Missouri Law Review

Volume 78
Issue 3 *Summer 2013*

Article 6

Summer 2013

Deciding Where to Draw the Line: Compactness as a Protection against Gerrymandering in Missouri Redistricting

Stephanie Bradshaw

NOTE

Deciding Where to Draw the Line: Compactness as a Protection Against Gerrymandering in Missouri Redistricting

Pearson v. Koster, 367 S.W.3d 36 (Mo. 2012) (en banc)

STEPHANIE BRADSHAW*

I. INTRODUCTION

Every ten years, the release of the U.S. Census triggers a tidal wave of political ramifications that ripple from coast to coast. The census reflects the fluctuation in population among the states, necessitating a shuffling of, among other things, state legislative and congressional districts.[1] States are awarded Congressional representatives based on their populations: the greater the population, the greater the representation.[2] While some states gain representatives and others lose them, the outcome is the same: districts must be redrawn.[3] In what has been likened to a "periodic comet," challenges by citizens to this redistricting frequently arise.[4] Behind this litigation is often the fear that the authorities entrusted with the task of producing district maps will abuse their discretion and, in a practice known as "gerrymandering," draw districts that dilute the voting strength of particular groups.[5] Article III, section 45 of the Missouri Constitution contains a provision that acts to combat this practice, requiring that districts be "as compact . . . as may be."[6] Mis-

* B.J., University of Missouri, 2009; J.D. Candidate, University of Missouri School of Law, 2014; Senior Lead Articles Editor, *Missouri Law Review*, 2013-14. I would like to extend my sincere thanks to Professor Erin Hawley for her advice, insight, and encouragement throughout the writing process.

1. *See* Radogno v. Ill. State Bd. of Elections, No. 1:11-cv-04884, 2011 WL 5025251, at *1 (N.D. Ill. Oct. 21, 2011).

2. U.S. CENSUS BUREAU, STRENGTH IN NUMBERS: YOUR GUIDE TO CENSUS 2010 REDISTRICTING DATA FROM THE U.S. CENSUS BUREAU 1, 3 (2010), *available at* http://www.census.gov/rdo/pdf/StrengthInNumbers2010.pdf [hereinafter STRENGTH IN NUMBERS].

3. *See* Pearson v. Koster (*Pearson I*), 359 S.W.3d 35, 37 (Mo. 2012) (en banc).

4. *Radogno*, 2011 WL 5025251, at *1.

5. *See id.* at *1-3; BLACK'S LAW DICTIONARY 756 (9th ed. 2009) (gerrymandering is defined as "[t]he practice of dividing a geographical area into electoral districts . . . to give one political party an unfair advantage by diluting the opposition's voting strength.").

6. MO. CONST. art. III, § 45.

souri courts have consistently expressed the necessity of this "compactness requirement," stating, "The protection of this constitutional provision applies to each Missouri voter, in every congressional district. 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.'"[7] However, the effect of a century of redistricting litigation, culminating in the recent Supreme Court of Missouri case *Pearson v. Koster*, has been to weaken this provision rather than strengthen it. In order to reinforce state protections against gerrymandering, Missouri courts must interpret this constitutional requirement in a way that ultimately holds redistricting authorities responsible for justifying gross deviations from the standard of compactness.

II. FACTS AND HOLDING

With the release of the 2010 Census in early 2011 – and as a result of a slump in population growth compared to that of other states – Missouri lost one member of its delegation to the U.S. House of Representatives, reducing the number of Missouri representatives from nine to eight.[8] Pursuant to the state constitution, Missouri's General Assembly (General Assembly) is vested with the duty to reevaluate, and subsequently redistrict, the state's congressional districts.[9] Article III, section 45 of the Missouri Constitution provides:

> When the number of representatives to which the state is entitled in the House of the Congress of the United States under the census . . . is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.[10]

Upon holding hearings throughout the state, the General Assembly approved the new congressional redistricting map (the Map) in April 2011, and it went into effect as part of House Bill 193.[11] After surviving a veto by Governor Jay Nixon, the Map was officially adopted on May 4, 2011.[12]

Following its release, two groups of plaintiffs immediately challenged the Map.[13] Both groups sought the same outcome: that the court invalidate

7. *Pearson I*, 359 S.W.3d at 39 (quoting Burdick v. Takushi, 504 U.S. 428, 441 (1992)).

8. Brief of the Appellant, Pearson v. Koster (*Pearson II*), 367 S.W.3d 36 (Mo. 2012) (en banc) (No. SC92326), 2012 WL 662844, at *1.

9. *Pearson II*, 367 S.W.3d at 41-42.

10. MO. CONST. art. III, § 45.

11. Brief of the Appellant, *supra* note 8, at *2.

12. *Pearson I*, 359 S.W.3d at 38.

13. *Id.*

the Map to prevent the government from conducting elections under its framework and, ultimately, that the General Assembly draw a new map to take its place.[14] The "Pearson plaintiffs" and the "McClatchey plaintiffs"[15] (collectively referred to as Plaintiffs) filed separate petitions contesting the validity of the Map.[16] Both actions were filed in the Circuit Court of Cole County in Jefferson City.[17] Naming Attorney General Chris Koster and Secretary of State Robin Carnahan as defendants, the Pearson plaintiffs alleged several claims, chief among which was the assertion that the Map failed to meet the constitutional standard that districts be as compact as may be.[18] The McClatchey plaintiffs, who named Carnahan as the sole defendant, also took issue with the compactness of the Map's districts.[19] Specifically, Plaintiffs alleged that districts 3 and 5 were "particularly suspect" due to the meandering nature of their boundary lines.[20] Plaintiffs characterized this lack of compactness as an attempt at political gerrymandering by the General Assembly.[21] Defendants Koster, Carnahan, and intervening defendants State Representative John J. Diehl and State Senator Scott T. Rupp[22] (collectively referred to as Defendants) responded by filing motions to dismiss or, in the

14. *Id.* Although Plaintiffs did not specifically demand that a new map be drawn, if they had received their requested relief a new map would have naturally followed. *See* Preisler v. Doherty, 284 S.W.2d 427, 437 (Mo. 1955) (en banc) (ordering the redistricting authority, upon a finding that the prior map was unconstitutional, to create new, valid districts).

15. The Pearson plaintiffs are Kenneth Pearson, Joan Bray, Timothy Brown, Mildred Conner, Brian Murphy, and Phoebe Ottomeyer. The McClatchey plaintiffs are Stan McClatchey, Ivan Griffin, Laura Meeks, Patricia Smith, Molly Teichmann, Donna Turk, and Matt Ullman. *Pearson II*, 367 S.W.3d 36, 42 n.1 (Mo. 2012) (en banc).

16. *Pearson I*, 359 S.W.3d at 38.

17. *Id.*

18. *Id.* at 40. In addition to their compactness claim, the Pearson plaintiffs also presented additional claims to the trial court. These claims include: that the Map violated Article I, sections 1 and 2 of the Missouri Constitution in that it "deprives equal protection of rights" and is not "instituted solely for the good of the whole." *Id.* at 40-42.

19. *Id.* at 40. Like the Pearson plaintiffs, the McClatchey plaintiffs also presented other claims, including the argument that the Map "reflects bipartisan gerrymandering." *Id.*

20. *Id.*; *see also id.* at 43 app. A.

21. *See* Brief of Appellants, *Pearson I*, 359 S.W.3d 35 (Mo. 2012) (en banc) (No. SC92200), 2011 WL 7005504, at *12 (alleging that the General Assembly's merger of highly urban areas with highly rural areas to create district 5 was "an act of political gerrymandering").

