Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence

For more than a century the right to cast a vote has been protected against invidious discrimination.¹ In 1962 the Supreme Court considered for the first time the quality of that vote² and two years later proclaimed a goal of "fair and effective representation of all citizens."³ The Court has articulated the first prerequisite of fair and effective representation: "one man's vote . . . is to be worth as much as another's."⁴ Recently the Court recognized that even where votes are equally weighted, political gerrymandering⁵ denies fair and effective representation if it is designed to minimize or cancel out the voting strength of identifiable racial or political groups.⁶ It is not clear, however, whether the Court

¹ U.S. CONST. amend. XV. See also, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

² *Baker v. Carr*, 369 U.S. 186 (1962).

³ *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

⁴ *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). The Court has made clear the absolute nature of that requirement as applied to congressional districts. *White v. Weiser*, 412 U.S. 783 (1973); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).

⁵ Gerrymandering has been defined as "discriminatory districting which operates to inflate unduly the political strength of one group and deflate that of another." Dixon, *The Warren Court Crusade for the Holy Grail of "One Man—One Vote,"* 1969 SUP. CT. REV. 219, 255. Racial and ethnic gerrymandering are subcategories of political gerrymandering; their ultimate purpose is always political. See *Gomillion v. Lightfoot*, 270 F.2d 594, 612 (5th Cir. 1959) (Wisdom, J., concurring), *rev'd*, 364 U.S. 339 (1960).

⁶ See *White v. Regester*, 412 U.S. 755, 765 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971); *Abate v. Mundt*, 403 U.S. 182, 184 n.2 (1971); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). At best, "one person, one vote" has merely given equal numbers of people access to a representative. Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 22; Irwin, *Representation and Election: The Reapportionment Cases in Retrospect*, 67 MICH. L. REV. 729, 747 (1969); see Opinion to the Governor, 101 R.I. 203, 208, 221 A.2d 799, 802 (1966). At worst, it has increased use of gerrymandering. *Wells v. Rockefeller*, 394 U.S. 542, 555 (1969) (White, J., dissenting); Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970s, at 135, 140 (N. Polsby ed. 1971); Dixon, *Computers and Redistricting: A Plea for Realism*, 2 RUTGERS J. COMPUTERS & LAW 15, 16 (1971); Edwards, *The Gerrymander and "One Man, One Vote,"* 46 N.Y.U.L. REV. 879, 880 (1971); Elliott, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474, 482-83 (1970); Comment, *Apportionment and the Courts—A Synopsis and Prognosis: Herein of Gerrymanders and Other Dragons*, 59 NW. U.L. REV. 500, 518-19 (1964) [hereinafter cited as *Apportionment and the Courts*]. In *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964), the Court, in discussing state legislative reapportionment, conceded that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary

will disapprove for gerrymandering when the voting strength of a readily identifiable political group is not substantially reduced.⁷

This comment will attempt to define the concept of fair and effective representation and show that gerrymandering results in denial of such representation. The comment suggests that, even under a broad judicial examination of redistricting, practical problems of proof and the need for appropriate deference to legislative judgments make the courts an ineffective forum for preventing the harms resulting from many types of gerrymandering. Congress, however, can create a standard for minimizing gerrymandering of congressional districts.⁸ A mathematically defined standard of compactness would provide an effective and easily understandable criterion to guide apportionment decisions and judicial review of those decisions.

I. THE IDEAL OF FAIR AND EFFECTIVE REPRESENTATION

A. The Concept of Individual Interests

Although the Supreme Court has indicated that fair and effective representation is the goal of its redistricting decisions,⁹ it has rarely analyzed that concept.¹⁰ An individual's right to representation is fun-

lines may be little more than an open invitation to partisan gerrymandering," but nevertheless maintained "[w]hatever the means of accomplishment, the overriding objective must be substantial equality of population."

Before 1973, many lower federal courts had held gerrymandering of single-member districts nonjusticiable. *E.g.*, *Cousins v. City Council of Chicago*, 322 F. Supp. 428, 434 (N.D. Ill.), *rev'd*, 466 F.2d 830 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972); *Sincock v. Gately*, 262 F. Supp. 739, 833 (D. Del. 1967); *Bush v. Martin*, 251 F. Supp. 484, 513 (S.D. Tex. 1966). In *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), however, the Court made it clear that the issue "is not wholly exempt from judicial scrutiny under the Fourteenth Amendment."

⁷ Compare *Gaffney v. Cummings*, 412 U.S. 735 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), with *White v. Regester*, 412 U.S. 755 (1973).

⁸ This comment is limited to the problem of gerrymandering of congressional districts. State legislative apportionment involves different considerations and may require a different solution to gerrymandering. For example, state legislative districts are more numerous and substantially smaller in area than congressional districts, thereby increasing the importance of geographic factors and political subdivision lines. See *Mahan v. Howell*, 410 U.S. 315 (1973); *Abate v. Mundt*, 403 U.S. 182 (1971). Because there are more state representatives per population unit, proportional representation might be more effective in giving representation to small interest groups. The argument for trying to represent local interests in state legislative districts is thus stronger because national issues are less likely to dominate state elections. Finally, unlike congressional redistricting, state legislative district lines are drawn by those who will run from those districts, thereby increasing the incentives to gerrymander.

⁹ *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).

¹⁰ See Casper, *supra* note 6, at 2. Professor Casper notes that the Court is moving in the direction of "viewing representation as a concept which needs further clarification." *Id.* at 32.

damentally a right to have his interests and views represented.¹¹ The Court, by recognizing only the interests advocated by well-defined groups, has in effect dealt with only the broadest parameters of viewpoints—for example, “black interests” deemed to be possessed by Black people¹² or “Republican views” deemed to be held by people who have usually voted for Republican candidates.¹³ The concept of fixed groups committed to broad, ideological interests, however, is not consistent with present realities or the historic ideals of the American political system.

