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3. EQUAL POPULATION

Introduction

The U.S. Supreme Court's 1962 decision in *Baker v. Carr*⁶⁶ was a sharp departure from that Court's long-standing policy of judicial nonintervention in redistricting cases.⁶⁷ Many redistricting cases that reached the Supreme Court in the next several years were challenges to situations in which differences in population among legislative districts, or in the number of people represented by members of a single legislative body, were so great that—viewed from the perspective of 1990—they are not only obviously impermissible but also ludicrous. These situations had nearly all disappeared either before or during the post-1970 round of redistricting. This chapter discusses the constitutional requirement of equal population among state legislative and congressional districts as it has developed in federal cases decided since *Baker v. Carr*.

One Person, One Vote—Background

Although the history-making decision in *Baker v. Carr* held that state legislative (and, by implication, congressional) districting cases are justiciable, and expressed confidence that courts would prove able to “fashion relief” where constitutional violations might be found,⁶⁸ the Supreme Court did not provide specific standards or criteria for judicial review of state districting or for judicial remedies.

Development by the Supreme Court of the substantive case law standards that govern state legislative and congressional districting began the following year with *Gray v. Sanders*,⁶⁹ in which the Court held that unit voting systems are unconstitutional *per se*. That decision included the now familiar assertion by Justice Douglas that

⁶⁶ 369 U.S. 186 (1962).

⁶⁷ *E.g.*, *Colegrove v. Green*, 328 U.S. 549 (1946) (ruling that courts should not interfere in congressional redistricting disputes). However, in 1958, a three-judge federal district court in effect threatened to intervene should the Minnesota Legislature fail to redistrict itself in accordance with the state's constitution. *Magraw v. Donovan*, 163 F. Supp. 184 (D. Minn. 1958). The Legislature responded (although the new districts were held inequitable after *Baker v. Carr*) and the case was dismissed as moot on the plaintiff's motion. 177 F. Supp. 803 (1959). For an interesting discussion of pertinent U.S. Supreme Court voting rights case law preceding *Baker v. Carr*, as well as an informative summary of the development of redistricting standards since that case was decided, see Padilla and Gross, “Judicial Power and Reapportionment,” 15 *Idaho L. Rev.* 263 (1979).

⁶⁸ 369 U.S. 186, 197-198.

⁶⁹ 372 U.S. 368 (1963).

"[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."⁷⁰

Measuring Population Equality Among Districts

How is the degree of population equality (or inequality) among legislative or congressional districts measured? A clear understanding of the measures available and those used by the courts—and by the drafters of redistricting plans—is essential. The courts have not always been consistent or precise in their terms, and this has led to considerable misunderstanding and confusion. For example, courts have sometimes used terms with definite statistical meaning in a general, nonstatistical manner. A definition of terms, therefore, may be helpful at this point.

Ideal population. A logical starting point is the "ideal" district population. In a single-member district plan, the "ideal" district population is equal to the total state population divided by the total number of districts. (For example, if a state's population is 4 million and there are 40 legislative districts, the "ideal" district population is 100,000.) For purposes of this discussion, it will be assumed that a single-member districting plan is being considered. In districting plans that use multimember districts, the "ideal" population is more properly expressed as the "ideal" population per representative and is obtained by dividing the total state population by the total number of representatives. The number of representatives rather than the number of districts would thus be used in performing statistical calculations for districting plans that employ multimember districts.

There is, then, the need to express the degree to which: 1) an individual district's population varies, or differs, from the "ideal;" and 2) all districts collectively vary, or differ, in population from the "ideal."

Deviation. The degree by which a single district's population varies from the "ideal" may be stated in terms of "absolute deviation" or "relative deviation." The "absolute deviation" is equal to the difference between its population and the "ideal" population, expressed as a plus (+) or minus (-) number, meaning that the district's population exceeds or falls short of the "ideal" by that number of people. (For example, if the "ideal" population is 100,000 and a given district has a population of 102,000, its "absolute deviation" is +2,000.) "Relative deviation," the more commonly used measure, is attained by dividing the district's absolute deviation by the "ideal" population. The resulting quotient indicates the proportion by which the district's population exceeds or falls short of the "ideal" population and usually is expressed as a percentage of the "ideal" population. (In the preceding example, the "relative deviation" is +2 percent.)

Several methods of measuring the extent to which populations of all the districts in a plan vary, or differ collectively from the "ideal," are available.

Mean deviation. A frequently used measure is the "mean deviation," expressed in absolute or relative terms. The "absolute mean deviation" of a set of districts from the "ideal" is equal to the sum of the absolute deviations of all the districts (disregarding "+" or "-" signs) divided by the total number of districts. The "relative mean deviation" is equal to the sum of the individual district relative deviations (disregarding "+" or "-" signs) divided by the total number of districts.

Overall range. Perhaps the most commonly used measure of population equality, or inequality, of all districts

⁷⁰ *Id.* at 381.

in a plan is “overall range,” which again can be expressed in absolute or relative terms. The “range” is a statement of the population deviations of the most populous district and the least populous district, expressed in either absolute or relative terms. (For example, if the ideal district population is 100,000, the largest district in the plan has a population of 102,000, and the smallest district has a population of 99,000, then the range is +2,000 and -1,000, or +2 percent and -1 percent.)

The “overall range” is the difference in population between the largest and the smallest districts, expressed either as a percentage or as the number of people. (In the preceding example, the “overall range” is 3 percent or 3,000 people.) Although the courts normally measure a plan using the statistician’s “overall range,” they almost always call it something else, such as “maximum deviation.”⁷¹

None of the foregoing measures provides a full picture of the degree of population equality, or inequality, and perhaps several measures should be used in evaluating any set of districts. (For example, the overall range may be a large one because of the large deviation of only one district, but all the remaining districts may be clustered closely around the “ideal.” The use of “mean deviation” would reveal this.) For purposes of comparison and clarity, this book uses the measures of relative overall range and relative mean deviation expressed simply as overall range and mean deviation. Table 2 shows the various measures in mathematical form.⁷²

⁷¹ E.g., *Abrams v. Johnson*, 521 U.S. 74, 99, 1939 (1997) (“overall population deviation”); *Board of Estimate v. Morris*, 489 U.S. 688, 700 (“maximum percentage deviation”); 489 U.S. at 691, 701 (“total deviation”) (1989); *Brown v. Thomson*, 462 U.S. 835, 838 (1983) (“maximum percentage deviation”); *Karcher v. Daggett*, 462 U.S. 725, 729, 766 (“maximum population difference”), 731-732, 741, 765-790 (“maximum deviation”) (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977) (“maximum deviation”); *Chapman v. Meier*, 420 U.S. 1, 23 (1975) (“deviation,” “variation,” “total population variance”); *White v. Weiser*, 412 U.S. 783, 785-790 (1973) (“total population difference,” “total percentage deviation,” “total absolute deviation”); *White v. Regester*, 412 U.S. 755, 761, 764 (“total variation”), 762 (“total deviation”), 763 (“population differential”) (1973); *Gaffney v. Cummings*, 412 U.S. 735, 742, 750-751 (1973) (“maximum variation”); *Mahan v. Howell*, 410 U.S. 315, 319-320 (1973) (“maximum percentage variation,” “maximum percentage deviation”); *Kirkpatrick v. Preisler*, 394 U.S. 526, 529 (1969) (“population difference”).

⁷² How “population” is defined for equal population purposes is an issue that seemed to be developing in the 1990s but did not rise to the forefront in the 2000s. In *Chen v. City of Houston*, the Supreme Court denied certiorari to a case arising from the 5th Circuit in which a violation of the one person, one vote principle was alleged because defining population as total population overrepresented the voting power of districts with a high level of noncitizen residents. 532 U.S. 1046 (2001). The Court of Appeals rejected this argument, ruling that the definition of population was an “eminently political question [that] has been left to the political process.” No. 98-20440, 206 F.3d 502, 528 (5th Cir. 2000). Justice Thomas issued a dissenting opinion in which he identified a developing circuit split on the issue and opined that a determination by the Court of the constitutionality of using citizen voting age population would be timely due to the immediacy of the next redistricting cycle. 532 U.S. at 1047.

Table 2. Statistical Terminology for Districting

IDEAL DISTRICT POPULATION	=	State Population/ Number of Districts
INDIVIDUAL DISTRICTS		
ABSOLUTE DEVIATION	=	District Population - Ideal Population
RELATIVE DEVIATION	=	Absolute Deviation/ Ideal Population
ALL DISTRICTS		
MEAN DEVIATION*	=	Sum of All Deviations/ Number of Districts
RANGE*	=	Largest Positive Deviation and Largest Negative Deviation
OVERALL RANGE*	=	Largest Positive Deviation + Largest Negative Deviation (Ignoring "+" or "-" signs)
*Can Be "Absolute" or "Relative"		

Source: NCSL, 2009.

