper and unconstitutional partisan political factors" and created district boundaries which were "neither compact nor consistent with traditional, historical, geographical, physical or neighborhood boundaries." The lower court invalidated the reapportionment ordinance and ordered an election. On March 21, 1964, the Pennsylvania Supreme Court granted a supersedeas and on April 19, 1967 reversed.

In the opinion by Justice Roberts on May 24, 1967, the court adopted a substantial equality test and ruled that no inquiry need be made into any factor other than equality of population.

The court also considered the claim of political gerrymandering, which the lower court found sufficient to invalidate the redistricting ordinance. The supreme court stated that gerrymandering does not raise a "cognizable federal constitutional claim" and rejected the lower court's holding that gerrymandering raised a cognizable state constitutional claim.

Reapportionment in the 1970's—The Expectations

In order to avoid continuous reapportionment litigation, the United States Supreme Court in Reynolds stressed that "limitations on the frequency of reapportionment are justified by the need for stability".

Id. at 357, 216 A.2d at 461, (Concurring opinion of Chief Justice Bell); see also 420 Pa. at 369-70, 216 A.2d at 472 (concurring and dissenting opinion of Justice Roberts); 420 Pa. at 375, 216 A.2d at 465 (dissenting opinion of Justice Musmanno).

32. Id. at 481, 230 A.2d at 55.
33. Id. at 482, 230 A.2d at 56.
34. Id. at 482-87, 230 A.2d at 56-58.
35. Id. at 487, 230 A.2d at 58-59:
[W]e are convinced that the ordinance redistricting City Council does not deviate enough from the substantial equality of population test laid down in this state's or federal reapportionment decisions to require that inquiry into compactness, preservation of historical or physical boundaries, or gerrymandering which inquiry is proper when the population deviation is substantial (emphasis added).

36. Id. at 489, 230 A.2d at 60.
[T]here is no basis . . . in Pennsylvania's present Constitution or laws for the proposition that gerrymandering per se, as distinct from departure from explicit constitutional or statutory requirements of compactness or contiguity, may constitute the sole basis upon which a legislative plan of apportionment may be judicially invalidated.
and continuity in the organization of the legislative system.”

The Court suggested that “decennial reapportionment would be appropriate” and warned that reapportionment of less frequency would be constitutionally suspect.

Thus, after the extensive legislation and litigation following Reynolds, states were given an opportunity to adopt new procedures and guidelines, or apply old ones, to implement the reapportionment requirements after the 1970 census. The strong suggestion was for states to adopt new statutory or constitutional provisions and procedures to avoid further difficulties and to avoid the need for judicial intervention and redistricting.

Satisfaction of the equal-population requirement, however exact, could still allow legislators to redistrict for partisan advantage; that is, politically gerrymander. All that would happen, it was feared, would be a substitution of the surgeon’s scalpel for the butcher’s cleaver. The results would be the same—voters would be deprived of an equally effective voice.

Reynolds itself indicated that the requirement of “one man, one vote” would not be sufficient to establish the right of a citizen to an equal voice in the political process. In the opinion, the Court pointed to the need to curb “any restrictions” on the right to vote freely.


38. 377 U.S. at 583-84:

That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. . . . While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.

39. Id. at 584:

We agree with the view of the District Court that state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible.

40. Initially, it was believed that if legislators used data processing to prepare reapportionment plans, gerrymandering would be impossible. However, it soon became clear that computers, while able to “forget” partisan criteria, can just as easily be used to insure partisan gain. J. Weaver, Pair and Equal Districts: A How-To-Do-IT MANUAL on Computer Use at 9 (National Municipal League 1970).


42. 377 U.S. 533, 555 (1964):

The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.
warned of partisan gerrymandering, and stated that “the Constitution forbids sophisticated as well as simple-minded modes of discrimination.” In fact, the Court suggested that some forms of gerrymandering might be so gross as to constitutionally invalidate a reapportionment plan. Commentators and courts thus awaited the “next step” in the reapportionment revolution—prohibition of ballot debasement whether quantitatively by malapportionment or qualitatively by gerrymandering.

Compactness and Contiguity

As noted in Reynolds itself, one recognized way to limit political gerrymandering was for states to “provide for compact districts of contiguous territory in designing a legislative reapportionment scheme.”

Since most states, even prior to Baker and Reynolds, had constitutionally or statutorily required districts to contain compact and contiguous

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See also 377 U.S. at 562:

[Al]ny alleged infringement of the right of the citizens to vote must be carefully and meticulously scrutinized.

43. Id. at 578-79. See text at note 11 supra.

44. Id. at 563.

45. Id. at 568:

[T]he existing apportionment ... presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone.


47. Of course, the United States Supreme Court had prohibited “racially based” gerrymandering in Gomillion, 364 U.S. 339; see 377 U.S. at 555. In Long v. Docking, 283 F. Supp. 339, 543 (D. Kan. 1968), a three-judge district court delicately criticized the legislature for being motivated by considerations other than equality of population. In Sinecock v. Gately, 262 F. Supp. 739, 808-09 (D. Del. 1967), the three-judge district court found the districting of Wilmington to be the result of political gerrymandering.

In Forson v. Dorsey, 379 U.S. 433 (1965), the United States Supreme Court considered a challenge to a mixed use of multi-member and single-member districts in a Georgia senate reapportionment plan because it discriminated against political minorities. The Court found insufficient support for such a claim but noted that it was not ruling on whether the minimization of voting strength of political elements, through means other than malapportionment, was violative of the equal protective clause. 379 U.S. at 439.

48. 377 U.S. at 578-79.
territory, it was hoped that state courts, as a matter of state law, would deter indirect legislative attempts to subvert *Reynolds* by enforcing not only the federal constitutional requirements of equality of population but also their own state requirements of geographic regularity. Failure to do so would result in the imposition of these standards by the federal courts.

Several state courts did recognize their duty to enforce state constitutional requirements of equality in population, compactness and contiguity. As early as 1955, the Missouri Supreme Court in *Preiser v. Doherty* reviewed a 1952 redistricting of senatorial districts in St. Louis by the Board of Election Commissioners. The court noted that the requirements of compactness and contiguity were placed in the Missouri Constitution “for a purpose . . . to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as the ‘gerrymander’, and to require the Legislature to form districts, not only of contiguous, but of compact or closely united territory.” Finding the newly created districts to be not compact and that the non-compactness was not to obtain more


Specific constitutional requirements as to the formation and boundaries of legislative districts must be observed, such, for example, as that they must consist of compact or convenient and contiguous territory.

Federal legislation had, at one time, made compactness and contiguity a requirement for congressional districting. Act of Aug. 8, 1911, ch. 5, 37 Stat. 15; Act of Jan. 16, 1900, ch. 93, 31 Stat. 733. However, it was never enforced by the Courts and it expired by not being introduced into the reapportionment law of June 19, 1929. See *Wood v. Broom*, 287 U.S. 1 (1932); *Gottlieb, supra* Note 46, at 544; *Note, Reapportionment, supra* Note 47 at 1284. A later attempt in 1965 to include it again, H.R. 5509, 89th Cong., 1st Sess. (1965), was unsuccessful. See *Schwartzberg, Reapportionment, Gerrymanders and Notions of “Compactness,”* 50 *Minn. L. Rev.* 443, 444 (1968).

52. 365 Mo. 460, 284 S.W.2d 427 (1955).

53. *Id.* at 471, 284 S.W.2d at 435. The Board has been “delegated very limited legislative power for a single purpose; namely, to divide the City into senatorial districts of contiguous territory, as compact and nearly equal in population as may be.” *Id.* at 466, 284 S.W.2d at 432. See art. III, §8 of the Missouri Constitution of 1945.
equality of population, the court found the 1952 redistricting to be therefore unconstitutional and void.

After the 1964 reapportionment decisions, other state courts similarly responded. In 1965, New York courts reviewed a 1964 reapportionment law in the light of the state constitutional requirement that state senatorial and house districts be composed of equal number of inhabitants and be compact and contiguous. The Supreme Court for New York County recognized that these state provisions were mandatory and were included to insure that gerrymandering would be held unconstitutional. The court then reviewed maps of existing districts and found them prima facie violative of the compactness and contiguity mandate. On appeal, the New York Court of Appeals affirmed the ruling of the lower court and specifically reaffirmed the state constitutional requirement that districts had to be compact and contiguous.