22. Diehl and Rupp intervened in their capacity as chairs of the redistricting committees for the House and Senate, respectively. *Pearson II*, 367 S.W.3d 36, 42 n.2 (Mo. 2012) (en banc).

alternative, for judgment on the pleadings.[23] After oral arguments, the court entered an order dismissing both cases.[24] Plaintiffs subsequently appealed to the Supreme Court of Missouri.[25]

In *Pearson I*,[26] the supreme court consolidated the two cases, officially merging the Pearson plaintiffs and the McClatchey plaintiffs into a single group.[27] Reviewing Plaintiffs' claim regarding the districts' compactness, the court stated that the evaluation should be limited to an objective inquiry: whether, under the evidence presented, the districts actually comply with the constitutional mandate that they be "as compact . . . as may be."[28] In articulating this objective standard, the court expressly rejected the proposition that good faith, or lack thereof, by the General Assembly should have any bearing on the analysis.[29] The court held that the trial court erred in dismissing Plaintiffs' claims regarding the compactness of the Map's districts.[30] However, the court did not make any factual determinations, instead stating, "It is a question of fact, yet to be tried" whether the districts meet the standard of compactness.[31] Consequently, the court remanded the case to the trial court with instructions to conduct an evidentiary hearing on this issue.[32] On remand, both Plaintiffs and Defendants presented evidence regarding the compactness of the challenged districts.[33] Once more, the trial court entered judgment in favor of Defendants, finding that Plaintiffs had failed to show that the districts did not meet the standard of compactness.[34] The court emphasized that the requirement does not necessitate absolute precision.[35] Plaintiffs again appealed to the supreme court.[36]

The supreme court took up Plaintiffs' second appeal in the instant case. In *Pearson II*,[37] Plaintiffs asserted that "the trial court's judgments erroneously interpret the constitutional standard for compactness and . . . the judgments

23. *Pearson I*, 359 S.W.3d at 38.

24. *Id.*

25. *Pearson II*, 367 S.W.3d at 42.

26. The court refers to Plaintiffs' first appeal to the Supreme Court of Missouri as "*Pearson I*." This terminology will be used throughout.

27. *Pearson II*, 367 S.W.3d at 42.

28. *Pearson I*, 359 S.W.3d at 40.

29. *Id.* at 39-40.

30. *Id.* at 40.

31. *Id.* The court affirmed the trial court's dismissal of Plaintiffs' other claims. *See id.* at 40-43. For discussion of these additional claims, see *supra* notes 18-19.

32. *Pearson I*, 359 S.W.3d at 43.

33. *Pearson II*, 367 S.W.3d 36, 42 (Mo. 2012) (en banc).

34. *Id.*

35. *Id.*

36. *Id.*

37. While the court does not use this terminology in its opinion, for purposes of clarity the instant case will be referred to as "*Pearson II*" throughout.

are against the weight of the evidence."[38] The court focused on the language of the compactness provision, again setting forth an objective standard and rejecting the argument that good faith by the legislature is a relevant consideration.[39] Affirming the trial court's judgment, the court found that it "did not erroneously declare the meaning of 'as compact . . . as may be'" under the constitution and that – deferring to the trial court's findings of fact – Plaintiffs failed to prove that the Map violated this standard.[40] Like the trial court, the supreme court stressed that the compactness standard is not a provision that can be met with complete accuracy.[41] Instead, the court emphasized that "mandatory and permissible recognized factors can impact the configuration of district boundaries," including natural and historical boundary lines and the boundaries of political subdivisions.[42] The court held that the Map did not contravene Article III, section 45 of the Missouri Constitution because the irregular shapes of the contested districts were the result of such permissible factors.[43] Therefore, the Map was enforceable.[44]

III. LEGAL BACKGROUND

As was the case in *Pearson II*, issues of redistricting typically arise in the wake of the release of the U.S. Census. Every ten years, the U.S. Census Bureau, a subdivision of the U.S. Department of Commerce, conducts a nationwide census.[45] Questionnaires delivered to households across the nation generate a slew of data, measuring the population of cities, counties, and states.[46] These statistics perform various functions, one of which is to ensure that legislative districts, both on the state and federal levels, reflect their respective population numbers.[47] Article I, section 2 of the U.S. Constitution, establishing the census, states in pertinent part:

> Representatives . . . shall be apportioned among the several States which may be included within this union, according to their respective Numbers . . . . The actual enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and

38. *Pearson II*, 367 S.W.3d at 41.
39. *Id.* at 46.
40. *Id.* at 47-48, 51.
41. *Id.* at 41.
42. *Id.* at 41, 50.
43. *Id.* at 51.
44. *See id.* at 41.
45. STRENGTH IN NUMBERS, *supra* note 2, at 1.
46. *Id.*
47. *Id.* at 3.

> within every subsequent Term of ten Years, in such Manner as they shall by Law direct.[48]

Thus, the release of new census data necessitates the redrawing of district lines.[49] The authority charged with performing this redistricting varies depending on whether districts are being drawn for state or federal legislative purposes.[50] In cases of federal legislative redistricting in Missouri, the General Assembly is vested with the power to divide the state into districts.[51] However, as a result of this power, new maps often give rise to a fear that the General Assembly will abuse its discretion and draw districts that work to weaken the vote of particular groups, specifically the minority political party.[52] This tactic, known as political gerrymandering, is "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength."[53]

Due to these concerns, legislative power in matters of redistricting is not absolute; both the federal government and state constitutional provisions place limits on the discretion of the General Assembly in making its apportionments.[54] In analyzing the Supreme Court of Missouri's holding in *Pearson II*, it is important to examine not only Missouri's constitutional provisions and judicial precedent, but also the standard imposed by the federal courts. Part A of this section will discuss the federal standard, in particular the "one person, one vote" principle established by the U.S. Supreme Court in *Wesberry v. Sanders*.[55] Part B will explore a century of Missouri redistricting

48. U.S. CONST. art. I, § 2, cl. 3.

49. *See, e.g.*, Radogno v. Ill. State Bd. of Elections, 1:11-CV-04884, 2011 WL 5025251, at *1 (N.D. Ill. Oct. 21, 2011).

50. *See* MO. CONST. art. III, § 45 (directing that congressional redistricting be performed by the General Assembly); MO. CONST. art. III, § 7 (directing that state legislative redistricting be performed by specially-appointed commissions).

51. MO. CONST. art. III, § 45. It should be noted that state House and Senate redistricting is not performed by the General Assembly; rather, such redistricting is effectuated by commissions appointed by the governor. *Id.* art. III, § 7. However, these commissions are still bound by a requirement that districts be "as compact . . . as may be." *Id.* art. III, § 5. Missouri courts have interpreted all of the state constitution's compactness provisions in the same manner. *See infra* Part III.B.1-2.

52. *See* Kurtis A. Kemper, Annotation, *Application of the Constitutional "Compactness Requirement" to Redistricting*, *in* 114 A.L.R. 5TH 311, 323-24 (West 2003).

53. BLACK'S LAW DICTIONARY 756 (9th ed. 2009). The type of gerrymandering that is referenced here, and will be referenced throughout, is political gerrymandering. Racial gerrymandering, or the dilution of minority voting strength, is not the focus of this Note.

54. *See* Kemper, *supra* note 52, at 323.