Two Different Standards for Congressional and Legislative Districts

The equal population requirements for congressional districts and legislative districts do not rest on the same stone in the constitutional foundation of the Republic. The equal population standard for congressional districts, first enunciated by the Supreme Court in *Wesberry v. Sanders*,⁷³ arises from Article I, Section 2, of the Constitution, "Representatives . . . shall be apportioned among the several states . . . according to their respective numbers. . . ." This standard has been strictly interpreted by the Court in *Kirkpatrick v. Preisler*,⁷⁴ *White v. Weiser*⁷⁵ and *Karcher v. Daggett*.⁷⁶ By contrast, the Supreme Court held in *Reynolds v. Sims*⁷⁷ that it is the Equal Protection

⁷³ 376 U.S. 1 (1964).

⁷⁴ 394 U.S. 526 (1969).

⁷⁵ 412 U.S. 783 (1973).

⁷⁶ 462 U.S. 725 (1983).

⁷⁷ 377 U.S. 533 (1964).

Clause of the 14th Amendment⁷⁸ that requires states to construct legislative districts that are substantially equal in population. The Supreme Court has required strict mathematical equality for congressional districts, but has not required the same degree of equality for state legislative districts.

The Standard for Drawing Congressional Districts—Strict Equality

In *Wesberry v. Sanders* (1964), the Supreme Court held that the population of congressional districts in the same state must be as nearly equal in population as practicable.⁷⁹

In April 1969, the Supreme Court decided *Kirkpatrick v. Preisler*,⁸⁰ a case involving congressional districts drawn by the Missouri General Assembly. The 10 districts had an overall range of approximately 6 percent. Writing for a five-member majority, Justice Brennan found that the plan failed to satisfy the “as nearly as practicable” standard of population equality the Court had earlier enunciated in *Wesberry v. Sanders*. The *Kirkpatrick* opinion specifically rejected the suggestion that there is a point at which population differences among districts becomes *de minimis* and held that, insofar as a state fails to achieve mathematical equality among districts, it must either show that the variances are unavoidable or specifically justify the variances.⁸¹ The opinion went on to reject several purported justifications advanced by Missouri.

The justifications rejected included a desire to avoid fragmenting either political subdivisions or areas with distinct economic and social interests, considerations of practical politics, and even an asserted preference for geographically compact districts. Also, the majority opinion held that Missouri had failed to show any systematic relationship between its congressional district population disparities and either of two other factors offered as justifications—varying proportions of eligible voters to total population and projected future population shifts among districts.⁸² (The Court did not flatly rule out the latter consideration, but it said such projections must be well-documented and uniformly applied.)

In *White v. Weiser*, a 1973 case involving Texas congressional districts,⁸³ the U.S. Supreme Court ruled that, although the overall range among Texas' 24 congressional districts was smaller than that invalidated in *Kirkpatrick v. Preisler* in 1969, the Texas districts were not as mathematically equal as reasonably possible and were therefore unacceptable. The Court specifically rejected an argument that the variances resulted from the Texas Legislature's attempt to avoid fragmenting political subdivisions.⁸⁴

⁷⁸ “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.”

⁷⁹ 376 U.S. 1 (1964).

⁸⁰ 394 U.S. 526 (1969).

⁸¹ *Id.* at 530-531.

⁸² 394 U.S. at 533-536.

⁸³ 412 U.S. 783 (1973).

⁸⁴ *Id.* at 790-791.

Ten years later, in *Karcher v. Daggett*,⁸⁵ the U.S. Supreme Court reaffirmed its position in *Kirkpatrick v. Preisler* that there is no level of population inequality among congressional districts that is too small to worry about, as long as those challenging the plan can show that the inequality could have been avoided. As Justice Brennan wrote for the 5-4 majority: "We thus reaffirm that there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, Sec. 2, without justification."⁸⁶

The congressional redistricting plan drawn by the New Jersey Legislature had an overall range of 3,674 people, or .6984 percent.⁸⁷ The plaintiffs showed that at least one other plan before the Legislature had a "maximum population difference" (overall range) of only 2,375 people or .4514 percent,⁸⁸ thus carrying their burden of proving that the population differences could have been reduced or eliminated by a good-faith effort to draw districts of equal population. The Court also noted that the population differences could have been reduced by the simple device of transferring entire political subdivisions of known population between contiguous districts.⁸⁹

Once the plaintiffs had shown that the population differences could have been reduced, the state had the burden of proving that each significant variation from the ideal was necessary to achieve "some legitimate state objective."⁹⁰

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.⁹¹

The New Jersey Legislature attempted to justify the population deviations as necessary to preserve the voting strength of racial minority groups. But the evidence was directed at only one of the 14 districts, so the Court

⁸⁵ 462 U.S. 725 (1983).

⁸⁶ *Id.* at 734.

⁸⁷ *Id.* at 728.

⁸⁸ *Id.* at 728-729.

⁸⁹ *Id.* at 739.

⁹⁰ *Id.* at 740.

⁹¹ 462 U.S. at 740-741.

found that New Jersey had failed to justify the deviations in the other districts and affirmed the lower court's rejection of the plan.⁹²

In 1997, *Abrams v. Johnson*⁹³ involved a challenge to a congressional plan drawn by a federal court on the basis of violation of the guarantee of one person, one vote. The challenged plan was drawn on remand from *Miller v. Johnson*.⁹⁴ In *Miller v. Johnson*, the Supreme Court affirmed that Georgia's 11th District was unconstitutional because race was a predominant factor in drawing the district.⁹⁵ A subsequent amended complaint was filed with

⁹² *Id.* at 742-744. Lower courts have relied on the holding and tests under *Karcher* to determine if congressional district plans achieve population equality. See *State ex rel. Stephan v. Graves*, 796 F. Supp. 468 (D. Kan. 1992) (ruling that a congressional district plan with a "maximum population deviation" (overall range) of .94 percent was unconstitutional regardless of the fact that the plan maintained whole counties in each congressional district; the court instead adopted a plan with an overall range of 0.01 percent, which was one of three plans before the court with "population deviations" (overall ranges) of less than .34 percent). See also *Larios v. Cox*, 300 F. Supp. 2d 1320, 1354-55 (N.D. Ga. 2004) (ruling that a congressional plan with a total deviation of 72 people was constitutional due to a legitimate state interest in avoiding precinct splits along something other than easily recognizable boundaries despite testimony that an alternate plan that addressed traditional districting principles with less deviation was possible), *aff'd* 542 U.S. 947 (2004) (mem.) (Stevens & Breyer, JJ. concurring) (Scalia, J., dissenting); *Graham v. Thornburgh*, No. 02-4087-JAR, 207 F. Supp. 2d 1280 (D. Kan. 2002) (ruling that a congressional plan with a maximum deviation of 33 people was constitutional despite existence of alternative plans with lower deviations due to the adopted plan's relatively small deviation, the fact that the deviation was a result of balancing legitimate state goals, and the adopted plan caused the least shift of population from the 1992 plan); *Vieth v. Pennsylvania*, No. 1:CV-01-2439, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (ruling that a congressional plan with an overall range of 19 people was unconstitutional based on the finding that the justification offered by the state (avoiding split precincts) could be more closely achieved by alternative plans with minimum possible population deviations and that the justification was not the actual cause of deviation), *appeal dismissed as moot sub nom. Schweiker v. Vieth*, 537 U.S. 801 (2002) (mem.); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Calif. 1994) (finding a plan with an overall range of .49 percent, see *Wilson v. Eu*, 823 P.2d 545, 607-09 (Cal. 1990), was justified by legitimate state objectives), *aff'd in part, appeal dismissed in part*, 515 U.S. 1170 (1995) (mem.); *Stone v. Hechler*, 782 F. Supp. 1116 (W.D. W.Va. 1992) (holding that a congressional plan with an overall range of .09 percent was constitutional even though 17 other plans had lower overall ranges, the court found that the deviation was necessary to further legitimate state goals of preserving the cores of prior districts and making districts compact and that the adopted plan was more successful in achieving those goals than were the other plans); *Anne Arundel County Republican Cent. Comm. v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991) (ruling that a congressional plan with a "variance" (overall range) of 10 people was constitutional based on the state's justifications that the plan kept major regions intact, created a minority voting district, and recognized incumbent representation with its attendant seniority in the House), *aff'd* 504 U.S. 938 (1992) (mem.), *reh'g denied* 505 U.S. 1231 (1992); and *Turner v. Arkansas*, 784 F. Supp. 585 (E.D. Ark. 1991) (accepting a plan with a "variance" of 0.78 percent even though several plans with lower "variances" were introduced; the court found that the plan achieved a legitimate state objective because none of the other plans met the dual objectives of population equality plus meeting other constitutional criteria), *aff'd* 504 U.S. 952 (1992) (mem.). Cf. *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (adopting a congressional plan with an overall range of one person, not only on the basis that the "deviation" was smaller than the other plan offered (17 people) but also because the adopted plan better met other constitutional criteria such as fairness to minorities and fair distribution of party seats across party lines; even though the court recognized that cases such as *Karcher* consider even minute deviations legally significant, it stated that "rather than reduce congressional redistricting to a 'hair splitting game' we shall focus greater attention on other constitutional criteria that may reveal" a distinction between the two plans more significant than the mathematical distinction. *Id.* at 645 (citing *Carstens v. Lamm*, 543 F. Supp. 68, 85 (D. Colo. 1982)).