American political life traditionally has been viewed as nonideological. Broad questions concerning the structure of government and society have occasionally been the focus of political concern, but in general there has been a fundamental consensus on such matters. The primary focus of political concerns has been on specific issues of day-to-day policy that affect the interests of nonideological factions.¹⁴ Representation of these individual concerns has been the ideal of American representative democracy.¹⁵ To represent fully the concerns of his constituency, a representative must not be merely an agent whose opinions match those of some ideological majority in his district, he must be attuned to a diversity of interests.¹⁶ An individual wishing to advocate his views will usually join with others of similar interests. Indeed, a view must be shared by a number of people before it carries weight in any democratic community. The ideal, however, envisions a great number of potentially influential groups and freedom of move-

¹¹ See generally H. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); Pennock *Political Representation: An Overview*, in *REPRESENTATION* (J. Pennock & J. Chapman eds. 1968).

¹² See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

¹³ See *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Williams v. Rhodes*, 393 U.S. 23 (1968).

¹⁴ See D. BOORSTIN, *THE GENIUS OF AMERICAN POLITICS* 1-7 (1953); L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* 3-32 (1955); BANFIELD, *In Defense of the American Party System*, in *POLITICAL PARTIES*, U.S.A. 21-39 (R. Goldwin ed. 1964). Alexis deTocqueville, perhaps the shrewdest observer of American politics, noted that “In the absence of great parties, the United States swarm with lesser controversies; and public opinion is divided into a thousand minute shades of difference upon questions of detail.” A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 89 (R. Heffner ed. 1956).

¹⁵ See A. DETOCQUEVILLE, *supra* note 14, at 89-90.

¹⁶ The nature of the issues that animate American politics also affects the representative's role in the parliamentary process. Parliamentary interaction among representatives does not consist of pitched battles along sharply drawn ideological lines. Coalition building—realignment of political configurations in an almost constant state of mutation—is the essence of the process. A representative heavily committed to an ideological position arising from a politically homogeneous constituency has little incentive to engage in the political trade offs necessary to the coalition-building process, and a parliamentary body in which many members represent homogeneous constituencies dominated by ideological interests would be incapable of sustaining a flexible coalition-building process.

ment among them, thereby allowing an individual to obtain representation of his own diversity of views. Although the individual is likely to be committed to a group whose views he does not completely share, a wide variety of influential groups and continual restructuring of groups and coalitions allows the individual to ally himself with whatever group represents the views he regards as most important at any given time. At times relatively stable groups will form that represent a significant percentage of the relevant electorate. Racial and ethnic minorities, for example, have often formed such groups.¹⁷ These views must be represented, but where such a group has a controlling voice in elections for an extended period of time, either alone or in combination with a small number of other stable groups, a representative supported by the controlling group is able to maintain his position without ever considering the interests of those in the community who do not share the controlling group's views.¹⁸

B. Designing Congressional Districts to Serve the Ideal

1. *Politically Competitive Districts.* In order to achieve this ideal of effective representation, legislatures should be apportioned so as to minimize the extent to which any representative is able to rely solely on a single interest group for his support. A competitive election in a district with diverse interests requires candidates to try to build successful electoral coalitions by granting concessions to potentially hostile groups.¹⁹ The creation of a coalition thus provides access to power for those groups incapable of electing a representative committed solely to their viewpoints.²⁰ The advantages of the politically competitive district are brought into sharper focus by an examination of the major alternative, proportional representation.

2. *Proportional Representation Districts.* Many have argued that effective representation is better achieved by proportional representation in either single- or multi-member districts, than by politically

¹⁷ See E. BANFIELD & J. WILSON, CITY POLITICS 89-94, 134-37 (1963).

¹⁸ The greatest denial of fair representation, therefore, occurs when 51 percent of the relevant voting population belongs to a stable interest group and the remaining 49 percent are of diverse interests. If the 49 percent represent a competing group, they might be able to threaten the dominant group. Where there is a diversity of interests among those not part of the controlling group, however, they are not needed in an electoral coalition nor can they pose a substantial threat to the dominant group.

¹⁹ V.O. KEY, POLITICS, PARTIES AND PRESSURE GROUPS 568 (1946); Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 55. It has been noted that such a process exerts a moderating influence on the representative. A. MILNOR, ELECTIONS AND POLITICAL STABILITY 34-35 (1969); Jewell, *Political Patterns in Apportionment*, in THE POLITICS OF REAPPORTIONMENT 26 (M. Jewell ed. 1962).

²⁰ A. MILNOR, *supra* note 19, at 99; see *Whitcomb v. Chavis*, 403 U.S. 124, 150 (1971).

competitive single-member districts.²¹ The purpose of proportional representation—to provide an arithmetical reflection in the legislature of all numerically significant sets of political opinions and interests in the electorate²²—is often considered synonymous with increasing the representation of political minorities.²³ Proportional representation, in its pure sense, requires multi-member districts.²⁴ It is being suggested with increasing frequency, however, that the drawing of single-member district lines to ensure that certain minorities will be successful in electing one of their own achieves the spirit, if not the mathematical exactitude, of proportional representation.²⁵ It is questionable,

²¹ See, e.g., C. HOAG & G. HALLETT, JR., *PROPORTIONAL REPRESENTATION* (1926); J. HOGAN, *ELECTION AND REPRESENTATION* (1945). The most popular system of proportional representation in the United States has been that proposed by Thomas Hare. T. HARE, *ELECTION OF REPRESENTATIVES* (1865). Under Hare's system, three or more representatives are chosen from the same district, with the distinctive feature of the transferable vote. On his ballot, each voter ranks the candidates in accordance with his preferences. When a candidate receives first-choice ballots in excess of the amount needed for election, the excess ballots are then distributed to the second choices indicated on them, and so on. This system is thought desirable because of the close mathematical relationship of voting to representation, and the guarantee of minority representation. See C. HOAG & G. HALLETT, JR., *supra*, at 90-110. Although such a system has never been utilized in an American congressional election, it has been tried and rejected in many state and city elections. See E. BANFIELD & J. WILSON, *supra* note 17, at 96.

²² Proportional representation of political parties has been suggested as a way of guaranteeing that a state-wide majority of voters elect a majority of a state's congressmen. See Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656, 677 (1964) (Stewart, J., dissenting). See also Gaffney v. Cummings, 412 U.S. 735 (1973). That position, however, ignores the fact that political parties are generally conglomerations of diverse interest groups. To give a party a number of seats proportionate to its state-wide strength would still render many interest groups inside and outside the party unable to elect their own representative. See Kasper v. Pontikes, 414 U.S. 51 (1973); Rosario v. Rockefeller, 410 U.S. 752, 763 (1973) (Powell, J., dissenting).