55. *See infra* Part III.A.

precedent, examining both the evolution of the compactness requirement and the expanding scope of legislative discretion.[56]

A. "One Person, One Vote"

The U.S. Supreme Court has interpreted the Constitution to impose restrictions on legislative redistricting power.[57] In 1964, the Court handed down two landmark decisions, establishing that both federal congressional districts and state legislative districts must be apportioned on the basis of population.[58] This standard is founded on the principle of "one person, one vote," advanced by the Court in its decision in *Wesberry v. Sanders*.[59] In *Wesberry*, which arose as a result of inequality of population among Georgia's congressional districts, the Court stated that the aim of Article I, section 2 of the Constitution was to "mak[e] equal representation for equal numbers of people the fundamental goal for the House of Representatives."[60] In particular, the Court declared that the Constitution's directive that "[t]he House of Representatives shall be composed of Members chosen . . . *by the People of the several States*" means that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[61]

Less than four months later, the Court in *Reynolds v. Sims* confirmed that this standard of population equality extended to state legislative districts as well.[62] In response to a dispute regarding the apportionment of Alabama's legislature, the Court held that the Equal Protection Clause of the Fourteenth Amendment demanded that state legislative seats be assigned on the basis of population.[63] The Court also declared that this apportionment must be made in good faith.[64] The Court stated:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.[65]

56. *See infra* Part III.B.
57. *See* Kemper, *supra* note 52, at 323.
58. *See* Wesberry v. Sanders, 376 U.S. 1, 18 (1964); Reynolds v. Sims, 377 U.S. 533, 569 (1964).
59. *See Wesberry*, 376 U.S. at 7-8, 18.
60. *Id.* at 2-3, 18.
61. *Id.* at 4, 7-8; *see also* U.S. CONST. art. I, § 2, cl. 1 (emphasis added).
62. *Reynolds*, 377 U.S. at 568.
63. *Id.* at 536-37, 568.
64. *Id.* at 577.
65. *Id.*

Thus, the Court in *Reynolds* emphasized that not only must districts be apportioned to achieve population equality, but that the subjective intent of the authority charged with redistricting is relevant.[66] This good faith standard plays an important role in the adjudication of redistricting challenges, as federal courts utilize a burden-shifting framework to ensure that districts are not drawn arbitrarily.[67] If a plaintiff asserting unconstitutional population disparities among districts shows that the legislature did not make a good faith effort to achieve equality, the burden shifts to the defendant to prove that there was a reasonable basis for the variance.[68] Some states also incorporate a good faith standard in cases of redistricting.[69] Although not mandated by any state constitutional provision, courts in Iowa, New Jersey, and Maryland have, upon a showing of "noncompactness," required the state legislature to justify deviations from compactness.[70] Missouri courts have declined to employ such a framework.[71]

As a result of this "one person, one vote" principle, redistricting authorities are required to consider population equality when drawing new districts.[72] In addition, under *Reynolds*, deviations from this standard must be made in good faith.[73] This requirement ultimately acts to curb the power of these authorities in their redistricting efforts. Yet, other than the standard of population equality, federal courts provide little protection against the unreasonable exercise of legislative discretion.[74] In 2004, a plurality of the U.S. Supreme Court held that claims of political gerrymandering were nonjusticiable because such claims lack "judicially discernible and

66. *See id.*

67. *Pearson II*, 367 S.W.3d 36, 46 (citing Karcher v. Daggett, 462 U.S. 725, 730-31 (1983)).

68. *Id.*

69. *See In re* Legislative Districting of Gen. Assembly, 193 N.W.2d 784, 789-90 (Iowa 1972); Jackman v. Bodine, 262 A.2d 389, 395 (N.J. 1970); *In re* Legislative Districting of the State, 805 A.2d 292, 306, 324 (Md. 2002).

70. *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d at 791; *Jackman*, 262 A.2d at 395; *In re Legislative Districting of the State*, 805 A.2d at 305.

71. *Pearson II*, 367 S.W.3d at 46.

72. *See* Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964); Reynolds v. Sims, 377 U.S. 533, 568 (1964). In addition, the Voting Rights Act imposes a federal statutory limitation on legislative redistricting, prohibiting the drawing of districts that dilute minority voting strength. Kemper, *supra* note 52, at 323. The Act states that a violation is established if "it is shown that the political processes . . . are not equally open to participation by members of a class of citizens [on account of race or color] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Voting Rights Act, 42 U.S.C. § 1763(b) (2006).

73. *Reynolds*, 377 U.S. at 577.

74. *See generally* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (plurality opinion); Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).

manageable standards" for adjudication.[75] This decision, which was subsequently upheld, has thus left the federal courts with little power to provide redress in cases of gerrymandering.[76] Consequently, federal limitations on legislative discretion are fairly minimal. However, a number of states – including Missouri – have imposed further constitutional restrictions on redistricting power.[77]

B. The Missouri Compactness Requirement

While Missouri's congressional redistricting provision emphasizes equality of population, it also instructs the General Assembly to consider an additional criterion: compactness.[78] Article III, section 45 of the Missouri Constitution articulates the compactness requirement, stating that districts must be "composed of contiguous territory as compact . . . as may be."[79] Like the standard of population equality required under the U.S. Constitution, the standard of compactness helps to ensure that districts are not drawn arbitrarily and, therefore, that each person's vote carries equal weight.[80] Missouri courts have communicated the importance of this standard, stating, "The protection of this constitutional provision applies to each Missouri voter, in every congressional district. 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.'"[81]

A standard of compactness was first inserted into the Missouri Constitution as an effort to prevent the partisan drawing of district boundaries.[82] As the Supreme Court of Missouri stated, the purpose of the compactness requirement was "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as the 'gerrymander,' and to require the Legislature to form districts, not only of contiguous, but of compact or closely united, territory."[83] And despite the fact that this standard appeared for the first time in Missouri's Constitution of 1875 and has subsequently been subject to several amendments, the language has re-

75. *Vieth*, 541 U.S. at 281.

76. *See id.*; *League of United Latin Am. Citizens*, 548 U.S. at 413-14 (holding claims of political gerrymandering nonjusticiable, stating that a dispute still existed over which substantive standard to apply).

77. Kemper, *supra* note 52, at 323.

78. MO. CONST. art. III, § 45.

79. *Id.*

80. *See* Kemper, *supra* note 52, at 323-24.

81. *Pearson I*, 359 S.W.3d 35, 39 (Mo. 2012) (en banc) (quoting Burdick v. Takushi, 504 U.S. 428, 441 (1992)).

82. *See* State *ex rel.* Barrett v. Hitchcock, 146 S.W. 40, 61 (Mo. 1912).

83. *Id.* (quoting People *ex rel.* Woodyatt v. Thompson, 40 N.E. 307, 315 (Ill. 1895)).

mained markedly similar over time.[84] This continuity highlights the importance of the provision in guarding against gerrymandering, implying, as the Supreme Court of Missouri has held, that it is "necessary to the preservation of true representative government."[85]

For more than a century, Missouri courts have grappled with their interpretation of the "as compact . . . as may be" standard.[86] Among states that require districts to be as compact as possible, two distinct definitions of "compactness" have emerged: compactness of physical shape or size and compactness as "closely united territory."[87] Missouri courts have adopted the latter definition.[88] While the definition of "compact" is well settled, court interpretation of the provision has demonstrated that the "closely united territory" standard is not the end of the analysis.[89] Even if a plaintiff proves that a map does not meet this standard, the map may yet be valid as a reasonable exercise of the legislature's power to draw district boundaries.[90] *State ex. rel Barrett v. Hitchcock* and its descendants make clear that departures from the notion of compactness, as long as they can be reasonably justified, are squarely within the discretion of the legislature.[91]

1. *State ex. rel Barrett v. Hitchcock*

In *State ex. rel Barrett v. Hitchcock*, the Supreme Court of Missouri first gave meaning to the term "compact" as it pertains to Missouri's constitutional redistricting clause.[92] At issue in *Barrett* were the now-defunct redistricting provisions, which stated in pertinent part:

> Sec. 5. . . . For the election of Senators the State shall be divided into convenient districts, as nearly equal in population as may be[.]
>
> . . . .

84. Preisler v. Doherty, 284 S.W.2d 427, 435 (Mo.1955) (en banc); *see* MO. CONST. art. III, § 45; MO. CONST. of 1875, art. IV, § 9.

85. Preisler v. Kirkpatrick, 528 S.W.2d 422, 425 (Mo. 1975) (en banc).

86. The first Missouri case to analyze the meaning of the redistricting "compactness" standard, *State ex rel. Barrett v. Hitchcock*, was decided in 1912. 146 S.W. at 61-62. *Barrett* addressed the reapportionment of the state's senatorial districts. *Id.* at 48.

87. Kemper, *supra* note 52, at 324.

88. *See Barrett*, 146 S.W. at 61.