Similarly, the California Supreme Court and the New Jersey Supreme Court upheld the validity of state constitutional mandates of compactness and contiguity, provided they do not interfere with the federal requirement of equality of population. Of course, as discussed earlier, the Dauphin County Court in 1938 and the Pennsylvania Supreme Court in 1964 and again in 1966 mandated that legislative reapportionment comply not only with the federal and state constitutional requirements of equality in population, but also with the state constitutional requirement of compactness and contiguity.

54. Id. at 468, 284 S.W.2d at 433. The most extreme violations of compactness, in fact, created the greatest inequality.

55. Id. at 471, 284 S.W.2d at 435.

56. The New York Constitution, article III, §4, provided that reapportionment shall create senate districts containing "as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable . . . and shall at all times consist of contiguous territory . . . ." Article III, §5 provided that assembly districts shall be apportioned to have "as nearly equal in number of inhabitants, excluding aliens as may be' and to be composed of "convenient and contiguous territory in as compact form as practicable . . . ."


58. The court reviewed several court of appeals decisions indicating that political considerations were to be precluded through the compactness and contiguity requirement. 45 Misc.2d at 640-41. It concluded that "the use of the gerrymander is, in essence, forbidden by the State Constitution; and, thus, it is certainly a State matter, and, troublesome or not, this court may not escape it." 45 Misc.2d at 647.

59. 45 Misc.2d at 655.

60. 15 N.Y.2d at 351 (1965).

The court of appeals did not discuss the purpose of the requirement nor the lower court's discussion of the constitutional invalidity of gerrymandering.


62. Jackman v. Bodine, 49 N.J. 406 (1967). The court made it clear that compactness could not justify appreciable deviations in population. It was, as noted by all other courts, a factor subsidiary to equality of population, Id. at 419.

The court interpreted the United States Supreme Court reapportionment decisions allowance of minor deviations to provide for geographical regularity as an attempt to discourage gerrymandering. Id. at 415.

63. See text at notes 16 to 30.
Burden of Proof

The second method, suggested by Reynolds, to limit political gerrymandering, was for the courts to enforce the requirement that deviations from equality of population be shown to be "based on legitimate considerations incident to the effectuation of rational state policy. . . ." 64 Only then could the requirement that an "honest and good faith effort" be made to apportion be satisfied. 65

Commentators urged that such a requirement required any reapportionment plan to be politically neutral. Thus while legitimate policy considerations, such as compactness or contiguity or the maintenance of political subdivisions, as described in Reynolds, might justify slight divergences in population, 66 illegitimate goals such as partisan gerrymandering would mandate the voiding of any reapportionment act. 67 In any event, the burden would be on the state to justify any population variance. 68 As gerrymandering could easily be identified by the lack of compactness and contiguity, 69 the state would also have the burden of justifying failure to follow such subsidiary requirements as well. 70

This rationale seemed to be adopted by the United States Supreme Court itself in the latter half of the 1960's. In Swann v. Adams, 71 the Court reviewed the Reynolds requirements and reversed a district court's validation of a Florida reapportionment plan because of "the failure of the state to present or the District Court to articulate acceptable reasons for the variations among the populations of the [districts]." The Court continued that Reynolds allowed deviations only as "to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.'" After noting that such allowable considerations could include the integrity of political subdivisions, compactness and contiguity, the Court stressed that divergences were sharply limited to "such minor deviations only

64. 377 U.S. at 579; see text at note 12 supra.
65. Id. at 577. See text at note 10; see also discussion in note 14.
66. Gottlieb, supra note 46 at 558-59; Hatheway, supra note 41 at 156, 158. See text at note 11 supra. In fact, some argued that the only reason for the Court to allow such exceptions, was to deter political gerrymandering. McKay, supra note 46 at 233; Stiles, Congressional Reapportionment, 15 VILL. L. REV. 223, 227 (1969).
67. McKay, supra note 46 at 681, 688; Williamson, supra note 46 at 399.
69. Comment, Apportionment and the Courts—A Synopsis and Prognosis: Herein of Gerrymanders and Other Dragons, supra note 46 at 536; Note, Reapportionment, supra note 41 at 1285.
70. Hatheway, supra note 41 at 156, 158; Schwartzberg, supra note 51 at 448; Comment, Apportionment and the Courts—A Synopsis and Prognosis: Herein of Gerrymanders and Other Dragons, supra note 46 at 536.
71. 385 U.S. 440.
as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." 72

Thereafter, at least one federal district court found that the failure of the legislature to justify deviations in population, as shown by its failure to create compact districts of contiguous territory, required a reapportionment law to be declared unconstitutional. 73

Finally, in 1969, in *Kirkpatrick v. Preisler,* 74 the Court appeared to adopt an absolutist approach. In evaluating a congressional districting plan for Missouri with a maximum deviation of 3.13 percent, the Court rejected a de minimus approach and cited *Reynolds* for the proposition that the state must "make a good faith effort to achieve precise mathematical equality.'"

Unless population variances among congressional districts are shown to have resulted despite such effort, the state must justify each variance, no matter how small. 75

More specifically, the Court rejected partisan politics as a legitimate justification. 76

Reapportionment in the 1970's—The Early Decisions

Prior to the decisions of 1973, 77 only three post-1970 reapportionment cases reached the United States Supreme Court. 78 Each indicated that the lower courts should be cautious in nullifying reapportionment statutes.

In *Ely v. Klahr,* 79 the Supreme Court affirmed the district court's refusal to enjoin the 1970 legislative elections in Arizona from being

72. Id. at 443-44. See also 386 U.S. at 122.
73. 283 F. Supp. at 542-43; see also 303 F. Supp. 224.
74. 394 U.S. 526.
75. Id. at 531.
76. Id. at 533: "Problems created by partisan politics cannot justify an apportionment which does not otherwise pass the constitutional muster."
held under an invalid reapportionment act, pending the filing of a new reapportionment plan after the 1970 census results were obtained. In so doing, the Court clearly indicated that the Kirkpatrick standard of "absolute equality" was the standard for state reapportionment as well as for congressional. Although the district court had found the reapportionment plan invalid because of political gerrymandering, the Supreme Court refused to resolve that issue directly.

In Sixty-Seventh Minnesota State Senate v. Beens, the Court per curiam (with Justice Stewart dissenting) vacated a reapportionment plan adopted by a federal District Court of Minnesota, but only on limited grounds. After declaring a pre-census reapportionment plan unconstitutional, and after requesting and reviewing the plans of all parties, including those of legislative representatives, the district court adopted a reapportionment plan that included reducing the number of senatorial districts from sixty-seven to thirty-five and the number of house districts from one hundred and thirty-five to one hundred and five. On appeal, the Supreme Court held that the district court went too far. Noting from Reynolds that apportionment is primarily a

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80. Id. at 111: The court properly concluded that this plan was invalid under Kirkpatrick . . . [s]ince the legislature had operated on the notion that a 16% deviation was de minimis.

then again, 403 U.S. at 112:
The court observed that its 1966 plan had fallen behind contemporary constitutional requirements, due to . . . the intervening decisions in Kirkpatrick and Wells . . .

81. 313 F. Supp. at 152: "The incumbency factor has no place in any reapportionment or redistricting" and "the consideration of party strength. . . ." is inappropriate.

82. 403 U.S. at 112 n.5.


84. Beens v. Erdahl, 336 F. Supp. 715, 717-19 (D. Minn. 1972). The district court had earlier established criteria for all proposed plans:
The Court ordered that all districts were to be single member, compact and contiguous, and of equal population. It was also established that "minor deviations" not to exceed 2% would be considered if they facilitated the maintenance of political subdivision boundaries. No consideration was to be given to the residence of incumbent legislators or to the voting patterns of electors.

Id. at 719. No challenge was made to these requirements or their implementation.


86. 406 U.S. at 198-200 (1972):
We know of no federal constitutional principle or requirement that authorizes a federal reapportioning court to go as far as the District Court did. . . . No case decided by this Court has gone that far and we have found no district court decision that has employed such radical surgery in reapportionment . . .

We conclude that the action of the three-judge court in so drastically changing the number of legislative districts and the size of the respective houses . . . is not justified as an exercise of federal judicial power.

87. 377 U.S. at 586.
matter for legislative consideration, the Court criticized the lower court for not recognizing the validity of Minnesota legislation setting the size of the legislative houses.