²³ See Auerbach, *supra* note 19, at 26, 35; E. BANFIELD & J. WILSON, *supra* note 17, at 97; V.O. KEY, *supra* note 19, at 565. See also Lucas v. Forty-Fourth General Assembly, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting).

²⁴ In Connor v. Johnson, 402 U.S. 690, 692 (1971), the Court declared that single-member districts are preferable to multi-member districts. It is clear, however, that multi-member districts are not per se unconstitutional, Whitcomb v. Chavis, 403 U.S. 124, 142 (1971); Kilgarlin v. Hill, 386 U.S. 120 (1967); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965), and are permissible where they afford minorities a greater opportunity for participation in the political processes than single-member districts. Zimmer v. McKeithen, 485 F.2d 1297, 1308 (5th Cir. 1973).

²⁵ See Wells v. Rockefeller, 394 U.S. 542 (1969); Wright v. Rockefeller, 376 U.S. 52 (1964); Beans v. Erdahl, 349 F. Supp. 97, 99 (D. Minn. 1972); Clinton, *Further Explorations in the Political Thicket: The Gerrymander and the Constitution*, 59 IOWA L. REV. 1, 43-44 (1973); Note, *Compensatory Racial Reapportionment*, 25 STAN. L. REV. 84 (1972). Indeed, providing representation to factions that might otherwise not be able to elect a member of their group under a single-member system has been referred to as "[t]he principal justification for gerrymandering." Edwards, *supra* note 6, at 896; see Dixon, *supra* note 5, at 251. But see text and notes at notes 29-31 *infra*.

however, whether the assured election of a chosen representative of every interest group of substantial size will promote truly effective representation.²⁶

The major drawback of proportional representation in multi-member districts is that it reduces the need for coalition building and interplay among interests at the electoral level.²⁷ Although multi-member districts may give representation to minorities previously unable to elect a representative devoted solely to their cause, the very fact that the minority obtains an exclusive representative shifts any interplay to the parliamentary level. At that level, each representative will view his role as spokesman for his group rather than as a legislator representing more diversified interests. Often it is minorities themselves that will be harmed by this creation of conflict and ideological debate at the parliamentary level.²⁸

Single-member districts drawn to guarantee minority representation create several additional problems. Proponents of systems that guarantee certain interest groups an exclusive representative must first make the difficult decision of which interests are entitled to be represented.²⁹ Even if it were possible to choose such an interest fairly and to identify the voters allied to that interest, there is no reason to believe that those voters will view the selected interest as transcending in importance all their other economic and social views. Many voters may not wish to have the interest be the basis for selection of a representative³⁰ and will either refuse to vote on the basis of the chosen interest (in which case the system does not work) or will vote the interest because they feel "locked in" (in which case the system denies representation to their other interests). Where a majority of the voters do vote on the basis of the selected interest, groups representing other interests will be relegated to permanent minority status and may lose their incentive for political activism. The group that represents the chosen interest also may lose its incentive to maintain close contact with the voters, because it is guaranteed continuing success. Viewed from a state-wide perspective, such a scheme may have the additional defect of "wasting" minority votes in a district in which they are not needed.³¹

²⁶ See generally G. HORWILL, *PROPORTIONAL REPRESENTATION* (1925).

²⁷ See generally Baker, *supra* note 6, at 148; Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 280.

²⁸ See V.O. KEY, *supra* note 19, at 568; Auerbach, *supra* note 19, at 49; Neal, *supra* note 27, at 280-81. See also note 16 *supra*.

²⁹ See Eulau, Wahlke, Buchanan, & Ferguson, *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke*, 53 AM. POL. SCI. REV. 742, 747 (1959).

³⁰ See Auerbach, *supra* note 19, at 38.

³¹ Cf. Note, *Compensatory Racial Reapportionment*, *supra* note 25, at 85. See generally

Thus, both types of proportional representation reduce the need for coalition building and interplay at the electoral level, and single-member districts effectively exclude divergent groups from the political process. Districts designed to guarantee proportional representation to identifiable political groups are not constitutionally required.³² The Constitution guarantees to each interest group an equal right to participate in the political system—not electoral victory. Politically competitive districts best promote the responsiveness needed for fair and effective representation. It remains to determine how gerrymandering impairs this representational ideal.

C. The Harm Inflicted by Gerrymandering

Gerrymandering is based on the identification of stable groups that, if they constitute a majority of the district, can elect a representative without creating a coalition. The goal of gerrymandering is to create a districting plan that facilitates the retention of seats by incumbents or allows the political group in power to enlarge the number of seats it holds.³³ Providing incumbents with safe seats is generally accomplished by giving them as large a majority as possible and by not placing more than one incumbent in the same district.³⁴ The interest groups that can be expected to support each incumbent are identified and the districts structured accordingly. This form of gerrymandering is most common where the apportioning legislature is not controlled by any single group;³⁵ such a plan benefits incumbents from opposing political groups by providing them with stable majorities in different districts. Where one party or group controls apportionment, it may increase its strength by concentrating the major opposition in a few districts while drawing each remaining district to provide a clear majority for itself.³⁶

Wells v. Rockefeller, 394 U.S. 542, 546 (1969); *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1969).

³² See *White v. Regester*, 412 U.S. 755, 765–66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 153–55 (1971); *Cousins v. City Council of Chicago*, 466 F.2d 830, 843 (7th Cir.), cert. denied, 409 U.S. 893 (1972); *Kelly v. Bumpers*, 340 F. Supp. 568, 583–84 (E.D. Ark.), aff'd, 413 U.S. 901 (1973).

³³ See de Grazia, *General Theory of Apportionment*, 17 LAW & CONTEMP. PROB. 256, 262 (1952); Jewell, *supra* note 19, at 16; Nagel, *Computers: The Law and Politics of Redistricting*, 2 RUTGERS J. COMPUTERS & LAW 22, 34 (1971).

³⁴ Nagel, *supra* note 33, at 34.

³⁵ For example, this was the situation in Illinois in 1964. See Jewell, *supra* note 19, at 16.