89. *See Kirkpatrick*, 528 S.W.2d at 424-25; Priesler v. Hearnes, 362 S.W.2d 552, 554-55 (Mo. 1962) (en banc); *Doherty*, 365 S.W.2d at 433-34; *Barrett*, 146 S.W. at 61.

90. *See Barrett*, 146 S.W. at 62.

91. *See Kirkpatrick*, 528 S.W.2d at 425; *Hearnes*, 362 S.W.2d at 555; *Doherty*, 284 S.W.2d at 433-35; *Barrett*, 146 S.W. at 62-65.

92. *See supra* note 86 and accompanying text.

> Sec. 9. . . . When any Senatorial district shall be composed of two or more counties, they shall be contiguous; such districts to be *as compact as may be*, and in the formation of the same no county shall be divided.[93]

The plaintiff, Barrett, took issue with senatorial redistricting that had been performed by a committee comprised of the governor, secretary of state, and attorney general.[94] Barrett filed suit against the judges of the Circuit Court of the City of St. Louis, alleging that the new map had produced "great inequalities" in population between several St. Louis districts and seeking a writ of mandamus requiring the judges to divide the city into senatorial districts "of compact and contiguous territory as nearly equal in population as may be, as is provided by law."[95] The court held the redistricting plan unconstitutional and in doing so evaluated the meaning of "compact" under the state constitution.[96]

According to the court in *Barrett*, two duties had been delegated to the legislature: making each district "as nearly equal in population . . . as may be" and making each district "as compact as it can reasonably be made."[97] The language of these provisions made it clear that the legislature was able to exercise limited discretion when executing these duties.[98] In defining "compact," the court stated that it "means '*closely united*,' and that the provision that districts shall be formed of contiguous and compact territory means that the counties . . . when combined to form a district, must not only touch each other, but must be closely united territory."[99] Although the court did not otherwise describe what makes territory "closely united," in analyzing the shape of the districts it indicated that physical boundaries were an important consideration in determining compactness.[100] Applying these principles to the relevant facts, the court determined that "the Legislature, in apportioning the state

93. MO. CONST. of 1875, art. IV, §§ 5, 9 (emphasis added).

94. *Barrett*, 146 S.W. at 41-43. Under the Missouri Constitution, it was the duty of the state legislature to reapportion the state's senatorial districts. MO. CONST. of 1875, art. IV, § 7. However, the General Assembly adjourned before performing this duty. *Barrett*, 146 S.W. at 41. In this situation, the constitution delegated the burden of redistricting to the governor, secretary of state, and attorney general. MO. CONST. of 1875, art. IV, § 7. As the court emphasized that this delegation "constitute[d] a legislative body" under these facts, hereinafter they will be referred to as "the legislature." *Barrett*, 146 S.W. at 48.

95. *Barrett*, 146 S.W. at 42-43. This duty was imposed upon the court by section 6 of Article IV of the state constitution. MO. CONST. of 1875, art. IV, § 6.

96. *See Barrett*, 146 S.W. at 61-65.

97. *Id.* at 53; *see* MO. CONST. of 1875, art. IV, §§ 5, 9.

98. *Barrett*, 146 S.W. at 53.

99. *Id.* at 61 (emphasis added) (quoting People *ex rel.* Woodyatt v. Thompson, 40 N.E. 307, 315 (Ill. 1895)).

100. *Id.* at 56.

into districts, wholly disregarded the constitutional mandates as to compactness of territory and equality in population."[101]

In reaching this conclusion, the court made it clear that while the Missouri Constitution gives some discretion to the General Assembly in matters of redistricting, that discretion is not absolute.[102] While the redistricting authority may deviate from the standards enunciated in the constitution, the reasons for such a departure must be reasonably justifiable.[103] The court stated, "Any departure from the limitation of equality in population must be made for the sake of securing greater compactness, and any departure from the limitation of compactness must be made for the purpose of securing greater equality in population."[104] However, after examining the populations of the districts in conjunction with their shapes, the court found that the largest discrepancies in population were between the districts that were the least compact.[105] The court emphasized that, as the implementation of the objective standard of compactness was necessarily subject to the discretion of those charged with redistricting, it was important to regulate legislative whims.[106] The court explained:

> [I]t was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper, nor to give to each a population which it deemed best.[107]

2. The *Preisler* Cases

Following *Barrett*, the courts were largely silent until a flurry of litigation erupted following the decennial censuses of 1950, 1960, and 1970. The cases arising from these proceedings – *Preisler v. Doherty*, *Preisler v. Hearnes*, and *Preisler v. Kirkpatrick* – served to further delineate the scope of legislative discretion permitted in Missouri redistricting and the factors that bear on compactness.[108] As a result of the constitutionally-mandated power

101. *Id.*
102. *Id.* at 54.
103. *Id.* at 55.
104. *Id.*
105. *Id.* at 56.
106. *Id.* at 54.
107. *Id.*
108. *See generally* Preisler v. Kirkpatrick, 528 S.W.2d 422 (Mo. 1975) (en banc), *overruled by Pearson II*, 367 S.W.3d 36 (Mo. 2012); Preisler v. Hearnes, 362 S.W.2d 552 (Mo. 1962) (en banc); Preisler v. Doherty, 284 S.W.2d 427, 435 (Mo. 1955) (en banc). These three cases were initiated by Paul W. Preisler, a St. Louis lawyer, activist, and politician. *Preisler, Paul W.*, OUR CAMPAIGNS, http://www.ourcampaigns.com/CandidateDetail.html?CandidateID=158585 (last modified Aug. 27, 2011). Preisler filed *Doherty*, his first redistricting suit, while he was a student at the St.

bestowed upon the General Assembly and other redistricting authorities,[109] the Supreme Court of Missouri has consistently given these authorities a wide berth in drawing district maps.[110] In particular, the court has delineated factors and circumstances that permit the legislature to depart from the standard of compactness proffered by *Barrett*.

At issue in *Preisler v. Doherty* was the 1952 redistricting of the City of St. Louis.[111] The Board of Election Commissioners of the City of St. Louis (the Board) had divided the city into seven state senatorial districts.[112] Plaintiffs brought a declaratory judgment action challenging the districts' validity.[113] Instead of the state legislature drawing the new districts, it was the Board that was charged with the duty.[114] However, it was still confined to the same standard as the General Assembly: that the districts be as compact as may be.[115] The Supreme Court of Missouri found that none of the districts were physically compact, describing one as "T-shaped" and another as "L-shaped."[116] Speaking to the power of the redistricting authority to depart from the standard of compactness, the court stated:

> [C]ourts may not interfere with the wide discretion which the Legislature has in making apportionments for establishing such districts when legislative discretion has been exercised. It is only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void.[117]

The court listed factors that might justify a departure from compactness, including the observation of political subdivisions, attempts to obtain population equality, and natural boundary lines.[118] However, the court found that, in creating the districts at issue in *Doherty*, none of these factors were relied

---

Louis University School of Law. *Id.* He died in 1971, while *Kirkpatrick* was still being litigated. *Id.*

109. While the General Assembly is charged with congressional redistricting, different authorities conduct state legislative redistricting. *See supra* note 52 and accompanying text.

110. *See generally Kirkpatrick*, 528 S.W.2d 422; *Hearnes*, 362 S.W.2d 552; *Doherty*, 284 S.W.2d at 431.

111. *Doherty*, 284 S.W.2d at 430.

112. *Id.*

113. *Id.*

114. *Id.* In situations where a county was allotted more than one senator, former Article III, section 8 of the Missouri Constitution delegated districting of the county to local authorities. MO. CONST. art. III, § 8 (repealed 1966).

115. *Doherty*, 284 S.W.2d at 432.

116. *Id.* at 432-33, 437.

117. *Id.* at 431.