In *Taylor v. McKeithen*, the Supreme Court refused, on technical grounds, to consider a court-imposed legislative reapportionment plan for Louisiana. The district court had instructed the special master, who prepared the final plan, that "no consideration whatsoever was to be given to the location of the residences of either incumbents in office or of appointed or prospective candidates." It accepted the master's plan and rejected the state Attorney General's plan, which complied with the one-man, one-vote requirement but protected "white" incumbents. The court of appeals reversed without opinion and adopted the Attorney General's plan. The Supreme Court remanded for an opinion explaining the circuit court's reversal, but indicated that, if the reasoning of the court were that the lower court's order constituted impermissible court gerrymandering, it would present an important federal question.

As the district courts reviewed legislative reapportionment plans, they generally interpreted the *Reynolds* standards strictly. As the most recent pronouncements on reapportionment had adopted the absolute equality standard, as described in the 1969 congressional reapportionment cases, specifically *Kirkpatrick*, most courts believed these standards to be applicable to all reapportionment cases, state or federal. One-man, one-vote meant just that, and no deviation was per se de

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89. Id. at 196.

[A] federal reapportionment court should accommodate the relief ordered to the appropriate provisions of state statutes relating to the legislature's size insofar as is possible.

*Id.* at 197. Of course, the Court noted that minor changes of only a few seats might be justified. "But to slash a state senate's size almost in half and a state house's size by nearly one-fourth is to make more than a mere minor variation." *Id.* at 199.

90. 407 U.S. 191 (1972). The opinion was per curiam but the Chief Justice and two other Justices dissented and asked the Court to consider the merits.

92. 407 U.S. at 191. The basis for that instruction was that:

... those elected to office for specific terms do not thereby acquire a vested interest in the office. Furthermore, we must not lose sight of the fact that members of the Legislature represent people and not parishes, wards, or precincts. It is the people who have the constitutional right at all times to be equally and fairly represented. The office holder has no constitutional right to represent anyone except for the specific term for which he is elected.

333 F. Supp. at 456.


94. 407 U.S. at 194. The lower court in *Minnesota State Senate v. Beens*, had also precluded considerations of incumbency in its "guidelines". *See* note 84, supra. However, as the issue was not raised on appeal, the Supreme Court did not mention that issue in that opinion.

Minor population variations must be clearly justified by acceptable and legitimate considerations. Recognizing that the Supreme Court had consistently indicated in its most recent cases that gerrymandering alone was not invidious discrimination, most courts rejected the arguments of counsel and the writings of the publicists to take this "next step." Arguments that political gerrymandering could not be a legitimate reason for violating the requirement of absolute equality were more successful, however, although many courts were still reluctant to enter that "political thicket."

Courts reviewed and scrutinized plans in terms of compactness, contiguity and the maintenance of the integrity of political subdivisions, always, of course, secondarily to equality of population. Some courts mandated such geographic regularities as being historically required, and as essential to preclude impermissible gerrymandering. Courts


97. See Beens v. Erdahl, 336 F. Supp. 715, 719 (D. Minn. 1972), remanded sub nom. Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972) (minor deviations of 2 per cent allowable but only if they were to maintain political subdivision boundaries).


99. See text at notes 46-47 supra.


weighed the presence of these secondary factors as a legitimate justification for slight population deviation and often included them within their court-ordered plans.

Reapportionment in the 1970's—The Pennsylvania Experience

One proposed solution to the ills of malapportionment was the establishment of bipartisan or nonpartisan commissions. Such commissions are unfortunately as subject to partisan pressures, and therefore to malapportionment, as the “bipartisan” legislature or the “nonpartisan” computer. Nevertheless, it was believed the assigning of the responsibility for reapportionment to such a commission had “quite obvious” advantages.

One state adopting the commission method was Pennsylvania. By an amendment to the Pennsylvania Constitution in 1968, a Legislative Reapportionment Commission was established to prepare plans for legislative districts in Pennsylvania after each federal decennial census. In order to assure bipartisan cooperation, the Commission was to consist of the majority and minority leaders of both the state Senate and House of Representatives, or their appointed deputies, and a chairman to be selected by the four members or, if they could not agree, by the Supreme Court of Pennsylvania.

Following the creation of the Commission, the following procedural steps were to be followed: (1) Filing of the preliminary reapportionment plan by the Legislative Reapportionment Commission; (2)

110. PA. CONST. art. II, § 17 (1968).
111. The new amendment was a result of the Pennsylvania Constitutional Convention of 1967-68 and was adopted April 23, 1968.
112. PA. CONST. art. II, § 17(a).
113. PA. CONST. art. II, § 17(b).
114. PA. CONST. art. II, § 17(c).
Thirty days for the Commission to make corrections in the plan and for any person aggrieved to file exceptions; If exceptions are received, thirty days for the Commission to file a revised reapportionment plan, which then becomes the final plan; Thirty days for “any aggrieved person” to appeal to the Pennsylvania Supreme Court; and then, Determination by the Supreme Court of Pennsylvania as to whether the final plan was “contrary to law.”

In addition, to give notice to “any aggrieved person” to file exceptions to a preliminary plan or to appeal a final plan, the constitution provided that “any reapportionment plan” had to be published in a newspaper of general circulation in each senatorial and representative district.

Another new constitutional amendment adopted the standards, suggested by Reynolds and mandated in Pennsylvania by Butcher v. Bloom, that were to be followed by the Commission. These standards are: (1) senatorial and representative districts were to be as nearly equal in population as practicable; (2) districts were to be composed of compact and contiguous territory; and (3) the integrity of political subdivisions was to be maintained.

Pursuant to these provisions, the Pennsylvania State Legislative Reapportionment Commission was finally established in 1971 and on November 17, 1971 filed its Preliminary Reapportionment Plan.

115. PA. CONST. art. II, § 17(c).
116. PA. CONST. art. II, § 17(c).
117. PA. CONST. art. II, § 17(c).
118. PA. CONST. art. II, § 17(d).
119. PA. CONST. art. II, § 17(d).
120. PA. CONST. art. II, § 17(h).
121. PA. CONST. art. II, § 16.
124. The four members, representing each political party in both the Senate and House of Representatives, were unable to select a chairman within the time prescribed. The Pennsylvania Supreme Court, therefore, appointed A. Leo Levin, Professor of Law at the University of Pennsylvania Law School as the Commission Chairman. 448 Pa. at 6 n.7, 293 A.2d at 28 n.7.
125. The Preliminary Reapportionment Plan as published in Philadelphia Inquirer on December 14, 1971, can be found in the Record for Appellant, Commonwealth of Pennsylvania as rel. Specter, No. 54 (Supreme Court of Pennsylvania, May Term, 1972) at 13 to 22 [hereinafter referred to as Record for Appellant].
126. As noted above (text at note 115 and note 120 supra), the Pennsylvania Constitution article II, §17(c) and 17(h) provided for thirty days for exceptions to be filed to the Preliminary Plan and for publication of the Preliminary Plan. In a letter dated December 1, 1971, two weeks after the filing of the Preliminary Plan, the Secretary of the Commonwealth of Pennsylvania, C. Delores Tucker, asked the then Attorney General of Pennsylvania, J. Shane Creamer, for an official opinion as to whether the Preliminary Plan had to be published under article II, §17(h). Letter of December 1, 1971 to Honorable J. Shane Creamer, Attorney General of Pennsylvania, from Honorable C. Delores Tucker, Secretary of the Commonwealth, Record of Appellant at 4-5. In his response of December 3, 1971, Attorney General Creamer advised Secretary Tucker to publish the preliminary plan in accordance with article II, §17(h). The basis for his opinion was that it was clear that the framers of the Constitution intended that the public be aware of a reapportionment plan in order to have an opportunity to voice objection to it, or, in the language of the Constitution, "file exceptions" to it.

The "Opinion Letter" concluded "the right of the public to know and be kept informed of governmental action, particularly actions affecting his franchise, is especially important." Letter of December 3, 1971, to the Honorable C. Delores Tucker, Secretary of the Commonwealth, Honorable J. Shane Creamer, Attorney General of Pennsylvania, Record for Appellant at 6-7. The Preliminary Plan was published in Philadelphia eleven days later.