⁹³ 521 U.S. 74 (1997).

⁹⁴ 515 U.S. 900 (1995).

⁹⁵ *Id.* at 917-20.

the district court considering the case on remand challenging the Second District on the same grounds. The court declared that district also to be unconstitutional. The court gave the Georgia legislature an opportunity to redraw the plan, but a special session of the Georgia legislature adjourned without adopting a new plan when the House of Representatives and the Senate could not agree on the number of majority-minority districts to be adopted.⁹⁶ The court then drew the plan at issue in this case.

The plan drawn by the district court had an "overall population deviation" (overall range) of 0.35 percent and an "average deviation" of 0.11 percent.⁹⁷ No other plan submitted or considered by the court that was otherwise judged to be a constitutional plan had a lower overall range.⁹⁸ In a 5-4 decision, Justice Kennedy delivered the opinion affirming the decision of the district court. (The dissent focused on grounds other than one person, one vote.)

The Supreme Court affirmed the principle established in *Karcher* that "absolute population equality [is] the paramount objective"⁹⁹ in congressional plans and the holdings in *Chapman v. Meir*¹⁰⁰ and *Connor v. Finch*¹⁰¹ that "[w]ith a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features."¹⁰² The Supreme Court found that the district court did comply with the applicable standards for variance from absolute population equality and effectively enunciated the specific policies and features that justified the variances.¹⁰³

In addition to affirming the status quo regarding one person, one vote standards in congressional redistricting, the court made two other important findings. The first was that, even if the plan had failed on the basis of the one person, one vote challenge, "the solution would not be adoption of the constitutionally infirm, because race-based, plans of appellants Rather, we would require some very minor changes in the court's plan—a few shiftings of precincts—to even out districts with the greatest deviations."¹⁰⁴ The second important finding is the acknowledgment by the court:

That exercise, however, and appellant's objections to the court plan's slight population deviations, are increasingly futile. We are now more than six years from the last census, on which appellant's data is based. The difference between the court plan's average deviation (0.11%) and the Illustrative Plan's

⁹⁶ 521 U.S. 74, 82.

⁹⁷ *Id.* at 99.

⁹⁸ *Id.*

⁹⁹ 521 U.S. at 98 (citing *Karcher v. Daggett*, 462 U.S. 725, 732 (1983)).

¹⁰⁰ 420 U.S. 1 (1975).

¹⁰¹ 431 U.S. 407 (1977).

¹⁰² 521 U.S. 74, 98 (citing *Chapman*, 420 U.S. at 26 and *Connor*, 431 U.S. at 419 -420).

¹⁰³ *Id.* at 99-100.

¹⁰⁴ *Id.* at 100

(0.07%) is 0.04%, which represents 328 people out of a perfect district population of 588,928. The population of Georgia has not stood still. Georgia is one of the fastest growing States, and continues to undergo population shifts and changes In light of these changes, the tinkering appellants propose would not reflect Georgia's true population distribution in any event. The *Karcher* Court, in explaining the absolute equality standard acknowledged that 'census data are not perfect' and that 'population counts for particular localities are outdated long before they are completed.' 462 U.S., at 732. *Karcher* was written only two years from the previous census, however, and we are now more than six years from one. The magnitude of population shifts since the census is far greater here than was likely to be so in *Karcher*. These equitable considerations disfavor requiring yet another reapportionment to correct the deviation.¹⁰⁵

The Standard for Drawing Legislative Plans

*Reynolds v. Sims*¹⁰⁶ is the cornerstone in the development of the federal judiciary's population variance standards for state legislative districting. The case is notable both for the ruling that both houses of a bicameral state legislature must be districted on a population basis and for comments about what population-based districting requires. The opinion by Chief Justice Warren includes the often-quoted comment that "mathematical nicety is not a constitutional requisite,"¹⁰⁷ but nevertheless states that "the overriding objective must be substantial equality of population among the various districts."¹⁰⁸ The Court declined at that time to express any view as to what degree of population equality would or would not be held constitutional, observing that "what is marginally permissible in one State may be unsatisfactory in another depending upon the particular circumstances of the case."¹⁰⁹

An especially significant comment—as matters later developed—differentiated between congressional and legislative districting. The Warren opinion said:

[S]ome distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a state than congressional seats, it may be feasible to use political

¹⁰⁵ 521 U.S. at 100-101. On remand (*Bush v. Vera*, 517 U.S. 952 (1996), affirming judgment of district court that Texas congressional Districts constituted racial gerrymander), the district court in *Vera v. Bush*, 980 F. Supp. 251 (S. D. Tex. 1997), following *Abrams*, declined to address population deviation issues in a court-ordered plan, stating that "[b]ecause any correction for population deviation is unlikely to reflect the current populations of the districts in this court's 1996 interim plan, we decline to adjust for any population deviation between districts." *Id.* at 253.

¹⁰⁶ 377 U.S. 533 (1964).

¹⁰⁷ *Id.* at 569.

¹⁰⁸ *Id.* at 579.

¹⁰⁹ *Id.* at 578.

subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State.¹¹⁰

Mahan v. Howell—Congressional and Legislative Districting Differentiated

Although the Supreme Court recognized a distinction between congressional and legislative districting, it did not specify what differences in equality of population this might permit.

This uncertainty prevailed for nearly nine years, a period during which the 1970 census was completed and the states undertook—and, in many cases, completed—legislative redistricting based on that census. Then, in February 1973, the U.S. Supreme Court announced its decision in *Mahan v. Howell*,¹¹¹ a rather complicated challenge to Virginia's legislative districting plan. *Mahan* involved issues of the constitutionality of multimember districts and the treatment of certain naval personnel “home-ported” in Norfolk, Va., as well as a challenge to the overall range of the plan enacted by the Virginia General Assembly. A federal district court, concluding that the “maximum deviation” (overall range) among house districts was 16.4 percent, declared the plan unconstitutional by reason of that population disparity.

The Supreme Court majority opinion recounted some of the facts stated and conclusions reached in *Reynolds*, including those factors the Court had suggested might justify limited departure from strict population equality in legislative, as opposed to congressional, districting. The opinion, by Justice Rehnquist, stated:

Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, Sec. 2 [of the United States Constitution], broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting The dichotomy between the two lines of cases has consistently been maintained.¹¹²

The majority took note of the Virginia General Assembly's state constitutional authority to enact local legislation dealing with particular political subdivisions. They found that this legislative function was a significant and a substantial aspect of the Virginia legislature's powers and practices and thus justified an attempt to preserve political subdivision boundaries in drawing House of Delegates' districts. The majority concluded that, while the resulting overall range among house districts “may well approach tolerable limits, we do not believe it exceeds them.”¹¹³ Chief Justice Burger and Justices Stewart, White and Blackmun joined the majority opinion; Justice Powell took no part.

¹¹⁰ *Id.*

¹¹¹ 410 U.S. 315 (1973).

¹¹² *Id.* at 322. The evolution of districting technology has not significantly affected this principle. See, e.g., *In Re: Constitutionality of House Joint Resolution 1987*, No. SC02-194, 817 So. 2d 819, 826 (Fla. 2002) (rejecting challengers' assertion that the court should hold states to a stricter standard of population equality because of advances in technology stating that the “Supreme Court has made it clear that the goal of achieving population equality among districts is not paramount.” quoting *Brown v. Thomson*, 462 U.S. 835, 842 (1983)).

¹¹³ *Id.* at 325-329.

Dissenting Justices Brennan, Douglas and Marshall sought, at some length, to refute the contention that a distinction between standards for legislative and congressional districting had been maintained by the Court.¹¹⁴ They suggested that the “total deviation” (overall range) in the Virginia House approached 25 percent, a figure they said placed the plan in the same range as several others invalidated by the Supreme Court in the period between 1967 and 1971.¹¹⁵ (The differing conclusions as to the overall range of the Virginia plan stem from alternative ways of treating the effect of flotal districts included in the plan.)¹¹⁶

The 10-Percent Standard

The distinction between the standard of population equality demanded in congressional districting and that required in state legislative districting again was recognized, and the legislative districting standard somewhat clarified, in June 1973 by the U.S. Supreme Court decisions in *Gaffney v. Cummings*,¹¹⁷ a Connecticut case, and *White v. Regester*,¹¹⁸ a Texas case. Each case arose from a state-drawn legislative districting plan struck down by a federal district court.