118. *Id.* at 432, 434.

upon.[119] "[D]epartures from compactness were not made to obtain equality of population, [and] the departures from ward lines in making districts were not used to obtain compactness," the court wrote, but instead "aided in making them less compact, more irregular, longer and narrower."[120] The Board's departure from compactness in drawing the districts was not justified by any acceptable factor, and as a result the court found that the Board abused its discretion and the districts were rendered invalid.[121]

The next Missouri case to take up the issue, *Preisler v. Hearnes*, arose as a result of congressional redistricting.[122] The plaintiff claimed that the 1961 Act dividing the state into new congressional districts resulted in a lack of compactness, rendering the Act unconstitutional.[123] Among his complaints, the plaintiff suggested that greater compactness could be achieved by dividing counties.[124] The court emphatically dismissed this argument, and in doing so stressed the importance of keeping counties united.[125] "[C]ounties are important governmental units, in which the people are accustomed to working together. Therefore, it has always been the policy of this state, in creating districts of more than one county (congressional, judicial or senatorial) to have them composed of entire counties."[126] In short, the *Hearnes* court placed great emphasis on the preservation of political subdivisions – in this case, counties – in redistricting efforts.[127]

Despite the holding that county boundaries were important to the compactness inquiry, the court in *Hearnes* again affirmed that the General Assembly had wide latitude in adhering to the rule.[128] It declared that "urban conditions" could justify dividing counties, noting that this was the case in the 1961 Act with respect to counties in both Kansas City and St. Louis, the state's two largest cities.[129] And while the court took the same stance that it did in *Doherty* regarding legislative discretion – stating that the General Assembly has a large berth in apportioning the districts – it used even stronger language in doing so.[130] The court acknowledged that the tenth district was not in fact reasonably compact and that it could have been made more compact by adding two additional counties.[131] Yet, it still found the 1961 Act

119. *Id.* at 434.
120. *Id.*
121. *Id.* at 435.
122. Preisler v. Hearnes, 362 S.W.2d 552, 553 (Mo. 1962) (en banc).
123. *Id.* Plaintiff also made an argument regarding the disparity in population among the districts. *Id.*
124. *Id.* at 556.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 557.
129. *Id.*
130. *Id.* at 555.
131. *Id.* at 557.

constitutional.[132] In explaining this counterintuitive result, the court underscored the importance of legislative discretion.[133] It stated:

> Very likely each legislator individually would draw somewhat different district lines. Therefore, any redistricting agreed upon must always be a compromise. Mathematical exactness is not required or in fact obtainable and a compromise, for which there is any reasonable basis, is an exercise of legislative discretion that the courts must respect.[134]

The court in *Hearnes* thus went beyond the *Doherty* court, suggesting that even if a district is unequivocally noncompact (as was true of the tenth district), as long as a reasonable basis for the deviation existed – in *Hearnes*, greater equality of population – the fact that a district is not as compact as possible will not render a map unconstitutional.[135]

The most recent case[136] interpreting Missouri's compactness provision resulted from state senatorial redistricting conducted in the wake of the 1970 decennial census.[137] In *Preisler v. Kirkpatrick*, the sole question presented on appeal was whether the districts were as compact as may be.[138] As in *Hearnes*, the Supreme Court of Missouri conceded that at least one district did not completely meet the compactness requirement.[139] In addition, the court agreed that the changes to the districts proposed by the plaintiffs would in fact make some districts more compact.[140] Nevertheless, the court did not find the districts unconstitutional.[141]

In upholding the district map, the *Kirkpatrick* court drew upon the holding in *Hearnes* and once again emphasized legislative discretion.[142] The court reiterated that the redistricting authority is inevitably made up of "fallible human beings" and that no districts are perfectly compact or without

132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. While *Preisler v. Kirkpatrick* is the most recent Missouri case bearing on the court's decision in *Pearson II*, there has been other recent litigation arising from the state's redistricting. On May 25, 2012 – the same day the *Pearson II* opinion was published – the court also handed down its decision in *Johnson v. State*. 366 S.W.3d 11 (Mo. 2012) (en banc). Like *Pearson II*, *Johnson* also stemmed from congressional redistricting. *Id.* at 16. However, as the court in *Pearson II* does not consider the *Johnson* holding in rendering its decision, *Johnson* will not be further analyzed in this Note.
137. Preisler v. Kirkpatrick, 528 S.W.2d 422, 423 (Mo. 1975) (en banc), *overruled by Pearson II*, 367 S.W.3d 36 (Mo. 2012) (en banc).
138. *Id.* at 424 (quoting MO. CONST. art. III, § 5).
139. *Id.* at 426.
140. *Id.*
141. *Id.*
142. *Id.*

room for improvement.[143] Except in rare occasions where districts take on naturally compact shapes, such as circles or squares, meandering county lines and uneven population density do not lend themselves to perfect, "geometric" compactness.[144]

The court also expanded upon the scope of this discretion, clarifying how its abuses would be measured.[145] In highlighting its finding that the redistricting commission made "an *honest* and *good faith* effort" in constructing the districts, the court appeared to suggest that there was a subjective element in assessing whether legislative discretion was violated.[146] The court also held that because the districts substantially complied with the compactness requirement, they were constitutionally sound.[147] Therefore, not only did the court in *Kirkpatrick* imply that the General Assembly must act in good faith in adhering to the compactness requirement, it also suggested that this standard must only be substantially met in order to pass constitutional muster.[148] However, this language was largely dismissed by *Pearson II*, which chose to interpret the compactness requirement in a way that negated legislative good faith as a consideration.[149] Instead, the court in *Pearson II* intimated that legislative discretion permitted the creation of noncompact districts, as long as such lack of compactness could be justified by "mandatory and permissible" factors.[150]

IV. INSTANT DECISION

In the instant case, Plaintiffs ultimately asserted that the trial court failed in finding the Map valid under the standard of compactness articulated in Article III, section 45 of the Missouri Constitution.[151] In particular, Plaintiffs challenged the constitutionality of districts 3, 5, and 6.[152] Before examining the characteristics of these contested districts, the court first addressed Plaintiffs' other claims: that the trial court's failure to shift the burden to Defendants to justify the Map's departures from compactness was an error[153] and that it incorrectly interpreted the language "as compact . . . as may be."[154]

143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* (emphasis added).
147. *Id.* at 427.
148. *Id.* at 426-427.
149. *See Pearson II*, 367 S.W.3d 36, 45-46 (Mo. 2012) (en banc).
150. *See id.* at 41.
151. *Id.*
152. *Id.* at 52.
153. *Id.* at 45. This claim was only raised by one set of plaintiffs: the McClatchey plaintiffs. *Id.*
154. *Id.* at 42-43.

Plaintiffs asserted that, under Missouri law, after a plaintiff makes a showing that a district could be more compact the burden shifts to the state to prove "why the district is not substantially more compact."[155] The court dismissed this reasoning, affirming that the burden never shifts from the plaintiff and emphasizing that Plaintiffs erroneously based their argument on the federal standard, which incorporates a good faith burden-shifting framework.[156] The court stated, "It is Plaintiffs who seek a declaration that the Map is unconstitutional, and shifting the burden of proof conflicts with their ultimate burden to show that the Map 'clearly and undoubtedly' contravenes the constitution."[157]

Having resolved Plaintiffs' claim regarding the burden of proof, the court took up its examination of the compactness requirement. The court observed that the issue raised by Plaintiffs – whether the districts are as compact as may be – is a mixed question of law and fact.[158] While the meaning of the constitutional language at issue is a legal determination, whether the Map adheres to that standard is a question of fact.[159] As such, it was necessary that the court use two different standards of review and analyze the issues separately.[160]

Turning first to the meaning of compactness, the court noted that it would be reviewed *de novo*.[161] The language of Article III, section 45 states in pertinent part:

> When the number of representatives to which the state is entitled in the House of the Congress of the United States under the census . . . is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.[162]

The court recognized that the standard "as compact . . . as may be," as contained within this provision, is comprised of two distinct parts: "compact" and "as may be."[163] Examining the word "compact," the court invoked the interpretation supplied in *Barrett*, declaring it to mean "closely united territo-

155. *Id.* at 45.