As the Preliminary Plan was filed on November 17, 1971, the thirty day period for the filing of exceptions expired on December 17, 1971. See Notice Accompanying Preliminary Plan, as published in the Philadelphia Inquirer on December 14, 1971, Record for Appellant at 13. Believing that Article II, §17 had to be read so as to require publication upon filing or at least a thirty day period after publication for the filing of grievances, a Complaint in Mandamus, No. 1100, C. D. 1971, was filed in the Commonwealth Court of Pennsylvania, seeking an Order directing the State to receive, entertain and consider until January 12, 1972, all exceptions to the Preliminary Plan filed by any aggrieved persons, and staying the entrance into law of the Preliminary Reapportionment Plan at least until January 12, 1972 to allow citizen of Philadelphia County an opportunity to file such grievances to the Plan. Commonwealth of Pennsylvania ex rel. Specter v. Tucker, No. 1100, C. D. 1971. After the Reapportionment Commission ceased accepting exceptions to the Preliminary Plan on December 17, 1971, plaintiff filed a Motion for an Immediate Hearing and a Prayer for Summary Judgment. A hearing was held before a three-judge court on December 23, 1971. At that hearing and in his brief, this writer argued that the publication of December 14, 1971, gave the citizens effectively only four days to challenge the plan. The argument continued that the purpose of the new constitutional amendments was to require the Commission to accept for thirty days proposals or exceptions by all interested parties and then to accept or reject them for inclusion into a final plan. Quoting the Attorney General's opinion, counsel continued that the notice to the public was to be given by publication. Since a person could not become "aggrieved" until he knew of the existence and contents of the plan, the thirty day period to file exceptions would be meaningless unless publication, indicating full and complete disclosure, preceded filing. Realizing that to require publication of the Preliminary Plan would be unfair, counsel asked only that the period to file exceptions be extended to January 12, 1972, thirty days after publication.

On the day of argument, December 23, 1971, the Commonwealth Court denied the Prayer for Summary Judgment. In its opinion, filed on January 12, 1972, the three judge court stated that its denial was because the right to mandamus was not "clear" enough for a summary judgment. Record for Appellant at 8-12, Opinion, per curiam, Commonwealth ex rel. Specter v. Tucker, No. 1100, C. D. 1971 (filed Jan. 12, 1972).

An Appeal, as of January Term, 1972, No. 213, and a Petition for Assumption of Plenary Jurisdiction, as of No. 134, Miscellaneous Docket 19, were filed in the Supreme Court of Pennsylvania on December 29, 1971, again seeking an order providing more time for the filing of exceptions to the Preliminary Plan. After scheduling a special argument for January 20, 1972, where this author made the same arguments described above, the court on January 4, 1972, dismissed the appeal as interlocutory and declined to assume plenary jurisdiction.

Although the issue was raised again in the briefs and arguments on appeal from the final plan, the Supreme Court of Pennsylvania did not discuss it at all in Commonwealth ex rel. Specter v. Tucker.
the Commission made minor changes and filed its final reapportionment plan on December 29, 1971.\textsuperscript{127} Thereafter, eighteen parties filed appeals from the reapportionment plan to the Supreme Court of Pennsylvania and argument was advanced from May, 1972 in Harrisburg to February 2, 1972 in Philadelphia.

The primary attack against the plan focused on the Commission's redistricting in Philadelphia County, and the attack was bipartisan and nonpartisan.\textsuperscript{128}

All of the Philadelphia appellants\textsuperscript{129} complained that the final plan created non-compact districts,\textsuperscript{130} that did not maintain the integrity of political subdivisions,\textsuperscript{131} so as to protect incumbents.\textsuperscript{132} No direct

\textsuperscript{127} The Final Reapportionment Plan as published in the Evening Bulletin on January 11, 1972, can be found in Record for Appellant at 23-32. Despite the fact that the final or revised plan was filed on December 29, 1971, it was not published in Philadelphia County until January 11, 1972. This writer argued that this provided citizens of the County of Philadelphia with only effectively sixteen days, until January 27, 1972, to appeal the plan. Article II, §17(d) provided thirty days for an appeal. See discussion supra note 126.

\textsuperscript{128} No. 54, May Term, 1972, was filed in behalf of Arlen Specter, individually and as District Attorney of Philadelphia County. No. 69, May Term, 1972, was filed on behalf of the Committee of Seventy, a non-partisan "watchdog" organization. Appeal No. 56, May Term, 1972, was filed in behalf of Republican State Senator Robert Rovner and other Republican state legislators. Appeal No. 59, May Term, 1972, was filed in behalf of former Democratic Mayor James H. J. Tate and two Democratic representatives.


\textsuperscript{130} In its exceptions to the Preliminary Plan, the Committee of Seventy stressed that the plan "shows districts that are long and narrow, districts that are L-shaped and districts that defy description, with relatively few that are compact", and then described eight districts as illustrative. See Statement of Exceptions to the Preliminary Reapportionment Plan Prepared by the Committee of Seventy, Philadelphia, Pennsylvania, for filing with the Legislative Reapportionment Commission on December 17, 1971, Record for Appellant at 33-34. In its Appeal, the Committee noted that only minor changes had been made in the Final Plan and described the plan as "simply a jigsaw puzzle." Brief for Appellant Michael von Moschziker, supra note 129 at 8. See also Brief for Appellant Commonwealth ex rel. Arlen Specter, supra note 129 at 32-34; Brief for Appellant Robert Rovner, supra note 129 at 14-19; Brief for Appellant James H. J. Tate, supra note 129 at 11-14.

\textsuperscript{131} See, e.g., Brief for Appellant Robert Rovner, supra note 129 at 20-22; Brief for Appellant James H. J. Tate, supra note 129 at 6-10.

\textsuperscript{132} In its Statement of Exceptions to the Preliminary Plan, supra, note 130, Record for Appellant Commonwealth ex rel. Specter at 33, 35-36, affirmed in its Brief on Appeal at 6, the appellant asked why the reapportionment failed to comply with the standard of compactness:

Why was this done? ... The Legislative Reapportionment Commission has chopped up Philadelphia in order to protect the chances of incumbent State Senators and State Representatives when they seek reelection—for with few exceptions there is but a single incumbent legislator in each of these ill-shaped districts. ... The Commission has butchered Philadelphia to prepare a feast for politicians!

A chart prepared by this writer for an appeal to the United States Supreme Court, appeal docketed No. 1445, U.S. S. Ct., October Term, 1971, Appendix E to
attack was made regarding the requirement of population equality, although two appellants proposed alternative plans claiming to have lower population differentials but also providing for more compact and contiguous districts.134

One brief 133 was filed by the Attorney General in answer to all eighteen appeals.135 In the brief and at argument, the state argued that "there has been a faithful adherence to a plan of population-based representation" in following the contour of the reapportionment plan established by the Pennsylvania Supreme Court in Butcher II,136 and making only those changes mandated by shifting populations.137 Comparing the 1972 plan to the 1966 Butcher I case, counsel argued that population differences had been reduced from "almost 20%" to "4.3%" in the Senate and from "in excess of 30%" to a "mere 5.45%" in the House.138

In answer to the appellants' contentions regarding compactness and contiguity, counsel argued that the 1972 Commission plan was as compact as the 1966 court plan; that "considerations of geography and political boundaries are secondary to the prime goal of achieving equal population among districts," and that "absent any allegations of invidious discrimination, it is inconceivable that any court would strike down a state reapportionment plan which comes as close to achieving absolute equality as the Commission's final plan because the plan is not composed of 50 and 203 squares and circles."139

Procedurally, the Attorney General argued that since the Commission plan had the force of law, the Supreme Court should disregard

jurisdictional Statement at 80-84, included all incumbents, their addresses, the ward and division of their addresses, and their old and new districts. Except when an incumbent had already indicated he was going to retire, or when a district was completely eliminated, each incumbent was placed by the Reapportionment Plan in a separate district with approximately the same type of constituency as before.

133. See Brief of Appellant Commonwealth of Pennsylvania ex rel. Arlen Specter, supra note 129 at 35, 35-36 and its Record at 44, 47, 50, 56-60; Brief of Appellants Robert Revier, supra note 129 at 23-24 and Appendices C & D.

134. Special counsel for the Legislative Reapportionment Commission also filed a brief, limited to the issue of publication and the allowable period for the filing of exceptions, raised by appellant, Commonwealth of Pennsylvania ex rel. District Attorney Arlen Specter, No. 54, Pa. Sup. Ct., May Term, 1972. See discussion in note 126, supra.

135. Brief for Appellee In re: Appeals from the Final Reapportionment Plan of the Legislative Reapportionment Commission (hereinafter cited as Brief for Appellee). Counsel also briefed the issue of publication and the allowable period for the filing of exceptions. See Brief for Appellee at 15-21.