³⁶ In theory, the most efficient gerrymander would produce many districts in which voters supporting those responsible for the redistricting would be a bare majority of the electorate. In practice, however, no controlling group is completely confident of its continuing support or its estimated strength; "comfortable majorities" or "calculated land-slides" are therefore the rule in most districts. A. HACKER, CONGRESSIONAL DISTRICTING 47

In almost every case, therefore, gerrymandering creates safe districts. This tactic diminishes effective representation by decreasing the number of politically competitive districts³⁷ and by reducing the effectiveness of the franchise through a reduction in the number of voters whose vote can affect the outcome.³⁸

Political gerrymandering affects the quality of representation in another sense. In a safe district, where victory is guaranteed, the controlling party is not forced to select its best candidate and may use the seat as a reward for the party faithful.³⁹ Incumbents may be able to continue in office without accounting to the voters in any significant way.⁴⁰ Although a potential primary challenge may compel a degree of responsiveness, a primary is generally a less adequate forum than a general election for raising important political issues.⁴¹ Most important, gerrymandered districts minimize the need to fuse various small or single-issue groups into an electoral coalition, thus removing the only significant opportunity for those groups to be heard.

II. INEFFECTIVENESS OF JUDICIAL REMEDIES TO COMBAT GERRYMANDERING

Although political gerrymandering reduces the effectiveness of representation, it is unclear to what extent it is unconstitutional. One view is that only gerrymandering schemes that substantially close off a well-defined interest group's access to the electoral process are unconstitutional.⁴² Under this view, the Constitution would not prohibit schemes

(1963). These principles are well illustrated by the 1962 New York election, in which the Republican Party elected 51 percent of the state's congressmen with 49 percent of the two-party vote. In eight out of twenty winning races, the Democrats had from 70.1 percent to 80.8 percent of the votes; in the twenty-one Republican districts, the winner's highest percentage was 68.3. The average Democratic majority was 64.6 percent, while the average Republican figure was 60.8 percent. *Id.* at 55-57.

³⁷ See *Cummings v. Meskill*, 341 F. Supp. 139, 149 (D. Conn.), *rev'd sub nom.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973).

³⁸ *Baker*, *supra* note 6, at 130; Note, *Reapportionment*, 79 HARV. L. REV. 1228, 1283 (1966).

³⁹ See A. MILNOR, *supra* note 19, at 108-09.

⁴⁰ *Cf. Ely v. Klahr*, 403 U.S. 108, 117-18 (1971) (Douglas, J., concurring); Casper, *supra* note 6, at 12; Jewell, *supra* note 19, at 27-28. In congressional accountability varies inversely with the number of successful incumbents, the current situation may already be serious. The percentage of freshmen in the Ninety-first Congress, for example, was 9.2—the lowest in American history. Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in REAPPORTIONMENT IN THE 1970s at 249, 259 (N. Polsby ed. 1971).

⁴¹ See C. EWING, *PRIMARY ELECTIONS IN THE SOUTH* (1953); V.O. KEY, *SOUTHERN POLITICS* ch. 19 (1949).

⁴² See generally *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Smith v. Allwright*, 321 U.S. 634 (1944).

that merely dilute access, and the burden would fall on Congress to minimize the opportunities for state legislatures to impose such abuses. The other view of the Constitution's protections is that fair and effective representation is absolutely guaranteed,⁴³ and only insignificant deviations from that concept are constitutionally permissible.

The Supreme Court has traditionally struck down only gerrymandering schemes that substantially denied access to identifiable political groups.⁴⁴ It has been suggested that the second, more absolutist view should be adopted by the Court;⁴⁵ it is questionable, however, whether the courts can provide an adequate forum for the enforcement of the more absolutist view. Although subtle cases of gerrymandering would be justiciable,⁴⁶ practical difficulties in proving a dilution of fair and effective representation, problems in making the possibly required showing of a legislative intent to discriminate, and the basic necessity for deferring to justifiable legislative decisions might still prevent the courts from remedying all but the most flagrant instances of gerrymandering.

A. Difficulties in Proving the Prima Facie Case

Even under the more absolutist doctrine, the plaintiff must be able to prove some denial of fair and effective representation. In *Whitcomb v. Chavis*⁴⁷ and *White v. Regester*,⁴⁸ the Supreme Court held that a plaintiff may show such a denial by establishing that because of the redistricting plan he, and persons sharing his interests, "had less opportunity than did the other residents in the district to participate in the

⁴³ The right of qualified voters "to cast their votes effectively . . . rank[s] among our most precious freedoms." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); see *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). The Court's choice in *Baker v. Carr*, 369 U.S. 186 (1962), of population over territorial representation as the ultimate constitutional requirement was, in essence, a decision that only population-based representation could be fair and effective. Whether required by Article I, Section 2 or the fourteenth amendment, "one person, one vote" has since been referred to as a constitutional requirement based on the guarantee of fair and effective representation for all citizens. See, e.g., *White v. Weiser*, 412 U.S. 783, 792-93 (1973); *White v. Regester*, 412 U.S. 755, 764 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973).

⁴⁴ The Court has invalidated only reapportionment schemes that intentionally precluded the right of Blacks to vote in a given election, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), or that substantially blocked the access of certain racial and ethnic groups to participation in the political process, *White v. Regester*, 412 U.S. 755 (1973).

⁴⁵ See, e.g., *Clinton*, *supra* note 25. See also *Whitcomb v. Chavis*, 403 U.S. 124, 171 (Douglas, J., dissenting).

⁴⁶ See note 6 *supra*.

⁴⁷ 403 U.S. 124 (1971).

⁴⁸ 412 U.S. 755 (1973).

political processes and to elect legislators of their choice.”⁴⁹ The Court appears also to require a showing that the legislature intended to discriminate against the plaintiff and his group in drawing the redistricting plan.⁵⁰ Both elements of proof are extremely difficult to establish except where the gerrymander is directed against a clearly identifiable and stable group.