Gaffney v. Cummings involved a plan prepared by a bipartisan commission appointed pursuant to Connecticut law. The plan’s “total maximum deviation” (overall range) was 1.8 percent in the Senate and 7.8 percent in the House,¹¹⁹ and one of its objectives was described as “political fairness;” i.e., the political makeup of each house should roughly reflect the proportion of the statewide total vote received by candidates of each major party.¹²⁰ *White v. Regester* concerned the distribution of Texas House seats in a plan, drawn by the state Legislative Redistricting Board, which had a “total variation” (overall range) of 9.9 percent.¹²¹ It was challenged both on that ground and on the complaint that certain multimember districts invidiously discriminated against particular racial or ethnic groups. (The latter complaint was found valid by the district court and upheld by the Supreme Court, that aspect of the case is discussed in chapter 8.)

The majority opinion in each of these cases was written by Justice White for himself, Chief Justice Burger, and Justices Stewart, Blackmun and Rehnquist, the same group that had formed the majority in *Mahan v. Howell*, as well as Justice Powell, who had taken no part in *Mahan*. In the *Gaffney* opinion, after again asserting that the Supreme Court had always maintained a distinction between congressional and state legislative districting cases, Justice White said:

¹¹⁴ 410 U.S. at 340-343.

¹¹⁵ *Id.* at 336.

¹¹⁶ A “flotal” district encompasses within its boundaries two or more other districts, each of which elects a member or members to a legislative or other public body. It is ordinarily used when none of the encompassed districts is, by itself, entitled to another seat, but their combined populations do entitle the area as a whole to additional representation.

¹¹⁷ 412 U.S. 735 (1973).

¹¹⁸ 412 U.S. 755 (1973).

¹¹⁹ 412 U.S. 735, 737.

¹²⁰ *Id.* at 752.

¹²¹ 412 U.S. 755, 761.

Although requiring that the population variations among legislative districts in *Mahan* be justified by substantial state considerations, we did not hold that in state legislative cases any deviations from perfect population equality in the districts, however small, make out prima facie equal protection violations and require that the contested reapportionments be struck down absent adequate state justification.¹²²

The *Gaffney* opinion continued by holding that no prima facie violation of the Equal Protection Clause had been shown and that the “political fairness” objective of *Gaffney* did not invalidate the plan.¹²³ Similarly, in the *White* opinion, the Supreme Court majority declared: “Insofar as the District Court’s judgment rested on the conclusion that the population differential [i.e., overall range] of 9.9 percent ... made out a prima facie equal protection violation under the 14th Amendment, absent special justification, the court was in error.”¹²⁴ The majority opinion observed: “Very likely, larger differences between districts would not be tolerable without justification ‘based on legitimate considerations incident to the effectuation of a rational state policy.’”¹²⁵

Justices Brennan, Douglas and Marshall, dissenting in both *Gaffney* and *White* with a single opinion, asserted that the majority opinions in the two cases had, in effect, established a 10 percent *de minimis* rule for state legislative districting.¹²⁶ Dicta in later Supreme Court decisions in *Chapman v. Meier*,¹²⁷ *Connor v. Finch*,¹²⁸ and *Brown v. Thomson*¹²⁹ have confirmed that a prima facie constitutional violation is not established by an overall range below 10 percent.

*Chapman v. Meier*¹³⁰ involved a redistricting of the North Dakota Senate devised by a federal court, under which the “total variance” (overall range) among districts was slightly more than 20 percent. Justice Blackmun, writing for the unanimous Court, recalled that state-drawn redistricting plans having less than a 10 percent “deviation” (overall range), and where there was no showing of invidious discrimination, were found valid in *Gaffney* and *White*, and that a “total population variance” (overall range) of 16.4 percent was subject to court scrutiny but was found justified in *Mahan* because it served to implement a rational state policy. He held that none of the reasons advanced—absence of a particular racial or political group whose voting power was minimized or canceled, sparse population of the state generally, and desire both to preserve political subdivision boundaries and to continue an

¹²² 412 U.S. 735, 743.

¹²³ *Id.* at 751-752.

¹²⁴ 412 U.S. 755, 763.

¹²⁵ *Id.* at 764.

¹²⁶ *Id.* at 776-777.

¹²⁷ 420 U.S. 1 (1975).

¹²⁸ 431 U.S. 407 (1977).

¹²⁹ 462 U.S. 835 (1983).

¹³⁰ 420 U.S. 1 (1975).

asserted tradition of dividing the state along political subdivision lines and along the Missouri River—was sufficient to justify the “variance” (overall range) of more than 20 percent.¹³¹

In *Connor v. Finch*,¹³² a case from Mississippi decided in May 1977, the Supreme Court's majority opinion, by Justice Stewart, stated that the “maximum deviation” (overall range) of the Mississippi redistricting plan at issue was computed by the federal district court (which drew the plan) to be 16.5 percent for the Senate and 19.3 percent for the House. The opinion noted that these figures “substantially exceed the ‘under-10 percent’ deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments,” and concluded that the district court failed to cite any unique feature of the Mississippi political structure that would justify a “deviation” (overall range) of such magnitude.¹³³ The plan was therefore invalidated. (The only dissenter was Justice Powell, who believed the plan should have been remanded to the district court for such limited changes as were necessary to bring it into conformity with Supreme Court guidelines.)¹³⁴

The only legislative reapportionment case involving population equality arising from the 1980 census and decided by the U.S. Supreme Court was *Brown v. Thomson*.¹³⁵ It concerned the Wyoming House. The Wyoming Constitution requires that each county constitute a legislative district, to be apportioned at least one senator and one representative. Wyoming had 23 counties, among which 64 representatives had been apportioned in accordance with the 1980 census. Niobrara County, the least populous, had 2,924 people, or 60 percent below the ideal of 7,337. The average deviation was 16 percent, and the “maximum deviation” (overall range) was 89 percent.¹³⁶

Justice Powell, in the majority opinion joined by Justices Burger, Rehnquist, O'Connor and Stevens, put to rest any doubt that the Court intends to use a 10-percent standard to judge legislative apportionment plans by saying that the Court's decisions had established, as a general matter, that a legislative apportionment plan with a “maximum population deviation” (overall range) under 10 percent is insufficient to make out a prima facie case of invidious discrimination under the 14th Amendment so as to require justification by the state.¹³⁷

A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State The ultimate inquiry, therefore, is whether the legislature's plan “may reasonably be said to advance [a] rational state policy” and, if so,

¹³¹ *Id.* at 21-26.

¹³² 431 U.S. 407 (1977).

¹³³ *Id.* at 418, 420.

¹³⁴ *Id.* at 430-433.

¹³⁵ 462 U.S. 835 (1983).

¹³⁶ *Id.* at 837-43.

¹³⁷ *Id.* at 842.

“whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.”¹³⁸

Justice Powell stated that consideration must be given to the character as well as the degree of deviations when analyzing a state redistricting plan: “The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause.”¹³⁹

Justice Powell concluded that Wyoming's constitutional policy—followed since statehood—of using counties as representative districts and ensuring that each county had at least one representative, was supported by substantial and legitimate state concerns, and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were no greater than necessary to preserve counties as representative districts, and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas.¹⁴⁰

The Supreme Court has maintained the status quo regarding population equality in legislative redistricting cases. In *Voinovich v. Quilter*,¹⁴¹ the Court in a unanimous opinion delivered by Justice O'Connor reversed a federal district court opinion holding that “total deviations in excess of 10% cannot be justified by a policy of preserving the boundaries of political subdivisions.”¹⁴²

Justice O'Connor validated the 10-percent *de minimis* standard for state legislative districts established in *Gaffney* and *White*, quoting *Brown* that:

[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State. Our decisions have established as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination, and therefore must be justified by the State.¹⁴³

¹³⁸ *Id.* at 842-843 (quoting *Mahan v. Howell*, 410 U.S. 315, 328 (1973)).

¹³⁹ *Id.* at 845-846.

¹⁴⁰ 462 U.S. at 843-846. *But see* how empty of precedential value the case may be, note 195 *infra* and accompanying text.

¹⁴¹ 507 U.S. 146 (1993).

¹⁴² *Id.* at 162.

¹⁴³ *Id.* at 161 (quoting *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983) (internal quotation marks and citations omitted)). The 10-percent standard has been consistently applied in the past two decades by lower courts. *See Rodriguez v. Pataki*, No. 02 Civ. 0618, 308 F. Supp. 2d 346, 363 (S.D.N.Y. 2004) (“Thus, a redistricting plan with a maximum deviation below ten percent is prima facie constitutional . . .” quoting *Marylanders*, 849 F. Supp at 1031), *aff'd* 543 U.S. 997 (2004) (mem.); *Larios v. Cox*, 300 F. Supp. 2d at 1340 (“as a general matter, ‘an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations’ that are insufficient to make out a prima facie case of discrimination” (citation omitted)); *Montiel v. Davis*, No. Civ.A. 01-0447-BH-S, 215 F. Supp. 2d 1279, 1285 (S.D. Ala.