156. *Id.* at 46. *See supra* Part III.A.

157. *Pearson II*, 367 S.W.3d at 46 (quoting Johnson v. State, 366 S.W.3d 11, 33 (Mo. 2012) (en banc)).

158. *Id.* at 47.

159. *Id.*

160. *Id.*

161. *Id.* at 48; *see also* City of Arnold v. Tourkakis, 249 S.W.3d 202, 204 (Mo. 2008) (en banc) ("[T]his Court reviews a trial court's interpretation of the Missouri constitution *de novo*.").

162. MO. CONST. art. III, § 45.

163. *Pearson II*, 367 S.W.3d at 48.

ry."[164] Other than to say that this definition "does not refer solely to physical shape or size" and that "a visual observation . . . is not a decisive factor," the court did not provide many clues as to the definition.[165] Instead, the court suggested that the phrase "as may be" gives meaning to "compact," stating that "[a] determination of whether a district fails to satisfy the requirement cannot be accomplished solely by inquiring if it is 'compact,' because the modifier 'as may be' alters the meaning of that word."[166] According to the court, "as may be" has a dual effect.[167] It conveys that "compactness" is not a standard that can be met with complete precision, and it grants the legislature the power to consider other recognized factors, such as those set out in *Doherty*, *Hearnes*, and *Kirkpatrick*.[168] The court stated, "This Court's precedent does not hold that constitutional requirements can be disregarded to consider other factors but instead recognizes that the constitutional requirements themselves incorporate such considerations by use of the standard 'as may be.'"[169] Such factors implicitly authorized for legislative consideration include "population density; natural boundary lines; the boundaries of political subdivisions, including counties, municipalities, and precincts; and the historical boundary lines of prior redistricting maps."[170]

Furthermore, the court recognized other factors that can affect the compactness of districts, such as "the interrelationship in standards for population equality and compactness requirements . . . the contiguity requirement . . . [and] federal laws."[171] According to the court, consideration of these factors means that, even if a district does not appear to be composed of closely united territory, it could still satisfy the constitutional compactness requirement.[172] Having thus declared the meaning of Missouri's compactness provision, the court proceeded to the question of fact: whether districts 3, 5, and 6 satisfied this standard. In making this determination, the court reviewed the trial court's findings of fact regarding the characteristics of the Map and the methodology behind its creation, deferring to its assessment of the contested evidence.[173]

164. *Id.*
165. *Id.* at 48-49.
166. *Id.* at 48.
167. *Id.* at 49.
168. *Id. See supra* Part III.B.2.
169. *Pearson II*, 367 S.W.3d at 51.
170. *Id.* at 50.
171. *Id.* at 53.
172. *Id.* at 51.
173. *Id.* at 44, 52; *see also* White v. Dir. of Revenue, 321 S.W.3d 298, 308 (Mo. 2010) (en banc) ("When evidence is contested by disputing a fact in any manner, this Court defers to the trial court's determination of credibility.").

A. District 3

Applying the reasoning articulated above, the court examined the features of district 3, focusing on its shape.[174] Districts 1 and 2, which lie to the east of most areas of district 3, were drawn in circular forms; as a result, district 3 took on what the court described as a "crescent shape."[175] Plaintiffs took issue with district 3's boundary lines, which they considered to be highly suspect due to the meandering nature of the boundaries.[176] However, according to evidence presented at trial, the shape of districts 1 and 2 could be attributed to an attempt to "protect[] against minority 'vote dilution'" and thus comply with the Voting Rights Act.[177] Therefore, the court recognized that while district 3 did have an unusual shape, its deviations from compactness were the result of a recognized factor: adherence to the Voting Rights Act.[178] The court found that the trial court did not err in holding that Plaintiffs failed to meet their burden, as they were unable to prove that district 3 did not meet the compactness standard.[179]

B. Districts 5 and 6

The court's analysis of district 5 required a more in-depth examination of the facts than did its analysis of district 3. While it conceded that the factual record showed a dispute regarding whether the deviations in district 5's boundaries were "minimal and practical," the court ultimately determined that the trial court was correct in holding that Plaintiffs failed to show that district 5 did not meet the compactness requirement.[180] The court first examined the shape of district 5, stating that, while it was not necessarily physically compact, it met the standard advanced in *Barrett* in that it was closely united territory.[181] In regards to legislative discretion, both Plaintiffs' expert and Defendants' expert admitted at trial that there was "no bright line between a compact and non-compact district."[182] Echoing the court's statement in *Hearnes* that mathematical precision cannot be achieved, Defendants present-

174. *Pearson II*, 367 S.W.3d at 54.

175. *Id.*

176. *Pearson I*, 359 S.W.3d 35, 40 (Mo. 2012) (en banc); *see also id.* at 43 app. A.

177. *Pearson II*, 367 S.W.3d at 54; *see* Voting Rights Act, 42 U.S.C. § 1973 (2006). See *supra* note 72 for further discussion of the Voting Rights Act.

178. *Pearson II*, 367 S.W.3d at 53-54. Missouri courts have held that the Voting Rights Act is a recognized factor justifying deviations from compactness. *See* Johnson v. State, 366 S.W.3d 11, 27 (Mo. 2012) (en banc) ("A valid map must comply with the Voting Rights Act.").

179. *Pearson II*, 367 S.W.3d at 54.

180. *Id.* at 56.

181. *Id.* at 55.

182. *Id.* at 55-56.

ed testimony that statistical measures, while useful, could not conclusively establish a map's compactness.[183] The court proceeded to evaluate the evidence presented to the trial court regarding the General Assembly's use of recognized factors in deviating from compactness.[184] The court reviewed evidence of both historical boundary lines and the boundaries of political subdivisions.[185] It noted that a portion of Jackson County had historically been carved out of district 5, and that the Map only slightly expanded that section.[186] Concerning the political subdivisions, the court stated that while some were divided, others were maintained.[187] It further suggested that the General Assembly could have had a reasonable basis for drawing the boundaries the way it did, in that a greater portion of Kansas City was kept intact, a factor that the court deemed "legitimate."[188] Ultimately, the court deferred to the trial court's evaluation of these facts, holding that its judgment was not against the weight of the evidence.[189] The court made a similar finding regarding district 6, stating that "because the boundary in district 5 has a direct correlation to the boundary in district 6, the same analysis applies."[190]

C. The Holding

Finding no error in the trial court's conclusions regarding the compactness of districts 3, 5, and 6, the court affirmed the judgments.[191] The court held the Map valid under the standard set forth in Article III, section 45 of the Missouri Constitution, stating that "the standard does not require absolute precision in compactness and because mandatory and permissible recognized factors can impact the configuration of district boundaries . . . plaintiffs do not prevail on their claim that the trial court's judgment is against the weight of the evidence."[192]

D. The Dissent

In his dissent, Judge William Ray Price, Jr. disputed the majority's claim that the Map met the standard articulated in Article III, section 45.[193] In disputing the compactness of the challenged districts, Judge Price took

183. *Id.* at 55; *see* Preisler v. Hearnes, 362 S.W.2d 552, 557 (Mo. 1962) (en banc).
184. *Pearson II*, 367 S.W.3d at 56.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 41.
193. *Id.* at 84.

particular issue with the shapes of districts 5 and 6.[194] Describing the districts as "bizarrely shaped," he asserted that their "visually jarring" borders divided communities; specifically, the cities of Blue Springs, Independence, Lee's Summit, and Oak Grove, each of which was placed in two different districts as a result of the Map.[195] While Judge Price recognized that the General Assembly is allowed discretion in redistricting, he emphasized that Article III, section 45 was enacted to place limits on that discretion.[196] He stated, "Discretionary factors cannot be read into the constitutional fabric if doing so would functionally erase the requirement that districts be compact."[197] Finally, Judge Price emphasized the importance of preserving the integrity of the voting process through redistricting.[198] Maintaining that the majority's decision undermined this objective, he stated:

> Abstract discussion of law cannot mask the obvious fact that the legislature has attempted to gerrymander a teardrop-shaped portion of Jackson County from district 5 and place it in district 6. Article III, section 45 is simply and clearly written. It should be enforced, not finessed in deference to an obvious legislative shenanigan.[199]

Ultimately, Judge Price advocated that the judgment of the trial court be reversed.[200]

V. COMMENT

Pearson II continues down the path of prior precedent, interpreting Article III, section 45 of the Missouri Constitution in a way that provides little check against obvious attempts at political gerrymandering. The court echoed Missouri precedent in declaring "compact" to mean "closely united territory" and in listing the factors that may justify a deviation from this standard, including political and historical boundary lines, urban conditions, and population equality.[201] *Pearson II* also continues a concerning trend in finding that a district that is decidedly noncompact is nonetheless "as compact . . . as may be" under the Missouri standard.