1. *Proving Denial of Fair and Effective Representation.* Where a plaintiff has proved that his district is controlled by a stable political group or coalition whose interests do not coincide with his interests, he has shown that he is less represented than the supporters of the controlling group. This proof, however, is insufficient to demonstrate a denial of fair and effective representation. The plaintiff must also show that, if the districts had been drawn differently, his representation would have been greater. Such proof will almost always require evidence that an interest group of which the plaintiff is a member would have been part of an influential coalition.⁵¹ Proof of membership in a group that would be better represented under a different plan is difficult where an individual seeks protection for the representation of interests that are not readily identifiable. Even if the plaintiff can demonstrate that he would be better represented if the districts had been structured differently, the court would have to consider the impact of alternative plans on voters in the entire area being districted. There may be instances where it is impossible to draw a districting plan that does not create some districts in which a single group dominates. Proof that the plaintiff's political group does not have congressional seats in proportion to its voting potential will therefore fall short of establishing a *prima facie* case.⁵²

In *White v. Regester*,⁵³ it was alleged and proven “that the political processes leading to nomination and election were not equally open to participation” by the plaintiff's group. In that case, however, there

⁴⁹ *Id.* at 766. On the central importance of the opportunity to participate in the political process, see Casper, *supra* note 6, at 26-29; Clinton, *supra* note 25, at 19.

⁵⁰ See text and notes at notes 58-63 *infra*.

⁵¹ If the plaintiff is the only person holding his views, only the unlikely possibility of a completely fragmented district with very few stable interest groups will give him representation.

⁵² See text and note at note 32 *supra*. But see *Reynolds v. Sims*, 377 U.S. 533, 565 (1964); *Kaelin v. Warden*, 334 F. Supp. 602, 606-07 (E.D. Penn. 1971); *Dixon*, *supra* note 5, at 267. Similarly, other standards of measurement are likely to conflict or be inconclusive. Indeed, it is often difficult to determine whether a given interest group is helped or hindered by a redistricting plan. See *Wright v. Rockefeller*, 376 U.S. 52 (1964), noted in 24 *RUTGERS L. REV.* 521, 538-41 (1970); *Apportionment and the Courts*, *supra* note 6, at 531.

⁵³ 412 U.S. 755 (1973).

was a history of racial discrimination in the voting process, and the multi-member districts established by the apportionment plan, in conjunction with a variety of state rules and procedures, substantially excluded Blacks and Mexican-Americans from the electoral process. The Constitution impels special sensitivity to racial exclusions,⁵⁴ and in *Regester* it was possible to prove that a different districting plan would not have caused this exclusion. Similarly, in *Gomillion v. Lightfoot*,⁵⁵ an Alabama state law transformed the City of Tuskegee from a square shape into "an uncouth twenty-eight-sided figure," and excluded from the city district all but four or five of the city's four hundred Black voters. It was not difficult to prove that an alternative form of districting would have given more equal representation to an identifiable set of political interests.

The difficulties of proof absent such a clear showing of discrimination are exemplified by the multi-member district cases. Thus, although the Supreme Court has recognized that a multi-member district might "operate to minimize or cancel out the voting strength of racial or political elements of the voting population,"⁵⁶ it has found such a plan unconstitutional only where there was substantial evidence of discrimination against the identifiable group at other points in the electoral process.⁵⁷ Where the group discriminated against is not easily identifiable, the ability to prove that an alternative plan would increase the group's power in the coalition-building process will be very rare. If establishing dilution of representation is further dependent on proof of other forms of discrimination, judicial remedies for subtle forms of gerrymandering become virtually unobtainable.

2. *Proof of intent to discriminate.* In *Wright v. Rockefeller*,⁵⁸ the Court held that the plaintiff failed to carry his burden of proof because he had not established that the legislature was motivated by racial

⁵⁴ Perhaps the most important difference between racial and other political gerrymandering is that the fourteenth amendment was adopted with the special intent of protecting Blacks. See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). Thus, "the Constitution itself requires a distinction between the familiar political abuse of gerrymandering and gerrymandering for the purpose of racial discrimination." *Sims v. Baggett*, 247 F. Supp. 96, 105 (M.D. Ala. 1965). But see *Whitcomb v. Chavis*, 403 U.S. 124, 153-55 (1971); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Cousins v. City Council of Chicago*, 466 F.2d 830, 847-50 (7th Cir.) (Stevens, J., dissenting), cert. denied, 409 U.S. 893 (1972); R. DIXON, JR., *DEMOCRATIC REPRESENTATION* 475 (1968); *Apportionment and the Courts*, *supra* note 6, at 535.

⁵⁵ 364 U.S. 339 (1960).

⁵⁶ *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

⁵⁷ See *White v. Regester*, 412 U.S. 755 (1973).

⁵⁸ 376 U.S. 52 (1964).

considerations in enacting the reapportionment plan under challenge. Justice Douglas, dissenting, found that the effect of drawing the boundary between two particular congressional districts was "to bring into the Eighteenth district and keep out of the Seventeenth as many Negroes and Puerto Ricans as possible."⁵⁹ He concluded that "[r]acial segregation that is state sponsored should be nullified whatever may have been intended."⁶⁰

The Court has vacillated on this question,⁶¹ but a finding of intent to discriminate appears to be necessary to invalidate a redistricting plan.⁶² Intent to discriminate may be provable in some instances—for example, in cases of racial discrimination,⁶³—but intent is unlikely to be provable where the group discriminated against is simply "those who do not support the controlling party in a safe district."

B. Deference to Legislative Judgments

Even if the requirement of intent is not imposed and the plaintiff is able to prove a denial of representation, such a showing will not be dispositive; the court must determine whether it should defer to the legislature's judgment that the proposed plan is the best possible.⁶⁴

⁵⁹ *Id.* at 60–61.

⁶⁰ *Id.* at 61. Mr. Justice Goldberg, also dissenting, observed that all three judges below required different showings of intent. *Id.* at 67.

⁶¹ For cases apparently holding that an intent to discriminate is a prerequisite to a finding of unconstitutionality, see *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); *Wright v. Rockefeller*, 376 U.S. 52, 58 (1964); *Cousins v. City Council of Chicago*, 466 F.2d 830, 841 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972). For authorities suggesting that only the effect is critical, see *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965); *Clinton*, *supra* note 25, at 40–41; Note, *Political Gerrymandering: The Law and Politics of Partisan Districting*, 36 GEO. WASH. L. REV. 144, 160–61 (1967).

⁶² See Note, *Compensatory Racial Reapportionment*, *supra* note 25, at 92–96. Although it might be argued that such a requirement is necessary to protect plans where some "safe" districts are unavoidable, the plaintiff must already show that the dilution could be avoided by an alternative plan in order to make out a *prima facie* case.