Once the plan's deviation exceeds this threshold, a prima facie case of discrimination has been established and the court must then determine whether the plan advances a rational state policy and whether the deviation exceeds constitutional limits in accordance with *Mahan* and *Brown*.

Proving Discrimination Within the 10-Percent Range

States should not assume that any legislative districting plan having less than a 10-percent overall range is safe from successful challenge. Even if the Court is prepared to allow the states some leeway from redistricting perfection, now that the basic law of population equality is well established, it is unlikely that the justices would be unduly hesitant to strike down a plan having an overall range of less than 10 percent if a challenger were to succeed in raising a suspicion that the plan was not a good faith effort overall or that there was something suspect about the districts involved.¹⁴⁴ However, the decisions in *Gaffney*, *White* and *Brown* indicate that the challenger of such a plan has the initial burden of showing that the plan violates the Equal Protection Clause.¹⁴⁵ The Supreme Court said in the *White* case that it could not "glean an equal protection violation from the single fact

2002) ("It is well settled that '[a legislative] apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.'" quoting *Brown*, 462 U.S. at 842-43); *Holloway v. Hechler*, 817 F. Supp. 617, 623 (S.D. W.Va. 1992) (holding that "the 9.97 percentage figure does not prima facie establish [the plan] to be unconstitutional under . . . the Fourteenth Amendment"), *aff'd* 507 U.S. 956 (1993) (mem.); *Fund for Accurate and Informed Representation Inc. (FAIR) v. Weprin*, 796 F. Supp. 662, 668-69 (N.D. N.Y. 1992) (stating that plaintiffs' concession that the plan at issue had a maximum deviation of 9.43 percent was "fatal" to their "one person, one vote claim because, absent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a prima facie case of discrimination").

¹⁴⁴ In *Marylanders for Fair Representation Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994), the district court stated its belief that "a plan with a maximum deviation below 10 percent could still be successfully challenged, with appropriate proof . . . of an unconstitutional or irrational purpose." The court rejected the argument that the 10-percent rule forecloses challenges to a plan and stated that there should be a remedy available for those whose votes are diluted by a lower-than-10-percent plan that is adopted for unconstitutional or irrational state policy purposes. *Id.* at 1033-1034. The plaintiffs in this case, however, were unable to prove that the plan at issue, with a "maximum deviation" (overall range) of 9.84 percent, was for an illegitimate state purpose or objective. See also *Kidd v. Cox*, No. 1:06-CV-0997-BBM, 2006 WL 1341302, 2006 U.S. Dist. LEXIS 29689, *19 (N.D. Ga. May 16, 2006) (stating that "population deviations of less than ten percent 'are presumptively constitutional, and the burden lies on the plaintiffs to rebut the presumption'" quoting *Larios*, No. 1:03-CV-693-CAP, 300 F. Supp. 2d at 1341, and ruling that even though the plaintiffs' assertions that a plan with a lower-than-10-percent deviation was not consistent with state's legitimate interests and alternative plans with less deviation better accomplished those interests had merit, the assertions did not overcome the presumption of constitutionality); *Rodriguez v. Pataki*, No. 02 Civ. 0618, 308 F. Supp. 2d at 365 (stating that a plan with a maximum deviation below 10 percent, in this case 9.78 percent, can be unconstitutional if challengers demonstrate that an "asserted unconstitutional or irrational state policy is the actual reason for the deviation" quoting *Marylanders*, 849 F. Supp. at 1032, but rejecting plaintiffs' assertion that an improper regionally discriminatory motive existed); *Montiel v. Davis*, No. Civ.A. 01-0447-BH-S, 215 F. Supp. 2d at 1285 (stating that "if the maximum deviation is less than 10 percent, the population disparity is considered *de minimis* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness" and ruling that plans with overall population deviations of 9.78 percent (House) and 9.93 percent (Senate) were constitutional because plaintiffs failed to prove the deviation resulted solely from the promotion of an unconstitutional or irrational state policy); *Bonneville County v. Ysursa*, 2005 Opinion No. 138, 142 Idaho 464, 129 P.3d 1213, 1217, 1219 (2005) (acknowledging that a presumptively constitutional plan can be found unconstitutional if the challenger can demonstrate "that the deviation results from some unconstitutional or irrational state purpose" but ruling that the regional deviation in the plan was not significant enough to "effectively dilute the right to vote" and no intent to regionally discriminate had been demonstrated).

¹⁴⁵ 412 U.S. 735, 740-741; 412 U.S. 755, 763-764; 462 U.S. 835, 842-843.

that two legislative districts in Texas differ from one another by as much as 9.9 percent¹⁴⁶ It indicated in *Gaffney* that a showing by the plaintiff that an alternative plan with a lower "variation" (overall range) could be devised is not in itself sufficient to require a federal court to invalidate a plan adopted by a state legislature.¹⁴⁷

In *Larios v. Cox*,¹⁴⁸ a district court struck down two state legislative plans enacted by the Georgia General Assembly in 2001 and 2002, ruling that the plans violated the one person, one vote principle. Although the district court acknowledged that districting "is intended to have substantial political consequences"¹⁴⁹ and also that "the plaintiffs could not establish a claim of unconstitutional partisan gerrymandering," the court still implied that partisan advantage alone would not be a legitimate state interest under a one person, one vote analysis. However, the court did not address the issue because it found that the state's political goals were "bound up inextricably with the interests of regionalism and incumbent protection."¹⁵⁰ The plan for each house had an overall range of 9.98 percent. Testimony was given by legislators and redistricting staff that they believed there was a safe harbor of "+/- 5%" and that population deviations below that level did not have to be supported by any legitimate state interest.¹⁵¹ In addition, the court found that testimony demonstrated that the protection of rural Georgia and inner-city Atlanta and the protection of Democratic incumbents, instead of "traditional redistricting criteria," were the objectives of the plan creators.¹⁵² The court also noted that the average deviation was above 3 percent in both plans and that the legislators had rejected a number of proposals with smaller deviations.¹⁵³ The court found that regional protectionism, rather than the protection of political subdivisions such as counties, was not a justification for minor deviations in apportionment, noting that, unlike regions, political subdivisions provide many governmental services and that state legislatures often enact local legislation.¹⁵⁴ The court also rejected protection of incumbents as a legitimate consideration if the policy is "not applied in a consistent and neutral way."¹⁵⁵ The district court found the incumbent protection "overexpansive," stating that "[t]he Supreme Court has said only that an interest in avoiding contests between incumbents may justify deviations from exact population equality, not that general protection of incumbents may also justify deviations."¹⁵⁶

¹⁴⁶ 412 U.S. 755, 764.

¹⁴⁷ 412 U.S. 735, 750-751.

¹⁴⁸ No. 1:03-CV-693-CAP, 300 F. Supp. 2d 1320, *aff'd* 542 U.S.947 (2004).

¹⁴⁹ *Id.* at 1351, quoting *Gaffney*, 412 U.S. 735, 753.

¹⁵⁰ *Id.* at 1351-52.

¹⁵¹ *Id.* at 1325.

¹⁵² *Id.* at 1325, 1331-34.

¹⁵³ 300 F. Supp. 2d 1320, 1352, *aff'd* 542 U.S.947 (2004).

¹⁵⁴ *Id.* at 1344-47.

¹⁵⁵ *Id.* at 1347-48.

¹⁵⁶ *Id.* at 1348.

The Supreme Court affirmed the district court decision. The majority did not issue an opinion, but Justices Stevens and Breyer issued a concurring opinion and Justice Scalia issued a dissenting opinion discussing the role of political considerations in the context of a one person, one vote challenge.

In his concurring opinion, Justice Stevens noted approvingly the majority's rejection of the appellant's argument that "a safe harbor for population deviations of less than 10 percent [exists], within which districting decisions could be made for any reason whatsoever."¹⁵⁷ Justice Stevens then revisited the Court's *Vieth*¹⁵⁸ decision concerning partisan gerrymandering, opining that after *Vieth* "the equal-population principle remains the only clear limitation on improper districting practices"¹⁵⁹ and that districting based solely on partisan interests is impermissible.¹⁶⁰ Justice Scalia stated in his dissent that he would have set the case for argument because the Court's cases have not addressed the question of whether a districting plan with a total deviation of less than 10 percent can be invalidated based on "circumstantial evidence of partisan political motivation."¹⁶¹ He opined that to recognize equal-population challenges to plans with overall deviations under 10 percent based on "impermissible political bias"¹⁶² would "more likely encourage politically motivated litigation than . . . vindicate political rights."¹⁶³

A relatively high mean deviation, even within the context of an overall range of less than 10 percent, may make it easier for a challenger to meet the burden of establishing an equal protection violation. In *Gaffney*, the majority opinion pointed out that, although the "total maximum deviations" (overall ranges) were 7.8 percent in the House and 1.8 percent in the Senate,¹⁶⁴ the respective mean deviations were only 1.9 percent and .45 percent.¹⁶⁵ Similarly, the *White* opinion contrasts the 9.9 percent "total variance" of the Texas House districting plan with its mean deviation of 1.8 percent.¹⁶⁶

¹⁵⁷ 542 U.S. 947, 949.