While there are situations in which factors may give grounds for a district's departure from the notion of compactness, through its decision in *Pearson II* the Supreme Court of Missouri has lowered the level of compliance

194. *Id.* at 78.
195. *Id.*
196. *Id.* at 75.
197. *Id.* at 74 (citing Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. 1983) (en banc)).
198. *Id.* at 84.
199. *Id.*
200. *Id.*
201. *See id.* at 48-50.

needed to meet this standard to a degree that undermines the ultimate purpose for which the compactness provision was put into place: to prevent gerrymandering.[202] Maintaining close adherence to the standard of compactness is especially important because federal protections against political gerrymandering are nearly nonexistent.[203] As a last line of defense against such political vote dilution, Missouri's judiciary should interpret the provision in a way that strengthens, rather than weakens, the standard of compactness.

Part A of this section will examine the importance of Missouri's compactness requirement in preventing political gerrymandering, while Part B will take the position that *Pearson II* has weakened this requirement such that it no longer fulfills the purposes for which it was adopted.[204] Finally, Part C will argue that, in situations in which districts fail to satisfy the standard of compactness, courts must impose a good faith standard on the General Assembly to ensure greater protection against attempts at gerrymandering.[205]

A. The Importance of Compactness in Preventing Gerrymandering

The U.S. Constitution imposes limited restrictions on state redistricting efforts.[206] In doing so, it advances a "one person, one vote" principle that seeks to prevent vote dilution and ensure that every person's vote is as nearly equal in value as possible.[207] In determining whether a redistricting map violates this standard, courts use equality of population among the districts as their measuring stick.[208] In cases in which a court finds that a redistricting body has not made a good faith effort to achieve population equality, maps are rendered invalid.[209] However, federal courts provide little redress beyond this point.[210] In 2004, a plurality of the U.S. Supreme Court declined to hear the Pennsylvania redistricting case *Vieth v. Jubelirer*, holding that claims of political gerrymandering were nonjusticiable.[211] The Court based its decision

202. *See* Preisler v. Kirkpatrick, 528 S.W.2d 422, 425 (Mo. 1975) (en banc).

203. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (plurality opinion); Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion); Radogno v. Ill. State Bd. of Elections, No. 1:11-cv-04884, 2011 WL 5025251 (N.D. Ill. Oct. 21, 2011).

204. *See infra* Parts V.A, V.B.

205. *See infra* Part V.C.

206. Kemper, *supra* note 52, at 323. The Voting Rights Act also imposes federal statutory restrictions on state redistricting. *Id.* For further discussion of the Voting Rights Act, see *supra* note 72.

207. *See* Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964).

208. *See* Reynolds v. Sims, 377 U.S 533, 568 (1964).

209. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

210. *See generally* League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (plurality opinion); Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).

211. *Vieth*, 541 U.S. at 281. The Court also distinguished claims of political gerrymandering from those of racial gerrymandering. *Id.* at 285-86. It noted that claims

on a lack of "judicially discernable and manageable standards" for adjudicating this type of claim.[212] The Court reaffirmed this position two years later in another plurality decision, *League of United Latin American Citizens v. Perry* (*LULAC*), explaining that there was still a dispute over which substantive standard to apply.[213] The upshot of the decisions rendering these cases nonjusticiable is that questionable redistricting plans may be able to survive federal claims of political gerrymandering.[214]

The potential ramifications of these decisions on Missouri courts can be seen in *Pearson I*.[215] In addition to their assertion that districts did not meet the compactness requirement, Plaintiffs also brought a partisan vote dilution claim.[216] Dismissing this argument, the court referenced the uncertainty surrounding political gerrymandering claims evidenced by the decisions in both *Vieth* and *LULAC*.[217] The court stated, "In light of the Supreme Court's inability to state a clear standard . . . this Court is unable to find that Plaintiffs have shown an entitlement to relief at this time."[218] The court's dismissal of this claim in *Pearson I* demonstrates the lack of federal protections against gerrymandering in Missouri.[219] As a result, state limitations on legislative discretion are rendered even more necessary.

Due to a lack of federal protection against gerrymandering, Missouri's compactness provision provides an important second line of defense.[220] As districts drawn for partisan purposes often tend to take on irregular shapes, a compactness requirement is a natural check on the power of the General Assembly to consider political motives in its redistricting efforts.[221] Both *Pear-*

---

of racial gerrymandering *are* justiciable, but are rare and seldom encountered. *Id.* at 286.

212. *Id.* at 281.

213. *League of United Latin Am. Citizens*, 548 U.S. at 413-14.

214. Laughlin Mcdonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 243 (2009). In a more recent decision, the Northern District of Illinois described the effect that *Vieth* and its successors have had on adjudication of gerrymandering claims, aptly stating that the decisions "place district courts in the untenable position of evaluating [these] claims without any definitive standards." Radogno v. Ill. State Bd. of Elections, No. 1:11-cv-04884, 2011 WL 5025251, at *4 (N.D. Ill. Oct. 21, 2011).

215. *See Pearson I*, 359 S.W.3d 35, 41-42 (Mo. 2012) (en banc).

216. *Id.* at 41.

217. *Id.* at 41-42.

218. *Id.* at 42.

219. *See id.*

220. *See* Preisler v. Kirkpatrick, 528 S.W.2d 422, 425 (Mo. 1975) (en banc).

221. *See* Kemper, *supra* note 52, at 323 n.8. The importance of compactness in preventing gerrymandering is perhaps underscored by the origin of the word. It "derives from 'the fancied resemblance to a salamander . . . of the irregularly shaped outline of an election district in northeastern (Massachusetts) that had been formed for

son II and the Missouri precedent on which it was based consistently extol the virtues of the compactness requirement and proclaim its importance in preventing gerrymandering.[222] The stance taken by *Pearson II* can be traced back to the court in *Barrett*, which stated that the purpose of Missouri's compactness provision was "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as the 'gerrymander,' and to require the Legislature to form districts, not only of contiguous, but of compact or closely united, territory."[223] However, the scope of legislative discretion allowed to the General Assembly by the court in *Pearson II* both compromises the provision and undermines its purpose.

B. The Weakening Effect of Pearson II

In holding that the districts in question satisfied Missouri's constitutional compactness requirement,[224] the *Pearson II* court interpreted the requirement so loosely as to neutralize the purposes for which it was added, a decision that may subsequently render the state more susceptible to partisan gerrymandering. In its 1912 opinion, the *Barrett* court spoke to the subjective mindset of the framers in adopting the compactness requirement, stating:

> [It] was not [their] intention . . . to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper . . . . Had the framers of the Constitution intended that the Legislature should apportion the state into districts according to its own free and untrammeled will, then they would not have used the words of restriction . . . .[225]

The court's recent decision in *Pearson II*, however, demonstrates the erosion that a century of redistricting litigation has wreaked on the framers' intent. In deeming constitutional those districts with highly questionable compactness, the *Pearson II* court has significantly weakened the strength of the compactness requirement.