⁶³ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

⁶⁴ Recent developments in equal protection analysis require the Court to subject all but a small minority of legislative classifications to what may be termed a rigorous rationality test. See Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Note, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 817–22 (1973); Note, *The Decline and Fall of the New Equal Protection: A Polemical Approach*, 58 VA. L. REV. 1489, 1505–09 (1972); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 124 (1972).

It appears that the Warren Court's minimal review will still be applied when strictly economic rights are involved. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (taxation); *United States v. Kras*, 409 U.S. 434 (1973) (certain commercial matters); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971) (social welfare benefits). *But cf.* *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Goldberg*

Deference to legislative decisions in this area is appropriate for two reasons. First, it is extremely difficult for a court to set up standards by which to judge whether a districting plan, taken as a whole, achieves maximum representation for all groups. Where the court is in doubt, it should defer to legislative decisions rather than usurp the legislative role; any other approach would entangle the courts in political considerations that cannot be appropriately handled through the judicial process. Judicial review of gerrymandering differs markedly from, for example, the easily quantifiable standard set up by the "one person, one vote" decisions. Review of legislative attempts to meet that standard did not create many doubts as to whether a more effective plan could be constructed.

The second reason for judicial deference arises from the fact that the relative importance of the many interests that combine to guide a plan must be evaluated first by the state legislatures. The state's interests may include facilitation of voter participation, promotion of the party system, compensation for past discrimination, and maintenance of traditional political and geographic subdivisions. Given the wide range of possibly justifiable legislative judgments present in redistricting, it is understandable that the Court has required proof of an intent to discriminate.⁶⁵ Intentional discrimination is the one state interest that unquestionably does not justify a diminution of fair and effective representation.

Appropriate deference does not constitute a decision that gerrymandering cases are nonjusticiable because of a lack of standards by which to judge such cases.⁶⁶ Rather, the deference represents a recognition that the selection of a plan that maximizes fair and effective representation and the determination of when important state interests require alterations of that plan is for the legislature, unless there

v. Kelly, 397 U.S. 254 (1970). Strict review will continue to be applied to the suspect classifications established by the Warren Court, *see, e.g.*, *Alexander v. Louisiana*, 405 U.S. 625 (1972) (race), and to restrictions on rights explicitly or implicitly guaranteed by the Constitution, *e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (freedom of speech); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voting rights).

Under the rigorous rationality approach, the legitimacy of the state interests is rigorously examined, *see, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and the endangered personal rights are balanced against the importance of the state interests, *see, e.g.*, *Salyer Land Co. v. Tulare Lake Basin Storage Dist.*, 410 U.S. 719 (1973). The court will also determine whether it is possible to achieve the same end through less onerous means. *See, e.g.*, *Kusper v. Pontikes*, 414 U.S. 51 (1973).

⁶⁵ *See* *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971).

⁶⁶ *Compare* *Gaffney v. Cummings*, 412 U.S. 735 (1973), and *White v. Regester*, 412 U.S. 755 (1973), *with* *Colegrove v. Green*, 328 U.S. 549 (1946).

is clear proof of an unjustifiable impairment of fair and effective representation.

The difficulty of proving a diminution of fair and effective representation and intent to discriminate through political gerrymandering, combined with the proper judicial deference for legislative judgments, make the courts an ineffective forum for the redress of the harms of political gerrymandering. It is open to the Congress, however, to create a general standard for districting that minimizes the possibilities of political gerrymandering by the state legislatures and yet is enforceable in the courts. It is suggested that a compactness standard is appropriate to such a purpose.⁶⁷

III. DEVELOPING A LEGISLATIVE ALTERNATIVE

It has been noted that maximizing fair and effective representation requires legislative decisions that evaluate each district within each plan. A guide of general application must therefore be constructed as a prophylactic measure that will minimize political gerrymandering rather than attempt to define the absolute maximum of representation. The standard must be one that legislatures and courts can use conveniently in formulating and reviewing reapportionment plans.⁶⁸

⁶⁷ Congressional power to enact a compactness statute is derived from Article I, section 4 of the Constitution, which specifically authorizes Congress to enact regulations regarding congressional elections or to alter rules enacted by the state legislatures. *Wells v. Rockefeller*, 311 F. Supp. 48, 57 (S.D.N.Y.) (Cannella, J., dissenting), *aff'd mem.*, 398 U.S. 901 (1970). Note, *Congress in the Thicket: The Congressional Districting Bill of 1967*, 36 GEO. WASH. L. REV. 224 (1967). Based on this constitutional grant, Congress enacted various redistricting requirements for the period from 1842 until 1929. See *Wood v. Broom*, 287 U.S. 1, 6 (1932); note 71 *infra*. Throughout those years, there were no court challenges to the statutes. *Lucas, Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194, 216.

In 1967, Congress indicated that the passage of a "compact and contiguous" standard may be within reach. The House of Representatives passed a bill that required districts to be composed of "contiguous territory in as compact a form as the State finds practicable." H.R. 2508, 90th Cong., 1st Sess., 113 CONG. REC. 11089 (1967). According to those who supported stronger legislation, the last five words made the provision nonjusticiable in the federal courts. The Senate passed the measure with the last five words deleted. 113 CONG. REC. 15244 (1967). The conference report, R. Rep. No. 435, 113 CONG. REC. 17509 (1967), which was passed in the House, 113 CONG. REC. 30251 (1967), and defeated in the Senate, 113 CONG. REC. 31712 (1967), retained the language of the House bill.

⁶⁸ It has been suggested that computer-programmed district lines may be the best answer to the search for objectivity in redistricting. See, e.g., *Symposium on Legislative Reapportionment*, 2 RUTGERS J. COMPUTERS & LAW 13 (1971); Weaver & Hess, *A Procedure of Non-Partisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288 (1963). Use of computers, however, does not diminish the necessity for developing an appropriate standard. Baker, *supra* note 6, at 139; Dixon, *supra* note 6, at 17. See also *Ely v. Klahr*, 403 U.S. 108 (1971).