¹⁵⁸ *Vieth v. Jubelirer*, 541 U.S. 267 (2004). This case is discussed in chapter 6.

¹⁵⁹ 542 U.S. at 949.

¹⁶⁰ *Id.* at 951.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 952.

¹⁶⁴ 412 U.S. 735, 737.

¹⁶⁵ *Id.* at 750.

¹⁶⁶ 412 U.S. 755, 764.

It should be noted that there is nothing in the U.S. Constitution or case law to prevent state courts from imposing stricter standards of population equality, under state constitutions, than the federal courts demand. State legislatures also can impose stricter population standards of equality in their redistricting law.¹⁶⁷

“Rational State Policies” That Justify Exceeding the 10-percent Standard

If a state enacts or adopts a plan with an overall population range exceeding 10 percent in either house and the plan is challenged in federal court, the state will have the burden of showing both that the overall range is necessary to implement a “rational state policy”¹⁶⁸ and that it does not dilute or take away the voting strength of any particular group of citizens. The obvious question, then, is: What are the criteria of a “rational state policy” that are constitutionally relevant to legislative districting?

Affording representation to political subdivisions. The majority opinion in *Reynolds v. Sims* stated: “So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible”¹⁶⁹ in legislative districting. That opinion continued: “Considerations of area alone provide an insufficient justification for deviations from the equal-population principle.”¹⁷⁰ It also observed:

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a state may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering.¹⁷¹

In *Mahan v. Howell* the majority reaffirmed the foregoing position and stated:

We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational.

¹⁶⁷ Iowa has required that no senatorial district's population can exceed that of any other by more than 5 percent; no representative district's population may exceed that of any other by more than 5 percent; no congressional district's population can exceed that of any other by more than 1 percent; average deviations from the ideal population for House and Senate districts cannot exceed 1 percent; and in a court challenge the General Assembly has the burden of proof of justifying any variance in excess of 1 percent of the ideal population for any district. Iowa Code § 42.4.

¹⁶⁸ *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 580.

¹⁷¹ *Id.* at 580-581.

And if that be so, the decision of the General Assembly to provide representation to subdivisions qua subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection Clause of the Fourteenth Amendment.¹⁷²

The majority opinion went on to hold that Virginia's "plan for apportionment of the House of Delegates may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions."¹⁷³

In *Brown v. Thomson*,¹⁷⁴ the Supreme Court showed that it was willing to go a long way to support a state's constitutional policy of using counties as legislative districts and ensuring that each county had at least one representative, even when that meant upholding a plan with a "maximum deviation" (overall range) of 89 percent. Writing for the majority, Justice Powell found that the policy, followed since statehood, was supported by substantial and legitimate state concerns and had been applied in a manner free from any taint of arbitrariness or discrimination. He also found that the population deviations were not greater than necessary to preserve counties as representative districts and that there was no evidence of a built-in bias tending to favor particular interests or geographical areas.¹⁷⁵

In 1994, the district court in *Quilter v. Voinovich*¹⁷⁶ relied on *Mahan v. Howell* and *Brown v. Thomson* in ruling that Ohio's legislative district plan with a "total deviation" (overall range) of 13.81 percent for House districts and 10.54 percent for Senate districts did not violate the one person, one vote guarantee because the deviation was justified by the rational state policy of preserving county lines. The court stated, in distinguishing *Quilter* from other cases where a rational state policy argument was rejected, that Ohio had a clearly stated constitutional policy, the plan advanced that policy, and the deviations resulting from the plan were not constitutionally excessive.¹⁷⁷ The court also pointed out that the plan was not advanced arbitrarily as evidenced by the fact that the plan did, in fact, preserve whole counties within the applicable population limits.¹⁷⁸

¹⁷² 410 U.S. 315, 325-326 (1973).

¹⁷³ *Id.* at 328.

¹⁷⁴ 462 U.S. 835 (1983).

¹⁷⁵ *Id.* at 843-846. *Cf.* note 195, *infra*, discussing the decision of *Gorin v. Karpin*, 775 F. Supp. 1430 (D. Wyo. 1991), which found Wyoming's legislative plan to be unconstitutional.

¹⁷⁶ 857 F. Supp. 579 (N.D. Ohio 1994). This decision resulted from the Supreme Court's decision in *Voinovich v. Quilter*, 507 U.S. 146 (1993) to remand an earlier unpublished district court decision holding that "deviations" of more than 10 percent could not be justified by a policy of preserving political boundaries. *See supra* note 141 and accompanying text.

¹⁷⁷ 857 F. Supp. at 584, 586 and 587. *See also Deem v. Manchin*, No. 3:01cv75, 188 F. Supp 2d 651 (N.D. W.Va. 2002) (ruling that 10.92 percent overall range was justified by five rational and legitimate policy goals in text of legislation even if the goals were applied inconsistently due to balancing of competing goals), *aff'd sub nom. Unger v. Manchin*, 536 U.S. 935 (2002) (mem.); *Marylanders for Fair Representation Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (finding a House of Delegates' plan with a "maximum deviation" (overall range) of 10.67 percent constitutional based on proof that the plan preserved state boundaries and preserved core districts without exceeding constitutional limits).

¹⁷⁸ 857 F. Supp. at 585.

Affording representation to political subdivisions was, as of 2008, the only “rational state policy” that had actually been accepted by the Supreme Court as justification for a legislative districting plan that had an overall range greater than 10 percent. The record since 1973 suggests that the Supreme Court is not easily persuaded to accept even this justification. It declined to do so in *Chapman v. Meier*, *Connor v. Finch* and *Langsdon v. Millsaps*.¹⁷⁹

In its unanimous decision in *Chapman* the Court found: “It is far from apparent that North Dakota policy currently requires or favors strict adherence to political lines.”¹⁸⁰ The opinion also noted that it would have been possible to follow such a policy in North Dakota and still achieve a significantly lower overall range.¹⁸¹ Similarly, in a concurring opinion in *Connor*, Justice Blackmun wrote:

I do not understand the [Supreme] Court to disapprove the District Court’s decision to use county lines as districting boundaries wherever possible, even though this policy may cause a greater variation in district population than would otherwise be appropriate for a court-ordered plan. The final plan adopted [by the District Court, and subsequently appealed] appears to produce even greater population disparities than necessary to effectuate the county boundary policy.¹⁸²

In *Langsdon v. Millsaps*, Tennessee’s apportionment plan for its House of Representatives had a “maximum deviation” (overall range) of 13.9 percent and divided 30 counties.¹⁸³ The state argued that the “variance” of 13.9 percent was necessary in order to comply with the state constitutional prohibition on splitting counties, but the plaintiffs presented a plan with a “total population variance” (overall range) of 9.847 percent that split only 27 counties.¹⁸⁴ The district court held, and the Supreme Court affirmed, that, although the “constitutional provision against splitting counties is a rational state policy to be considered in apportionment legislation,” in this case it was “patently unreasonable to justify a 14% variance on the basis of not splitting counties” because, as plaintiffs had shown, fewer counties may be split while decreasing the variance below the goal of 10 percent.¹⁸⁵

*Mahan v. Howell*¹⁸⁶ and *Brown v. Thomson*¹⁸⁷ are the only cases in which the Court has found that affording representation to political subdivisions is a “rational state policy” that justifies exceeding the 10 percent overall range. And in *Brown v. Thomson*, Wyoming’s policy of affording representation to political subdivisions may have been less important to the result than was the peculiar posture in which the case was presented to the Court. The

¹⁷⁹ 836 F. Supp. 447 (W.D. Tenn. 1993), *aff’d* 510 U.S. 1160 (1994) (mem.).

¹⁸⁰ 420 U.S. 1, 25 (1975).

¹⁸¹ *Id.*

¹⁸² 431 U.S. 407, 426 (1977).

¹⁸³ 836 F. Supp. 447, 448.

¹⁸⁴ *Id.* at 448, 450.

¹⁸⁵ *Id.* at 451-52.

¹⁸⁶ 410 U.S. 315 (1973).