137. Brief for Appellee at 7-11.

138. Id. at 9-10.

139. Id. at 13-14.
proposed plans of appellants and that "a heavy burden is placed on any appellant" to prove the plan invalid.\textsuperscript{140}

Counsel for appellee did not discuss any of the specific objections raised in any appeal as to any geographic locality; did not attempt to explain or refute any of the population variances, other than by noting that they were less than heretofore; did not attempt to explain or refute any of the contentions as to the lack of compactness and political-subdivision integrity, other than by generally stating that the plan more closely satisfied the requirement of equality of population than heretofore; and did not mention, let alone attempt to explain or refute, any of the contentions as to political gerrymandering. Moreover, counsel sought to put the heavy burden on the appellants to invalidate the plan and asked the court to evaluate the arguments without considering alternative plans proposed by appellants.\textsuperscript{141}

On February 7, 1972, five days after oral argument, the Pennsylvania Supreme Court entered the following order affirming the final plan:

[W]e find that the Final Reapportionment Plan of the Pennsylvania State Legislative Reapportionment Commission filed on December 29, 1971, is in compliance with the mandates of the Federal and Pennsylvania Constitution and therefore shall have the force of law. Hence it is ordered that the said Plan filed on December 29, 1971, shall be used in the forthcoming Primary and General Elections of 1972 and thereafter shall remain in force and effect until constitutionally altered.\textsuperscript{142}

Four judges supported this decision. Chief Justice Jones, Justices Pomeroy, and Manderino dissented. The bases for the order were to be given in a later opinion.

After waiting three weeks for an explanatory opinion, appellant in No. 54, May Term, 1972, Commonwealth of Pennsylvania \textit{ex rel.} Arlen Specter, joined with appellants in No. 56, May Term, 1972,\textsuperscript{143} in filing a class-action complaint under the Civil Rights Act in the United States

\textsuperscript{140} Id. at 21-24. In a similar but separate argument, counsel stated that "the election process has commenced in the Commonwealth of Pennsylvania and this Court should not upset the final plan except on the strongest showing of constitutional infirmity." Id. at 24-26.

\textsuperscript{141} At the time of oral argument on February 2, 1972, the attorney general did not discuss any of the specifics raised by each of the appellants. Instead, he made very short and precise statements as to the Commission's extensive research and time-consuming efforts to prepare a plan in accordance with the Pennsylvania and Federal Constitutions.

\textsuperscript{142} 448 Pa. at 4-5.

\textsuperscript{143} Appeal of Robert Rovner, Matthew F. Coppolino, Adriano Mastrangelo, Edward Cotzen and Joseph R. Kennedy, \textit{appeal docketed} No. 56, May Term, 1972.
District Court for the Eastern District of Pennsylvania, seeking to enjoin the enforcement, operation and execution of the final reapportionment plan as it violated the due process and equal protection clauses of the fourteenth amendment of the United States Constitution. With the ninety-day appeal time running, appellant, Commonwealth of Pennsylvania ex rel. Arlen Specter, then filed, on the last day, an appeal to the United States Supreme Court from the order of the Pennsylvania Supreme Court.

On June 5, 1972, almost four months after the original order upholding the plan, the opinions were filed—Justice Roberts for the majority (Justices Roberts, O'Brien, Eagen and Nix) and separate dissents by Chief Justice Jones and Justices Pomeroy and Manderino. After reviewing Reynolds, both Butcher v. Bloom decisions and the

144. Commonwealth ex rel. Specter v. Levin, Civil Action No. 72-402. The Complaint alleged (1) that notice in Philadelphia County of the preliminary plan denied the citizens of Philadelphia County equal and adequate notice in violation of the due process and equal protection clauses of the fourteenth amendment; (2) that the Commission failed to abide by the federal and Pennsylvania constitutional requirements of compactness and contiguity; and (3) that population variations among districts were based on politically motivated gerrymandering and thus constitutionally impermissible.

Plaintiffs requested a three judge court and after arguments and briefs before the Honorable Donald W. Van Artsdalen on March 2, 1972, Judge Van Artsdalen requested on March 3, 1972, that the Chief Judge of the Third Circuit convene a three judge court. On March 10, 1972, the Honorable Collins J. Seitz, Chief Judge, entered an order designating the Honorable Ruggero J. Aldisert, Circuit Judge, and Clifford Scott Green and Donald W. Van Artsdalen, District Judges, to hear and determine all issues.

After Plaintiff, Commonwealth of Pennsylvania ex rel. Specter, filed his Appeal from the Pennsylvania Supreme Court to the United States Supreme Court on May 5, 1972, the three-judge court filed a Memorandum and Order on June 23, 1972, holding the civil rights complaint in abeyance until final disposition by the United States Supreme Court. After the United States Supreme Court dismissed the appeal "for want of a substantial federal question" on October 10, 1972, and after further argument, the three-judge court granted on May 8, 1973, a Motion to Dismiss the Complaint on res judicata grounds. 359 F. Supp. 12.

145. Commonwealth of Pennsylvania ex rel. Specter v. Tucker, October Term 1971, No. 1445 (Filed May 5, 1972). In his Jurisdictional Statement, appellant listed the questions presented as follows:

I. Did the publication of the preliminary reapportionment plan in Philadelphia County just four days prior to the cessation of the period to file exceptions to the plan violate the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution as it gave the citizens of Philadelphia County an inadequate and unequal period to evaluate, analyze and prepare criticisms of the plan?

II. Does the revised or final reapportionment plan filed on December 29, 1971 by the Pennsylvania State Legislative Reapportionment Commission violate the equal protection clause of the United States Constitution in that it establishes districts on the basis of impermissible political considerations and not composed of compact and contiguous territory?

III. Does the revised or final reapportionment plan filed on December 29, 1971, by the Pennsylvania State Legislative Reapportionment Commission violate the equal protection clause of the Fourteenth Amendment of the United States Constitution in that the Commission did not make a good faith effort to create districts of equal population "as nearly as practicable?"

146. 448 Pa. 1, 233 A.2d 15. In addition to writing his own opinion, Chief Justice Jones joined in the dissenting opinion of Justice Pomeroy.
state constitutional provisions in article II, § 16. Justice Roberts then
turned to “an examination of the plan filed by the Reapportionment
Commission.”

The court first found that the Plan satisfied the overriding require-
ment of “substantial equality of population,” by providing for a
maximum deviation of 4.31 percent in the Senate and 5.46 percent in
the House.

No decision of the United States Supreme Court or of
this Court has ever invalidated a reapportionment plan with
population deviations as minimal as those occasioned by the
Commission’s plan, and we believe that the deviations clearly
do not dilute the equal-population principle “in any significant
way.” We conclude therefore that the Commission’s plan
fully achieves the constitutionally-mandated overriding objec-
tive of substantial equality of population.

The court then concluded that the increase in political-subdivision
splits was “obviously necessitated by the stricter requirements of popu-
lation equality that are now in order.”

We also conclude that the Commission’s final plan has
properly maintained the integrity of political subdivisions to
the extent that it is possible without defeating the overriding
principle of substantial equality of population.

The court finally concluded that “there is a certain degree of un-
avoidable noncompactness in any apportionment scheme.” As none
of the appellants offered “any concrete or objective data indicating that
the districts . . . lack compactness” and as an evaluation “cannot
be made merely by a glance at an electoral map,” the appellants
failed to satisfy their burden of proving that the plan’s non-compactness
was contrary to law.

In light of appellants’ failure to produce any objective
date [sic] indicating that the districts established by the Com-
mission’s plan lack compactness, we cannot conclude, merely
on the basis of appellants’ unsupported assertions, that the

147. Id. at 7-13, 293 A.2d at 18-21.
148. Id. at 13, 293 A.2d at 21.
149. Id. at 16, 293 A.2d at 22. See also id. at 17, 293 A.2d at 33. “under any
scheme of reapportionment that aims at substantial equality of population . . .
150. Id. at 16, 293 A.2d at 22.
151. Id. at 16, 293 A.2d at 22.
152. Id. at 18, 293 A.2d at 23.
153. Id. at 19, 293 A.2d at 24.
154. Id. at 18, 293 A.2d at 23.
155. Id. at 19, 293 A.2d at 24.
Commission's plan fails for lack of compactness. This Court will not adopt the illusory and undiscerning approach of rejecting a plan merely because the geographic shapes of a few districts are not aesthetically pleasing.\(^{156}\)

Thus, the majority accepted the method and arguments of appellant's counsel. The court did not discuss any of the specific objections raised in any appeal as to any geographic locality;\(^ {157}\) did not attempt to question, explain or refute any of the population variances, other than by noting that they were less than heretofore; did not question, explain or refute any of the contentions as to lack of compactness and political-subdivision integrity other than by generally stating that they were "unavoidable" to preserve equality of population; and did not mention, let alone attempt to question, explain or refute any of the contentions as to political gerrymandering. In addition, the court put the burden on appellants to give objective data as to non-compactness and refused to consider alternative plans or even "glances" at the electoral map.