The most neutral, practical standard is a mathematically defined compactness requirement.⁶⁹

A. Compactness as a Districting Standard

Some state⁷⁰ and federal⁷¹ laws have set up a compactness criterion, but these laws have failed to create an objective, mathematical standard by which to evaluate compactness. The effectiveness of compactness laws has been further impaired by the use of limiting phrases such as "as compact as practicable"⁷² or "as compact as may be."⁷³ The limiting phrases and the absence of a clear statutory definition have resulted in courts treating compactness as nothing more than a general requirement of fairness.⁷⁴

The establishment of a state nonpartisan or bipartisan redistricting body has also been suggested. *See, e.g., Baker, One Person, One Vote: "Fair and Effective Representation?"*, in REPRESENTATION AND MISREPRESENTATION 89 (R. Goldwin ed. 1967); Dixon, *supra* note 5, at 244; McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223, 235-36 (1968). Although nonpartisan commissions may be less inclined to abuse the redistricting power, it is unrealistic to believe that they would not be subjected to the same political pressures and temptations that have affected legislatures. *See Gaffney v. Cummings*, 412 U.S. 735 (1973). After a bipartisan Connecticut redistricting board drew the 1972 state legislative redistricting lines, Republicans won 62 percent of the House seats and 64 percent of the Senate seats with 53 percent of the popular vote.

⁶⁹ Some courts have also recognized the value of compactness as a legislatively defined requirement in districting. *See, e.g., Wells v. Rockefeller*, 394 U.S. 542, 554-55 (1969) (White, J., dissenting); *Wells v. Rockefeller*, 273 F. Supp. 984, 991 (S.D.N.Y.), *aff'd*, 389 U.S. 421 (1967); *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966).

⁷⁰ By 1970, twenty states had constitutional compactness requirements for state legislative districts. *See NATIONAL MUNICIPAL LEAGUE, STATE CONSTITUTIONAL PROVISIONS ON APPOINTMENT AND DISTRICTING* (1971). ALAS. CONST. art. VI, § 6; ARIZ. CONST. art. IV, pt. 2, § 1(1); COLO. CONST. art. V, § 47; HAWAII CONST. art. III, § 4, ¶ 13; ILL. CONST. art. III, § 3(a); IOWA CONST. art. III, § 34; MD. CONST. art. III, § 4; MICH. CONST. art. IV, §§ 2(2), (3) ¶ 2 & § 3, ¶ 4(2); MO. CONST. art. III, § 2, ¶ 7 & § 8; MONT. CONST. art. VI, § 3; NEB. CONST. art. III, § 5; N.J. CONST. art. IV, § II, ¶ 3; N.Y. CONST. art. III, § 5, ¶ 4; OHIO CONST. art. XI, § 7; OKLA. CONST. art. V, § 9A; PA. CONST. art. II, § 16; R.I. CONST. amend. XIII, § 1 & amend. XIX, § 1; VA. CONST. art. II, § 6; W. VA. CONST. art. VI, § 4; WYO. CONST. art. III, § 49.

⁷¹ Act of Jan. 16, 1901, ch. 93, §§ 3, 4, 31 Stat. 733, 734; Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13 (expired 1929). *See Colgrove v. Green*, 328 U.S. 549, 555 (1946); *Hearings Before Subcomm. No. 2 of the House Comm. on the Judiciary* [hereinafter cited as *Hearings*], 86th Cong., 1st Sess. ser. 10, at 64 (1959) (testimony of Professor Kallenbach); R. BROOKS, POLITICAL PARTIES AND ELECTORAL PROBLEMS 476 (1923); Baker, *supra* note 6, at 130-31; 23 CONG. Q. WKLY. REP. No. 12, at 419-20 (Mar. 19, 1965); Mayhew, *supra* note 40, at 254. *See also* the unenacted proposal discussed at note 67 *supra*.

⁷² *See, e.g., HAWAII CONST. art. III, § 4, ¶ 13; R.I. CONST. amend. XIII, § 1 & amend. XIX, § 1. See also* Opinion to the Governor, 101 R.I. 203, 210-11, 221 A.2d 799, 803 (1966).

⁷³ *See, e.g., COLO. CONST. art. V, § 47; MO. CONST. art. III, § 2, ¶ 7 & § 8.*

⁷⁴ *E.g., People ex rel. Scott v. Grivetti*, 50 Ill. 2d 156, 166, 277 N.E.2d 881, 887 (1972); *Donovan v. Holzman*, 8 Ill. 2d 87, 97, 132 N.E.2d 501, 507 (1956); *Commonwealth ex rel. Specter v. Levin*, 448 Pa. 1, 17-19, 293 A.2d 15, 23-24 (1972). *See Schwartzberg, Reapportionment, Gerrymanders, and the Notion of "Compactness"*, 50 MINN. L. REV. 443, 444

Illinois, for example, has had various constitutional compactness provisions since 1870. The Illinois compactness requirement was interpreted in 1895 in *People ex. rel. Woodyatt v. Thompson*.⁷⁵ No definition was specified in the Illinois Constitution, so the court found that "compact" meant "closely united."⁷⁶ Recognizing that this standard was no more judicially manageable than the simple requirement that districts be "compact," the court held:

There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the legislature.⁷⁷

Review of reapportionment plans under this type of vague standard requires such deference to legislative judgments as to prohibit only the most extreme examples of gerrymandering. A more explicit standard is necessary to minimize gerrymandering effectively.

A district has achieved maximum compactness when the greatest distance between two points in the district cannot be reduced without decreasing the total area of the district. Circular districts are therefore the most compact. Circular districts, however, would exclude some persons altogether, so a relative compactness standard is necessary. The relative compactness of two districts can be measured by dividing the perimeter of each district by the perimeter of a circle equal to the district in area⁷⁸ or by dividing the area of the district by the area of the smallest possible circumscribing circle.⁷⁹ Under either measurement,

(1966). However, see Annot., 2 A.L.R. 1337, 1358-59 (1919), for early twentieth century examples of judicial enforcement of state constitutional compactness provisions.

⁷⁵ 155 Ill. 451, 40 N.E. 307 (1895).

⁷⁶ *Id.* at 478, 40 N.E. at 315.

⁷⁷ *Id.* at 480, 40 N.E. at 315-16, cited with approval, *Cousins v. City Council of Chicago*, 466 F.2d 830, 833-34 (7th Cir.), cert. denied, 409 U.S. 893 (1972).

⁷⁸ See Schwartzberg, *supra* note 74, at 446, where it is suggested that all districts with an index of 1.67 or less be declared to be sufficiently compact.