¹⁸⁷ 462 U.S. 835 (1983).

appellants chose not to challenge the 89 percent overall range of the plan, but rather to challenge only the effect of giving Niobrara County its own representative.¹⁸⁸ The Legislature had provided that, if this representation for Niobrara County were held unconstitutional, it would be combined with a neighboring county in a single representative district; the House then would consist of 63 representatives.¹⁸⁹ In that event, the overall range would be reduced to 66 percent and the average deviation to 13 percent.¹⁹⁰ Rather than find the whole plan unconstitutional and require the state to be redistricted without respecting county boundaries (as it had done in *Whitcomb v. Chavis*¹⁹¹ for the Indiana General Assembly), the Court chose to confine itself to the marginal effect of giving Niobrara County a representative and found that it was *de minimis*: “These statistics make clear that the grant of a representative to Niobrara County is not a significant cause of the population deviations that exist in Wyoming.”¹⁹²

Justice O'Connor, joined by Justice Stevens, concurred in the result but emphasized that it was only because the challenge was so narrowly drawn that she had voted to reject it:

I have the gravest doubts that a statewide legislative plan with an 89 percent maximum deviation could survive constitutional scrutiny despite the presence of the State's strong interest in preserving county boundaries. I join the Court's opinion on the understanding that nothing in it suggests that this Court would uphold such a scheme.¹⁹³

Justice Brennan, writing for himself and Justices Marshall, Blackmun and White, dissented from the Court's holding, stressing:

[H]ow extraordinarily narrow [the Court's holding] is, and how empty of likely precedential value [I]t is unlikely that any future plaintiffs challenging a state reapportionment scheme as unconstitutional will be so unwise as to limit their challenge to the scheme's single most objectionable feature [P]laintiffs henceforth will know better than to exercise moderation or restraint in mounting constitutional attacks on state apportionment statutes, lest they forfeit their small claim by omitting to assert a big one.¹⁹⁴

¹⁸⁸ *Id.* at 846.

¹⁸⁹ *Id.* at 840.

¹⁹⁰ *Id.* at 847.

¹⁹¹ 403 U.S. 124 (1971).

¹⁹² 462 U.S. at 847.

¹⁹³ *Id.* at 850.

¹⁹⁴ *Id.* at 850-851.

The Court reaffirmed this narrow view of its holding in *Brown* by later citing it as authority for the statement that “no case of ours has indicated that a deviation of some 78% could ever be justified.”¹⁹⁵

Overall ranges in excess of 10 percent appear most likely to be upheld in cases of apportionment. In apportionment, members are apportioned among political subdivisions rather than a district being drawn for each member. However, such schemes have been upheld only when the number of members greatly exceeds the number of political subdivisions among which they are apportioned. In *Reynolds v. Sims*, the Alabama Legislature apportioned 106 seats among 67 counties, with each county being assured one seat. This resulted in an overall range of 16:1. In overturning the apportionment scheme, the Court stated:

[A] State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible.¹⁹⁶

In *Abate v. Mundt*, 18 members of county government were apportioned among five cities, resulting in an overall range of 11.9 percent. The Court noted that:

[A] desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality [T]he facts that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes.¹⁹⁷

¹⁹⁵ *Bd. of Estimate v. Morris*, 489 U.S. 688, 702 (1989). This statement was reiterated in *Gorin v. Karpan*, 775 F. Supp. 1430 (D. Wyo. 1991), a district court case in which, unlike *Brown*, the overall range of Wyoming's state legislative plan was being challenged. In *Gorin* the challenged plan for the House had a “maximum deviation” (overall range) of approximately 83 percent and the “maximum population deviation” for the Senate was approximately 58 percent. *Id.* at 1439. The defendant tried to justify the deviations using the same argument presented in *Brown*—preservation of county boundaries. *Id.* at 1442. While noting that such preservation was, in fact, a legitimate state policy, the Court stated that the policy was carried to such an “unconstitutional extreme” that it “emasculated the ‘one person, one vote’ principle.” *Id.* at 1444. The strength of the policy argument had also been diminished by the fact that other plans were offered that, for the most part, maintained county boundaries while reducing population inequality. *Id.*

¹⁹⁶ 377 U.S. 533, 581 (1964).

¹⁹⁷ 403 U.S. 182, 185 (1971).

In *Brown v. Thomson*, the Wyoming Legislature was apportioning 64 representatives among 23 counties. The Court noted with approval *Schaefer v. Thomson*,¹⁹⁸ where a three-judge district court held that the apportionment of the Wyoming Senate of 25 senators among 23 counties, with the two largest counties each having two senators, so far departed from the principle of population equality that it was unconstitutional.¹⁹⁹ But the Court went on to state: "The Wyoming House of Representatives presents a different case because the number of representatives is substantially larger than the number of counties."²⁰⁰

In *Bd. of Estimate v. Morris*,²⁰¹ the charter of the city of New York had created a Board of Estimate composed of eight ex officio members, each of whom was an elected official. The mayor, comptroller and city council president were elected citywide and had two votes each. The five borough presidents were elected by their boroughs and had one vote each. The overall range of population among the five boroughs was 132 percent. The overall range of population per vote on the board, including the three at-large members with two votes each, was 78 percent. The Supreme Court held that the city had failed to carry its burden of justifying "such a substantial departure from the one-person, one-vote ideal."²⁰²

Thus, the use of apportionment among political subdivisions may afford an acceptable scheme where the number of seats apportioned is substantially larger than the number of political subdivisions among which they are apportioned. In 1993, the apportionment of 435 seats in the federal House of Representatives among the 50 states resulted in an overall range of 76.2 percent.²⁰³ After the 2000 census, the overall range was 63.3 percent.²⁰⁴

Other state policies. The Supreme Court has, at least in dicta in *Karcher v. Daggett*, said that other state policies besides affording representation to political subdivisions can be used to justify a variance from equal population.

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives The State must, however, show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the

¹⁹⁸ 240 F. Supp. 247 (D. Wyo. 1964).

¹⁹⁹ 462 U.S. 835, 837 (1983).

²⁰⁰ *Id.* at 845, n. 7.

²⁰¹ 489 U.S. 688 (1989).

²⁰² *Id.* at 703.

²⁰³ Wyoming had the smallest population district, 453,588, and Montana had the largest, 799,065. U.S. Census Bureau, *1990 Census of Population and Housing, Summary Tape Files 1/3, Congressional Districts of the 103rd Congress* on CD-ROM (Washington, D.C.: U.S. Census Bureau, 1993).

²⁰⁴ After the 2000 census, Wyoming again had the smallest population district, 495,304, and Montana the largest, 905,316. U.S. Census Bureau, *Congressional Apportionment: Census 2000 Brief* (Washington, D.C.: U.S. Census Bureau, July 2001), available at www.census.gov/prod/2001pubs/c2kbr01-7.pdf.

availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely. By necessity, whether deviations are justified requires case-by-case attention to these factors.²⁰⁵

Since *Karcher v. Daggett* was a congressional redistricting case, where strict equality of population is required, these additional "rational state policies" would presumably apply with even greater force in a legislative redistricting case.

Legislative Plans Drawn by a Court

An interesting feature of *Chapman v. Meier* and *Connor v. Finch* is the Supreme Court's indication that, where it becomes necessary for a federal court to draw a state legislative districting plan, the 10-percent standard does not apply:

A court-ordered plan . . . must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.

...

[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan . . . with minimal population variance cannot be adopted.²⁰⁶

Although the 10-percent standard does not apply, "[t]his is not to say . . . that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting."²⁰⁷

Conclusion

The U.S. Supreme Court has determined that the Apportionment Clause of Article I, Section 2, of the U.S. Constitution requires that the population of all the congressional districts in a state be as nearly equal in population as practicable.²⁰⁸ There are no *de minimis* variations, which could practicably be avoided, without justification.²⁰⁹ Justification might include making districts compact, respecting municipal boundaries, preserving

²⁰⁵ 462 U.S. 725, 740-741 (1983).

²⁰⁶ *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); partially quoted in *Connor v. Finch*, 431 U.S. 407, 417-418 (1977).

²⁰⁷ 420 U.S. 1, 27, n. 19 (citations omitted).

²⁰⁸ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²⁰⁹ *Karcher v. Daggett*, 462 U.S. 725, 734 (1983).

the cores of prior districts, or avoiding contests between incumbent representatives.²¹⁰ However, the state must show with some specificity that a particular objective required the specific deviations in its plan.²¹¹

The Court has held that, under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, both houses of a state legislature must have districts that are substantially equal in population.²¹² However, the Court has distinguished between congressional plans and legislative plans, saying that a legislative apportionment plan is not *prima facie* invalid because of population inequality as long as its overall range is less than 10 percent.²¹³ Even if the overall range is more than 10 percent, a state may be able to justify the inequality of population by showing that it was necessary to provide representation to political subdivisions, as political subdivisions,²¹⁴ or to avoid splitting political subdivisions.²¹⁵ However, this may be possible only where the number of representatives is apportioned among a substantially smaller number of political subdivisions.²¹⁶

Table 3 shows the degree of population equality attained by redistricting plans based on the 2000 census.

²¹⁰ *Id.* at 740-741.

²¹¹ *Id.* See also *Abrams v. Johnson*, 521 U.S. 74, 99-101 (1997).