The dissenters sharply contested the majority method and conclusions. As to equality of population, all three dissenters rejected the majority's "good enough" approach. Justice Pomeroy, joined by Chief Justice Jones, challenged the court's standard of "substantial equality of population" by stressing that the United States Supreme Court in Kirkpatrick had expressly rejected any de minimis exception but rather had stressed that "the State must justify each variance, no matter how small."\(^ {158}\)

It may be that satisfactory explanation for and justification of the comparatively minor population deviations which are contained in the present plan can be made. Unfortunately, however, this can be done only by the Reapportionment Commission which struggled with the problem. . . . [T]he

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156. Id. at 19, 293 A.2d at 24.
157. Justice Pomeroy in his dissent noted that:
   "The majority opinion, it will be noted, speaks only in general terms, making no attempt to address itself to the particular exceptions and arguments of the various appellants. Similarly, in the single brief filed by the Commonwealth covering the 18 appeals now before us, no attempt is made to treat all the individual and different fact situations which they involve, or to respond to the detailed arguments of the several appellants. The Commission itself has filed no brief on the merits of the appeals. In this context I see nothing to be gained in this dissenting opinion by considering individually the contentions made by each appellant."

Id. at 27 n.7, 293 A.2d at 28 n.7.

158. Id. at 25, 293 A.2d at 27 (quoting from Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)). Justice Pomeroy did note that Kirkpatrick dealt with congressional districting but stressed that "there is no indication that the de minimis standard would be acceptable in [districting for state offices]." Id. at 25, 293 A.2d at 27.
Commission did not see fit to explain or justify its report in any way, or to indicate on what grounds it dismissed the exceptions which form the bases for those appeals. We therefore have before us only the plan itself, which constitutes the entire record in this case. I cannot agree that this "res ipsa loquitur" approach passes constitutional muster today.¹⁵⁹

Similarly, Justice Manderino rejected any "substantial equality standard," stating:

The Fourteenth Amendment does not speak of substantial equal protection of the laws. It speaks of equal protection of the laws. When absolute equality is not achieved, the government must show that the lack of equality was either unavoidable or that the lack of equality of treatment of a citizen resulted from a rational plan or scheme devised to achieve legitimate state objectives.¹⁶¹

Justice Manderino noted that there was no showing by the Commission that the population deviations were unavoidable or justifiable.¹⁶²

A mere statement, however, that population variances in the legislative districts resulted from the pursuit of legitimate state constitutional objectives does not make it so unless this Court is presented with a rational state plan whose implementation resulted in population variations. . . . We have been presented with no such plan and are completely in the dark as to whether the discriminations that occurred in population variations resulted from the implementation of a rational state plan or were crazy-quilt.¹⁶³

As to the question of the maintenance of the integrity of political subdivisions, all three dissenters rejected the majority's "must have been necessary" approach. Chief Justice Jones stressed that the Commission "utterly fails to demonstrate any necessity in any manner in justification of the many divisions of political entities embodied in the plan."¹⁶⁴

Time after time, instance after instance, the . . . Commission has not only divided counties, boroughs and other municipalities but in some instances divided precincts in the same ward so that persons living in the same precinct on opposite

¹⁵⁹. Id. at 25-26, 293 A.2d at 27.
¹⁶⁰. Id. at 28, 293 A.2d at 28-29.
¹⁶¹. Id. at 29, 293 A.2d at 29.
¹⁶². Id. at 30, 33, 35, 293 A.2d at 29, 31, 32.
¹⁶³. Id. at 34, 293 A.2d at 31.
¹⁶⁴. Id. at 22, 293 A.2d at 25-26.
sides of a street would vote for representatives in different legislative and senatorial districts.\textsuperscript{165}

Similarly, Justice Pomeroy stated that the majority’s “bootstrap” argument\textsuperscript{166} that the increased number of political-subdivision splits was “necessitated by stricter requirements of population equality . . .” is at most a “good guess” and “by no means obvious.”\textsuperscript{167}

In the face of constitutional language which prohibits divisions unless “absolutely necessary”, there surely must be some showing of necessity, some demonstration that “the population principle cannot otherwise be satisfied.” The Commission has vouchsafed nothing, and the Court is reduced to trying to read its mind. It may be acknowledged that some dividing of counties, municipalities and wards and some surrender of compactness is unavoidable, but there is no presumption that each split that was made or each misshapen district that was created falls into this category.\textsuperscript{168}

Finally, Justice Manderino also stressed that the reapportionment plan violated the integrity of political subdivisions.\textsuperscript{169}

We have no way of knowing whether the lack of compactness in the districts or the violation of the integrity of the political subdivisions resulted because of the application of a rational state plan. The Commission has presented its conclusion that the lack of compactness and the split of political subdivisions was necessary. Why? We are not told. We have no way of knowing whether the defects resulted from arbitrary picking and choosing in various parts of the Commonwealth. A plan is not constitutionally validated by merely stating the objectives.\textsuperscript{170}

Lastly, as to the question of compactness, all three dissenters rejected the majority’s “non-aesthetic” approach. Chief Justice Jones stressed that “even the most cursory examination of the reapportionment plan in the districts . . . reveals a complete failure . . . to comply with the requirement of compactness.”\textsuperscript{171}

There is an old Chinese proverb that says: “One picture is worth more than 10,000 words.” The reapportionment

\textsuperscript{165} Id. at 22-23, 293 A.2d at 26.
\textsuperscript{166} Id. at 28, 293 A.2d at 28.
\textsuperscript{167} Id. at 27, 293 A.2d at 28.
\textsuperscript{168} Id. at 27-28, 293 A.2d at 28.
\textsuperscript{169} Id. at 36, 293 A.2d at 32.
\textsuperscript{170} Id. at 36-37, 293 A.2d at 32-33.
\textsuperscript{171} Id. at 21, 293 A.2d at 25.
plan clearly presents a picture more eloquent than words of a complete disregard by the Commission of the constitutional mandate that the districts be compact in nature. In many instances the districts involved in these appeals "twist and wind their way across the map in an erratic, amorphous fashion in order to include scattered pockets of partisan support or exclude centers of opposition voting strength." 172

Similarly, both Justices Pomeroy 173 and Manderino 174 stressed that the appellants gave no reason for the plan's lack of compactness. Justice Pomeroy noted that compactness had "gone with the wind." 175 Justice Manderino stated:

The Pennsylvania Constitution also states as legitimate objectives the compactness and contiguity of territory. . . . A look at the Pennsylvania map with the population of each political subdivision superimposed will readily show that many districts are not compact although they are all contiguous. 176

In summary, the dissenters rejected the "res ipsa loquitur" approach of appellees. In several instances, they referred to specific objections in particular localities 177 and looked at maps to make their evaluations. 178 They questioned the population variances, the lack of compactness, and the lack of political-subdivision integrity. In addition, they placed the burden on appellee to justify its actions 179 and noted

172. Id. at 21-22, 293 A.2d at 25.
173. Justice Pomeroy stated:

It may be acknowledged that . . . some surrender of compactness is unavoidable, but there is no presumption that . . . each misshapen district that was created falls into this category.

Id. at 27-28, 293 A.2d at 28.
174. Justice Manderino stated:

We have no way of knowing whether the lack of compactness . . . resulted because of the application of a rational state plan.