⁷⁹ See Roeck, Jr., *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDWEST J. POL. SCI. 70, 71 (1961). Roeck measured ninety districts of the 87th Congress and determined that sixty-four of them achieved a degree of compactness in excess of 0.4. *Id.* at 73. Andrew Hacker has suggested that 0.4 may be a proper cutoff point below which a district should be deemed to be noncompact. A. HACKER, *supra* note 36, at 68. For further definitions of compactness, see *Hearings*, *supra* note 71; Harris, *A Scientific Method of Districting*, 9 BEHAVIORAL SCI. 219 (1964); Taylor, *A New Shape Measure for Evaluating Electoral District Patterns*, 67 AM. POL. SCI. REV. 947 (1973); Tyler & Wells, *The New Gerrymander Threat*, AM. FEDERATIONIST 1, 7 (Feb. 1971); Vickery, *On the Prevention of Gerrymandering*, 76 POL. SCI. Q. 105 (1961); Note, *Compensatory Racial Reapportionment*, *supra* note 25, at 104 n.108.

the closer the result, or "compactness index," is to one, the more compact the district.

An accommodation between compactness and the "one person, one vote" principle must be reached to allow for differences between population densities and the contours of the boundaries of the various states. An appropriate solution is to require all congressional district maps to be drawn so as to minimize population variances among the districts and to maximize the compactness of the districts. The state's lowest possible compactness index would be the average of the indices of each district in a districting plan drawn exclusively to minimize population variances and maximize compactness.

Legislatures would have to use computers to determine the lowest possible compactness index.⁸⁰ A de minimis variation should be permitted so that the legislatures can correct minor difficulties, such as district boundaries drawn in the middle of a block. If the permissible variance is too great, however, the legislature would regain a large degree of the discretion that was withdrawn from it by the compactness requirement. The permissible variation from the lowest possible compactness index should be determined by Congress after empirical research.

B. The Relationship between Compactness and Effective Representation

The basic usefulness of the compactness standard is as a prophylactic measure that limits the possibility of legislative gerrymandering and increases the ability of courts to review districting plans. There is some disagreement, however, as to whether compactness would unduly reduce effective representation by increasing homogeneity, thus decreasing the importance of the coalition-building process.⁸¹

It is generally agreed that heterogeneous districts are conducive to party competition. It is not at all clear, however, that a compactness requirement would impair political heterogeneity.⁸² Compared to gerrymandered districts, compact districts more effectively preserve political heterogeneity, because they frustrate attempts to construct safe districts for incumbents or isolate opposition votes in certain dis-

⁸⁰ Computers, of course, could be used to print out the entire plan. See note 68 *supra*. See also Sheth & Hess, *Multiple Criteria in Political Redistricting: Development of Relative Values*, 2 RUTGERS J. COMPUTERS & LAW 44, 50-53 (1971); Weaver & Hess, *supra* note 68, at 296-300.

⁸¹ See text and notes at notes 17-20 *supra*.

⁸² See, e.g., A. CAMPBELL & H. COOPER, *GROUP DIFFERENCES IN ATTITUDES AND VOTES* (1956); P. COULTER & G. GORDON, *VOTING BEHAVIOR IN MASSACHUSETTS* (1967).

tricts. The use of such techniques maximizes political homogeneity, which, by definition, makes a district noncompetitive. Compact districts would maximize only territorial continuity, and possibly ethnic, racial, or economic homogeneity.

Members of the same ethnic, racial, and economic groups do not always live in close geographic proximity.⁸³ Even where this proximity exists, compactness does not necessarily increase political homogeneity. Within each group, members will hold a wide variety of views on political questions, and in a large city, a compact district will usually contain parts of a number of diverse communities.⁸⁴

Effective representation is reduced only if candidates do not need to build and rebuild coalitions within their districts in order to maintain their seats. This unresponsiveness is unlikely to arise in a district not created precisely for that purpose. A compactness standard is therefore not only preferable to gerrymandering but also no more likely to result in reduced effectiveness of representation than any other objective standard for drawing district lines. Such a standard is more administratively workable than the alternatives and also promotes competitive elections by facilitating transportation and media access within the district.

C. Respect for Political Subdivision Boundaries

Rare situations may arise in which giving weight to factors other than compactness would increase the effectiveness of representation—for example, where the use of traditionally significant political subdivision lines would improve the electoral process.⁸⁵ A geographic unit may have a long and important tradition as an electoral unit, with practices or organizations that play important roles in facilitating political debate and voter participation. Highly active reform groups and voters' leagues are examples of such organizations.⁸⁶ Noncompactness might be justified by a showing that it is essential to preserve important traditional political subdivisions, but the burden would be on the legislature to show that the subdivision lines were selected because of their historic importance and that the historic importance was a neutral criterion aid-

⁸³ See Mayhew, *supra* note 40, at 273.

⁸⁴ According to one commentator, the "urban center contains a wide spectrum of party, factional, social, economic, and other differences that hardly comprise a monolithic interest." Baker, *supra* note 68, at 77-78; see Neal, *supra* note 27, at 279. But see T. DYE, *POLITICS, ECONOMICS, AND THE PUBLIC* 57 (1966).

⁸⁵ See *Abate v. Mundt*, 403 U.S. 182 (1971).

⁸⁶ Political parties are, of course, such groups, but to permit legislatures to use the strength of party organizations to determine districting lines would defeat the purpose of enacting a compactness requirement. The exception should therefore be limited to non-partisan groups.

ing the electoral process, rather than a camouflage for gerrymandering. Respect for other factors, such as access to area-wide communications, might arguably also justify a deviation from compactness. However, in order for compactness to serve its prophylactic function, legislative discretion must be severely limited, and therefore justifications for non-compactness should be restricted to respect for traditional political subdivisions. A statute requiring compactness should also permit any person qualified to vote in a congressional election to bring an action to enforce the statute in his state. This would allow the voter to bring suit to enforce the statute without requiring him to prove discrimination against an identifiable group of which he is a member.⁸⁷

The statute proposed in this comment allows some legislative discretion with respect to protection of traditional political subdivisions, but would prevent the legislatures from using their districting power to protect the seats of incumbents or to increase the holdings of the dominant party. The statute also allows the courts to remedy the serious injustice of gerrymandering without exceeding the institutional and constitutional limits of their competence. Most important, the statute would bring the electoral system a step closer to "fair and effective representation for all citizens."

Robert S. Stern

⁸⁷ See text and notes at notes 51-57 *supra*.