²¹² *Reynolds v. Sims*, 377 U.S. 533 (1964).

²¹³ *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

²¹⁴ *Mahan v. Howell*, 410 U.S. 315 (1973); *Brown v. Thomson*, 462 U.S. 835 (1983).

²¹⁵ *Voinovich v. Quilter*, 507 U.S. 146 (1993).

²¹⁶ *Cf.*, *Brown v. Thomson*, 462 U.S. 835 (1983) (64 representatives apportioned among 23 counties, approved) and *Schaefer v. Thomson*, 240 F. Supp. 247 (D. Wyo. 1964) (25 senators apportioned among 23 counties, rejected).

Table 3. Population Equality of 2000s Districts

State	State House		State Senate		Congressional		
	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	People Overall Range
Alabama	42,353	9.93%	127,060	9.73%	636,300	0.00%	0
Alaska	15,673	9.96%	31,346	9.32%	N/A	N/A	N/A
Arizona	171,021	3.79%	171,021	3.79%	641,329	0.00%	0
Arkansas	26,734	9.87%	76,383	9.81%	668,350	0.10%	5698
California	423,395	0.00%	846,792	0.00%	639,087	0.00%	1
Colorado	66,173	4.88%	122,863	4.95%	614,465	0.00%	2
Connecticut	22,553	9.20%	94,599	8.03%	681,113	0.00%	0
Delaware	19,112	9.98%	37,314	9.96%	N/A	N/A	N/A
Florida	133,186	2.79%	399,559	0.03%	639,295	0.00%	1
Georgia	45,480	1.95%	146,187	1.93%	629,727	0.00%	2
Hawaii	22,046	20.10%	44,973	38.90%	605,769	0.31%	1,899
Idaho	36,970	9.71%	36,970	9.71%	646,977	0.60%	3,595
Illinois	105,248	0.00%	210,496	0.00%	653,647	0.00%	0
Indiana	60,805	1.92%	121,610	3.80%	675,609	0.02%	102
Iowa	29,263	1.89%	58,526	1.46%	585,265	0.02%	134
Kansas	21,378	9.95%	66,806	9.27%	672,105	0.00%	33
Kentucky	40,418	10.00%	106,362	9.53%	673,628	0.00%	4
Louisiana	42,561	9.88%	114,589	9.95%	638,425	0.04%	240
Maine	8,443	9.33%	36,426	3.57%	637,462	0.00%	23
Maryland	37,564	9.89%	112,692	9.96%	662,060	0.00%	2
Massachusetts	39,682	9.68%	158,727	9.33%	634,910	0.39%	2476
Michigan	90,350	9.92%	261,538	9.92%	662,563	0.00%	1
Minnesota	36,713	1.56%	73,425	1.35%	614,935	0.00%	1
Mississippi	23,317	9.98%	54,705	9.30%	711,165	0.00%	10
Missouri	34,326	6.08%	164,565	6.81%	621,690	0.00%	1
Montana	9,022	9.85%	18,044	9.81%	N/A	N/A	N/A
Nebraska	N/A	N/A	34,924	10.00%	570,421	0.00%	0

State	State House		State Senate		Congressional		
	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	Ideal District Size	Percent Overall Range	People Overall Range
Nevada	47,578	1.97%	95,155	9.91%	666,086	0.00%	6
New Hampshire	3,089	9.26%	51,491	4.96%	617,893	0.10%	636
New Jersey	210,359	1.83%	210,359	1.83%	647,257	0.00%	2
New Mexico	25,986	9.70%	43,311	9.60%	606,349	0.03%	166
New York	126,510	9.43%	306,072	9.78%	654,361	0.00%	1
North Carolina	67,078	9.98%	160,986	9.96%	619,178	0.00%	1
North Dakota	13,664	10.00%	13,664	10.00%	N/A	N/A	N/A
Ohio	114,678	12.46%	344,035	8.81%	630,730	0.00%	0
Oklahoma	34,165	2.05%	71,889	4.71%	690,131	0.00%	1
Oregon	57,023	1.90%	114,047	1.77%	684,280	0.00%	1
Pennsylvania	60,498	5.54%	245,621	3.98%	646,371	0.00%	2
Rhode Island	13,978	9.88%	27,587	9.83%	524,160	0.00%	6
South Carolina	32,355	4.99%	87,218	9.87%	668,669	0.00%	1
South Dakota	21,567	9.71%	21,567	9.69%	N/A	N/A	N/A
Tennessee	57,468	9.99%	172,403	9.98%	632,143	0.00%	5
Texas	139,012	9.74%	672,639	9.71%	651,619	0.00%	15
Utah	29,776	8.00%	77,006	7.02%	744,390	0.00%	1
Vermont	4,059	18.99%	20,294	14.73%	N/A	N/A	N/A
Virginia	70,785	3.90%	176,963	4.00%	643,501	0.00%	38
Washington	120,288	0.30%	120,288	0.30%	654,902	0.00%	7
West Virginia	18,083	9.98%	106,374	10.92%	602,781	0.22%	1,313
Wisconsin	54,179	1.60%	162,536	0.98%	670,459	0.00%	5
Wyoming	8,230	9.81%	16,451	9.51%	N/A	N/A	N/A

Note: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming received only one seat in the U.S. House of Representatives, so their congressional plans did not have an overall range.

Source: NCSL, 2009.

Table 4. Units of Geography Used to Draw 2000s Plans

State	House	Senate	Congressional
Alabama	Census blocks	Census blocks	Counties, census blocks
Alaska	Census blocks (split)	Census blocks (split)	N/A
Arizona	Census blocks	Census blocks	Census blocks
Arkansas	Census blocks	Census blocks	Counties
California	Census blocks	Census blocks	Census blocks
Colorado	Census blocks	Census blocks	Census blocks
Connecticut	Census blocks	Census blocks	Census blocks
Delaware	Census blocks (split)	Census blocks (split)	N/A
Florida	Counties; census tracts, block groups, blocks	Counties; census tracts, block groups, blocks	Counties; census tracts, block groups, blocks
Georgia	Census blocks	Census blocks	Census blocks
Hawaii	Census blocks	Census blocks	Census blocks
Idaho	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
Illinois	Census blocks	Census blocks	Census blocks (split)
Indiana	VTDs, census blocks (split)	VTDs, census blocks (split)	VTDs, census blocks (split)
Iowa	Townships, precincts	House districts	Counties
Kansas	VTDs, census blocks (split)	VTDs, census blocks (split)	VTDs, census blocks (split)
Kentucky	Census blocks (split)	Census blocks (split)	Census blocks (split)
Louisiana	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
Maine	Census blocks	Census blocks	Census blocks
Maryland	Precincts, census blocks	Precincts, census blocks	Precincts, census blocks
Massachusetts	Precincts	Precincts	Precincts
Michigan	Census blocks	Census blocks	Census blocks
Minnesota	Census blocks	Census blocks	Census blocks
Mississippi	Precincts, census blocks	Precincts, census blocks	Precincts, census blocks
Missouri	Census blocks	Census blocks	VTDs, census blocks
Montana	Census blocks	Census blocks	N/A
Nebraska	N/A	Precincts, census blocks	Precincts, census blocks
Nevada	Census blocks	Census blocks	Census blocks

State	House	Senate	Congressional
New Hampshire	Towns, wards, census blocks (split)	Towns	Towns
New Jersey	Census blocks	Census blocks	Census blocks
New Mexico	Precincts	Precincts	Precincts
New York	Census blocks	Census blocks	Census blocks
North Carolina	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
North Dakota	Census blocks (split)	Census blocks (split)	N/A
Ohio	Political subdivisions	Political subdivisions	Census blocks
Oklahoma	Census blocks	Census blocks	Census blocks
Oregon	Census blocks	Census blocks	Census blocks
Pennsylvania	Census blocks (split)	VTDs, MCDs	VTDs, census blocks (split)
Rhode Island	Census blocks	Census blocks	Census blocks
South Carolina	Census blocks	VTDs, census blocks	Census blocks
South Dakota	Senate districts, VTDs	VTDs, census blocks	N/A
Tennessee	Census blocks	Census blocks	Census blocks
Texas	Census blocks	Census blocks	Census blocks
Utah	Census blocks	Census blocks	Census blocks
Vermont	Towns, census blocks (split)	Towns, census blocks (split)	N/A
Virginia	Precincts, census blocks	Precincts, census blocks	Precincts, census blocks
Washington	VTDs, census blocks	VTDs, census blocks	VTDs, census blocks
West Virginia	VTDs, census blocks	VTDs, census blocks	Counties
Wisconsin	Wards, census blocks (split)	Wards, census blocks (split)	Wards, census blocks (split)
Wyoming	Census blocks (split)	Census blocks (split)	N/A

Note: VTD = Voting Tabulation District (precinct, ward, electoral district, etc.)

Source: NCSL, 2009.