Id. at 36-37, 293 A.2d at 32-33.
175. Id. at 24, 293 A.2d at 26.
176. Id. at 36, 293 A.2d at 32.
177. See id. at 21, 22, 293 A.2d at 25 (Chief Justice Jones); id. at 24 n.3, 293 A.2d at 25 n.3 (Justice Pomeroy).
178. See id. at 21-22, 293 A.2d at 25 (Chief Justice Jones); id. at 36, 293 A.2d at 32 (Justice Manderino).
179. As Justice Manderino stated:

The majority erroneously place certain burdens upon the objectors to the submitted reapportionment plan. Once the citizen has established his denial of the equal protection of the law by showing variations in the population districts which dilute his vote, it is incumbent upon the state to establish why this prima facie denial of the equal protection in population occurred . . . . The citizen does not have the tools to determine whether the variations were unavoidable or justified because of the implementation of a rational plan to achieve legitimate state objectives. How can the citizen properly assess whether variations were unavoidable or justified . . . .

Id. at 37, 293 A.2d at 33.
that the failure to so justify its plan and to follow the three-part requirements of the Pennsylvania Constitution could be the result of partisan gerrymandering.189

**Reapportionment in the 1970's — The New Constitutional Standards**

The majority and each of the dissenters in the Pennsylvania Supreme Court assumed that *Kirkpatrick v. Preisler*, while dealing with congressional reapportionment, established the standards for state reapportionment.181 As *Kirkpatrick* seemed to establish an absolute one-man, one-vote standard, unless substantial justification was shown,182 appellants sought to use the seemingly apparent defects of affirmation of population deviations without any stated reasons in the *Specter v. Levin* opinion to require a reversal by the United States Supreme Court.183 The state argued, in its motion to dismiss,184 that political gerrymandering was non-justifiable;185 that "rigid mathematical criterion are not the touchstone" and that the population deviations in its plans did not significantly violate one-man, one-vote requirements,186 and that the test was "substantial equality."187 Compactness and political-subdivision integrity alone were, it was argued, not justiciable as federal questions.188

Appellant argued, in its brief in opposition to motion to dismiss,189 as did the dissenters in the Pennsylvania Supreme Court, that there was no de minimus exception and that equality of population did not

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180. Chief Justice Jones noted that the division of political entities is a classic example of the *Reynolds* warning against "an open invitation to partisan gerrymandering." *Id.* at 22 n.3, 293 A.2d at 25-26 n.3 (quoting from *Reynolds v. Sims*, 377 U.S. 533 (1964)). He concluded that the reapportionment plan in fact amounts to "constitutionally offensive political and partisan gerrymandering." *Id.* at 23, 293 A.2d at 26.

181. See 448 Pa. at 10-12, 293 A.2d 19-21 (majority); *id.* at 25, 293 A.2d at 27 (Justice Pomeroy joined by Chief Justice Jones); *id.* at 28-29, 293 A.2d at 28-29 (Justice Manderino).

182. See note 14 and text at notes 74-76.

183. Commonwealth of Pennsylvania *ex rel.* Specter v. Tucker, October Term, 1971, No. 1445, (filed May 5, 1972) Brief [of Appellant Arlen Specter] in Opposition to Motion to Dismiss or Affirm. (Hereinafter cited as Appellant's Motion Brief) The Brief was filed after the Opinions of Supreme Court of Pennsylvania had been printed and filed by appellant as a Supplemental Appendix.


185. Appellee's Motion at 12-14.

186. Appellee's Motion at 14.

187. Appellee's Motion at 15.

188. Appellee's Motion at 10-11.

189. See note 191 supra.
mean substantial equality of population. Moreover, non-compactness and political-subdivision non-integrity were federal questions as they were the next step necessary to prevent gerrymandering. Finally, even assuming that these might not be federal questions, they indicated that "impermissible considerations," caused inequality, and that the failure to furnish acceptable reasons for population variations was in violation of the mandate of absolute equality.

On October 10, 1972, the United States Supreme Court, without oral argument or opinion, dismissed the appeal "for want of a substantial federal question." The bases for that dismissal were given in a series of decisions, in other cases, three and seven months later.

In *Mahan v. Howell*, the Supreme Court reviewed a district-court invalidation of a 1971 redistricting plan for the Virginia Legislature. As the plan provided for maximum population deviations of 16.7 percent, the district court held that under *Kirkpatrick*, it did not satisfy the present requirement of absolute equality. Justice Rehnquist, writing for the five justice majority, held that the *Kirkpatrick* "congressional standard" of absolute equality did not apply to the states. The lower court had found that the population variances were traceable to the desire to "maintain the integrity of traditional county and city boundaries" but had rejected the variances as too far from absolute equality.

The Supreme Court stressed that "more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting." Where, as here, the state presents an acceptable and legitimate reason for the deviations based on a

190. Appellant's Motion Brief at 5, 7.
191. Appellant's Motion Brief at 8-10.
192. Appellant's Motion Brief at 10-12.
194. 410 U.S. 315.
195. 93 S. Ct. 2321; 93 S. Ct. 2332; 93 S. Ct. 2348.
198. Only Justices Douglas, Marshall and Brennan dissented. Justice Powell, of Virginia, took no part in the consideration or decision of the case.
199. 410 U.S. at 324:
200. *Id.* at 319-20.
201. *Id.* at 321.
rational policy of avoiding the fragmentation of political subdivisions, the population deviations of 16.7 percent, which "may well approach tolerable limits," satisfies the equal protection clause.

Justice Brennan in his dissenting opinion for the three-justice minority, stated that the majority disregarded stare decisis and adopted different state legislative and congressional standards. The common standards had been two-fold:

(1) The paramount goal of reapportionment must be the drawing of district lines so as to achieve 

(2) Variations in weight accorded each vote can be approved only when the state meets its burden of presenting cogent reasons in explanation of the variations, and even then only where the variations are small.

The dissent found that the deviations in population were "substantial" and that on careful review of specific geographic areas, the variations were discriminatory and not justified by the mere unreasonably.

202. Id. at 325. The Supreme Court rejected the argument that since the state was not adhering to this policy in congressional and state senate redistricting, the reasons were not legitimate and based on a rational policy. Id. at 327-28.

203. Id. at 329. The Court upheld the lower court invalidation of three-single member senatorial districts in an area, which combined the City of Virginia Beach to the City of Norfolk but moved all naval personnel in Norfolk to a different district. This was discriminating treatment of military personnel and the lower court was correct in finding it constitutionally impermissible and in creating one temporary multi-member district. Id. at 331-32.

204. The opinion actually concurred in part and dissented in part. All Justices joined in upholding the lower court redistricting of the Norfolk-Virginia Beach area. The three Justices dissented from setting aside the District Court's finding that the apportionment of the State House of Delegates violated the Equal Protection Clause of the Fourteenth Amendment." Id. at 333-34.

205. Id. at 340:

Prior to today's decision we have never held that different constitutional standards are applicable to the two situations.

Previous decisions had made clear that certain state interests such as the preservation of political subdivisions could have no relevance to congressional districting which could justify small population deviations in state legislative districts. Id. at 341. However, the principles of Kirkpatrick v. Preisler, 394 U.S. 526 (1969), were founded on certain state legislative districting cases. Swann v. Adams, 385 U.S. 440 (1967), quoted as the definition of the standard for "as nearly as practicable" in Kirkpatrick, provided no de minimis exception and required the state to bear the burden to justify any deviations by acceptable reasons. Id. at 341-42.

206. Id. at 339 (emphasis added).

207. Id. at 340.

208. Id. at 343-40: "The Commonwealth of Virginia failed . . . to justify substantial variations . . . ."

209. The dissenters noted that the Northern Virginia suburbs of Washington, D.C., were perversely underrepresented. Id. at 344. In addition, while the reasons for the variances were supposedly the maintenance of political subdivision integrity, the lower court found that the fourth legislative district submerged smaller counties under the voting power of Wythe County. Id. at 348-49.
ported statement that they were to protect the integrity of county lines. 210

Despite this implicit overruling of previous decisions, it could still be argued that the one-man, one-vote principle remained intact. States would be given an opportunity to incorporate rational state policies into reapportionment plans, but any population variance would still be sufficient to oust a plan, unless and until the state met its burden of justifying such divergences as being required by acceptable considerations, such as political-subdivision integrity. 211 Four months later, the United States Supreme Court indicated that it meant to go even further in limiting challenges to state reapportionment plans.

On June 18, 1973, the five-justice Mahan majority, now joined by Justice Powell, declared its intention to remove itself from the “political thicket” of reapportionment 212 by allowing a high threshold at which population disparities between state legislative districts require any justification. 213

In Gaffney v. Cummings 214 the Court reversed a district-court invalidation of a Connecticut state legislative reapportionment plan with a maximum deviation of 1.81 percent in the House and 7.83 percent in the Senate. In White v. Regester, 215 the Court reversed a district-court invalidation of a Texas reapportionment plan for the State House of Representatives with a maximum deviation of 9.9 percent.

210. Id. at 350:

On this record—without any showing of the specific need for county representation or a showing of how such representation can be meaningfully provided to small counties whose votes would be submerged in a multi-county district—I see no basis whatsoever for upholding the Assembly’s 1971 plan and the resulting substantial variations in district population.

211. See Gaffney v. Cummings, 93 S. Ct. 2321, 2345, n.5 (1973) (dissenting opinion). At the time of oral argument before a three judge federal court in Commonwealth ex rel. Specter v. Tucker, Civil Action No. 72-402, this writer made this argument. Circuit Judge Ruggiero J. Aldisert wisely predicted that Mahan really stood for wider divergences of population being acceptable, perhaps automatically, for any state legislative reapportionment plan.

212. 93 S. Ct. 2321, 2330:

That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should have become bogged down in a vast intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.

213. 93 S. Ct. 2332, 2338:

[We] do not consider relatively minor population deviations [of almost 10 per cent] among state legislative districts to substantially dilute the weight of individual votes in the larger districts of fair and effective representation.


215. 93 S. Ct. 2332 (1973). The Supreme Court upheld the invalidation of multimember districts in Dallas and Bexar Counties because it discriminated against the black and Mexican-American communities.
The standard for state legislative plans, unlike congressional ones, is “substantional equality of population.” Moreover, the tests and burdens to be applied depend on the nature of the population divergences. The Court delineated three standards. First, “[t]he larger variations from substantial equality are too great to be justified by any state interest so far suggested.” As indicated in *Mahan v. Howell*, a “16-odd percent maximum deviation . . . may well approach tolerable limits.” Thus, deviations of twenty percent or more would be per se unconstitutional, whether justifiable or not. Secondly, “[p]opulation deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable.” Differences larger than 9.0 percent “would not be tolerable without justification.” Thus deviations of ten to twenty percent would be permissible if acceptable reasons for the divergences would be supplied by the state. Finally, “it is now time to recognize that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination . . . so as to require justification by the state.” Thus for deviations of less than ten percent, the state need not give acceptable or any reasons for the variations and the burden would be on the opponents of a plan to show invidious discrimination other than by population differences.

In addition, the Supreme Court rejected any “next step” in re-apportionment standards. Compactness and contiguity are not to be considered “independent Federal constitutional requirements for state legislative districts.” Moreover, partisan considerations which

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216. 93 S. Ct. at 2326; 93 S. Ct. at 2338.
217. 93 S. Ct. at 2327.
218. 410 U.S. at 329.
219. 93 S. Ct. at 2327.
220. 93 S. Ct. at 2338. See dissenting opinions, 93 S. Ct. 2345.
221. 93 S. Ct. at 2327.
222. 93 S. Ct. at 2338. See dissenting opinions, 93 S. Ct. at 2344.
223. 93 S. Ct. at 2330:

State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting state otherwise acceptable may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. . . . A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed “to minimize or cancel out the voting strength of racial or political elements of the voting population.”

One such example was in the companion case of *White v. Regester.*
224. 93 S. Ct. at 2331 n.18. In a congressional reapportionment case decided the same day, the Court, while maintaining a requirement of “absolute equality,” rejected the District Court’s adoption of Alternate Plan C which the lower court found “significantly more compact and contiguous” and adopted Plan B which protected incumbent congressmen. *White v. Weiser,* 93 S. Ct. 2348, 2352, 2355 (1973).
“some may call gerrymandering” are not sufficient bases to invalidate reapportionment plans.225

The dissenters, as they had done earlier in Mahan, considered the majority’s decisions as “a substantial and very unfortunate return from the principles established in our earlier cases. . . .” 226 After reviewing previous decisions, the dissenting opinion by Justice Brennan stressed that the Kirkpatrick standard of absolute equality, with no de-minimis exceptions, unless satisfactorily justified, had been used interchangeably in recent state legislative and congressional redistricting cases.227 These three justices noted that the dramatic improvement in equality of population after Kirkpatrick will be jeopardized by the majority’s establishment of a wide toleration of error.228

Reapportionment in the 1970’s—An Analysis

Reflection on the recent United States Supreme Court decisions indicate that reapportionment litigation, like reapportionment plans, are subject to political realities. The Baker and Reynolds decisions took a courageous step into the “political thicket” by making redistricting subject to constitutional scrutiny. Realizing that it would be difficult for complainants to shoulder the burden of showing discrimination in reapportionment, the Court came closer and closer to a requirement of absolute equality and finally adopted such a standard in Kirkpatrick. Any deviation from the precise one-man, one-vote requirement would have to be justified.

With the 1970 census, complainants and commentators sought to enforce that standard. In addition, they sought to force the Court to take the next step—enforce the equal protection clause by prohibiting partisan gerrymandering, either directly, or indirectly through enforcement of the secondary goals noted in Reynolds of compactness, contiguity and political-subdivision integrity. However, the Court that reviewed the post-1970 census reapportionment plans was a different Court than that which had established the original standards. An analysis of the Gaffney and White decisions clearly indicates that the

225. 93 S. Ct. at 2332. The Reapportionment Board of Connecticut “overtly adopted and followed a policy to structure districts to reflect the existing political plurality of votes.” Id. at 2333-34. The complainants considered this a political gerrymander to protect a built in bias in favor of the Republican party. The lower court considered such a policy as an insufficient basis for violating absolute numerical equality. See text and discussion in note 100 supra.
226. 93 S. Ct. at 2343.
227. Id. at 2345. See, e.g., 403 U.S. 108 discussed supra in text at notes 79-82.
228. 93 S. Ct. at 2346-47.
majority was composed of the four new Justices and of two pre-1970 Justices who had dissented in *Kirkpatrick*. Reynolds and *Kirkpatrick* had been limited not only by allowing tolerable levels, up to 10 percent, of population divergences without justification, but also by permitting partisan concerns to be legitimately considered by redistricters.

With the effective removal of the federal courts from the thicket, it might be expected that state courts would be more willing to enforce strict standards under their own constitutions. As discussed earlier, most states had constitutional requirements of equality of population, compactness and contiguity, and political-subdivision integrity. Courts had already recognized that the latter standards were to prevent partisan gerrymandering. However, as reflected by the Pennsylvania Supreme Court in *Spector v. Levin*, these courts are all too willing to accept, almost automatically, the plans submitted to them. Equality of population would be judged in relative terms and partisanship in redistricting would not be considered. Compactness, contiguity, and political-subdivision integrity would remain as ideals but would also remain unenforced.

229. Chief Justice Burger, Justices Blackmun, Powell and Rehnquist. Mr. Justice Powell with whom Chief Justice Burger and Justice Rehnquist joined, indicated that they would have objected to the *Kirkpatrick* standards had they been on the Court. See 93 S. Ct. at 2356:

Had I been a member of the Court when *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) . . . [was] decided, I would not have thought that the Constitution—a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions—could be read to require a rule of mathematical exactitude in legislative reapportionment. . . . [T]he exactitude required by the majority displayed a serious misunderstanding of the practicalities of the legislative and reapportioning process. Indeed, the Court's recent opinions . . . strengthen the case against attempting to hold any reapportionment scheme—State or congressional—to slide-rule precision. These more recent cases have allowed modest variations from theoretical "exactitude" in recognition of the impracticability of applying the *Kirkpatrick* rule as well as in deference to legitimate state interests.

However all of this may be, *Kirkpatrick* is virtually indistinguishable from this case and unless and until the Court decides to reconsider that decision, I will follow it. Accordingly, I join the Court's opinion.

230. Justice Stewart joined in the dissenting opinion of Justice Harlan in *Kirkpatrick*. Earlier, he had concurred in *Reynolds*, basing his rejection of the Alabama plan on its "lack of rationality."

Justice White, the author of the 1973 decisions, dissented in *Kirkpatrick* as it created a standard that was "unduly rigid and unwarranted." Justice White had joined in the *Reynolds* decision in 1964. In *Swann v. Adams*, 385 U.S. 440, 443-44 (1967), he had stated that *Reynolds* required even minor deviations to be justified. Then again, after *Kirkpatrick*, he wrote that an Arizona State Reapportionment Plan had been properly held "invalid under *Kirkpatrick v. Preisler* . . ." 403 U.S. 108, 111.

231. See text at notes 48 to 63.