In *Pearson II*, the court observed that recognized factors may justify "*minimal* and *practical*" deviations from compactness.[226] Deviations are hardly "minimal," however, when both the court and counsel for the state

---

partisan purposes in 1812 during (Elbridge) Gerry's governorship.'" *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1969)).

222. *See Pearson II*, 367 S.W.3d 36, 74, 84 (Mo. 2012) (en banc); State *ex rel.* Barrett v. Hitchcock, 146 S.W. 40, 61 (1912).

223. *Barrett*, 146 S.W. at 61 (quoting People *ex rel.* Woodyatt v. Thompson, 40 N.E. 307, 315 (Ill. 1895)).

224. *See supra* note 192 and accompanying text.

225. *Id.* at 54.

226. *Pearson II*, 367 S.W.3d at 48-49 (emphasis added).

concede that the districts at issue were noncompact.[227] Indeed, in *Pearson I*, the court acknowledged Plaintiffs' statement that districts 3 and 5 were "particularly suspect," stating that this "can be confirmed by any rational and objective consideration of their boundaries."[228] The record provides an even stronger indictment of the "compactness" of these two districts. Referring to district 5, counsel for the state declared at trial, "[F]rankly, I'm not going to stand here and defend the compactness of District 5. [It] seems to me to be problematic."[229] In fact, district 5 – described by the dissent as "L-shaped" – has a width "so narrow that it almost breaks the district's congruity."[230] When describing district 3 the state stated, "What you have in District 3 is . . . something that's *fairly* compact."[231] Despite admitting departures from compactness, the court found these two districts, along with district 6, to be constitutional under the "as compact . . . as may be" standard.[232]

Judge Price, in his dissenting opinion in *Pearson II*, took issue with the majority declaring districts to be compact which, in his view, were so noncompact as to be "visually jarring."[233] He noted that the districts split communities in half, tore apart cities, and divided counties.[234] Judge Price further stated, "Abstract discussion of law cannot mask the obvious fact that the legislature has attempted to gerrymander . . . [Article III, section 45] should be enforced, not finessed in deference to an obvious legislative shenanigan."[235]

In upholding a Map comprised of districts drawn with such questionable compactness, the court in *Pearson II* thus demonstrates an interpretation of the compactness requirement that runs directly contrary to the intent of the framers of the provision.[236] The General Assembly was given such a wide berth of discretion in its redistricting efforts that decidedly noncompact districts were able to slip through the cracks. In order to combat this concerning trend, upon a finding of noncompactness to the degree of those districts in *Pearson II*, the General Assembly must be required to justify these deviations in some manner if the districts are to be upheld. By sapping the compactness provision of much of its strength, the court has created a risk that, without the addition of a standard of accountability, legislative discretion will continue to go largely unchecked.

---

227. *See Pearson I*, 359 S.W.3d 35, 40 (Mo. 2012) (en banc).
228. *Id.*
229. *Id.* at 40 n.2.
230. *Pearson II*, 367 S.W.3d at 72 (Price, J., dissenting).
231. *Pearson I*, 359 S.W.3d at 40 n.2.
232. *Pearson II*, 367 S.W.3d at 53-56.
233. *Id.* at 78 (Price, J., dissenting).
234. *Id.* (Price, J., dissenting).
235. *Id.* at 84 (Price, J., dissenting).
236. *See* State *ex rel.* Barrett v. Hitchcock, 146 S.W. 40, 61 (1912) (quoting People *ex rel.* Woodyatt v. Thompson, 40 N.E. 307, 315 (Ill. 1895)).

C. The Necessity of a Good Faith Standard

If the Missouri judiciary is going to allow such a wide berth in state redistricting, it needs to ensure that there is a framework in place to hold the General Assembly, or redistricting commissions, accountable for gross deviations from compactness. Federal courts incorporate such a system: once a plaintiff has established population differences (here, noncompactness) that did not result from a good faith effort to achieve equality, the burden shifts to the defendant to justify the deviation.[237] The U.S. Supreme Court in *Karcher v. Daggett* describes this burden-shifting model:

> First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue . . . . If . . . the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.[238]

While Missouri courts have never adopted such a good faith burden-shifting framework, the Supreme Court of Missouri has previously implied that good faith is relevant to matters of redistricting.[239] In *Kirkpatrick*, the court stated, "[T]he Commission made an *honest* and *good faith* effort to construct senatorial districts as compact as may be."[240] While not expressly adopting the federal standard, the court appeared to be leaning towards an interpretation of the compactness provision that would impose more accountability on the redistricting authority by requiring the defendant to justify deviations from compactness.

This momentum was brought to an abrupt halt in *Pearson I*. In that case, the Supreme Court of Missouri abrogated the good faith portion of the *Kirkpatrick* decision.[241] The court reaffirmed this overruling in *Pearson II*.[242] It was a mistake by the court in *Pearson II* to dismiss the language used in

237. *See* Karcher v. Daggett, 462 U.S. 725, 730-31 (1983); *see generally* Reynolds v. Sims, 377 U.S. 533, 577 (1964) (holding that equal protection requires the State to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable"); Kirkpatrick v. Preisler, 394 U.S. 526, 533 (1969) (finding that Missouri did not "satisfactorily justif[y] the population variances among the districts").

238. *Karcher*, 462 U.S. at 730-31.

239. *See* Preisler v. Kirkpatrick, 528 S.W.2d 422, 426 (Mo. 1975) (en banc).

240. *Id.* (emphasis added).

241. *Pearson I*, 359 S.W.3d 35, 39-40 (Mo. 2012) (en banc).

242. *Pearson II*, 367 S.W.3d 36, 45-46 (Mo. 2012) (en banc).

Kirkpatrick without first considering its merits. In blindly adhering to precedent and declaring the subjective mindset of the legislature "irrelevant" under the Missouri Constitution,[243] the court failed to acknowledge that it was fully within its discretion to interpret the compactness requirement in a way that incorporates a burden-shifting standard. In his dissenting opinion in *Kirkpatrick*, Judge Finch proposed such a standard. He stated:

> Appellants have offered no evidence to justify the lack of compactness in any of these districts, nor to demonstrate any reason why the commission could not have complied with the requirements . . . . In my view, that burden rested on them when, as here, lack of compactness in fact exists.[244]

Had this opinion controlled, a good faith burden-shifting standard would have been introduced into Missouri courts.

Furthermore, Missouri would not have been the only state to adopt such a standard. Courts in both Iowa and New Jersey have interpreted their state compactness provisions to require burden shifting, even though neither state's constitution mandates such a framework.[245] The Iowa Supreme Court has stated that "[t]he goal of any apportioning authority must be to provide for equality of population and territorial compactness as nearly as practicable."[246] When claims are brought challenging the compactness of districts, the Iowa Supreme Court has interpreted the state constitution to require the legislature to show why it could not comply with the standard.[247] Likewise, the New Jersey Supreme Court has held that, when faced with a deviation from the standard set forth in constitutional redistricting provisions, the state bears the burden of justifying it.[248] Maryland also shifts the burden in cases of redistricting, utilizing a framework similar to that employed by federal courts.[249] Citing federal precedent, the Court of Appeals of Maryland held that if, after a hearing, sufficient evidence is presented to "preclude a finding that [a map is] valid as a matter of law," the burden shifts to the state to show that districts are compact.[250]

---

243. *Id.* at 46.

244. *Kirkpatrick*, 528 S.W.2d at 436 (Finch, J., dissenting).

245. *Pearson II*, 367 S.W.3d at 46-47, 47 n.6; *see In re* Legislative Districting of Gen. Assembly, 193 N.W.2d 784, 791 (Iowa 1972); Jackman v. Bodine, 262 A.2d 389, 395 (N.J. 1970).

246. *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d at 791.

247. *Id.*

248. *Jackman*, 262 A.2d at 395. These constitutional provisions include a compactness requirement. *Id.* at 394.

249. *Pearson II*, 367 S.W.3d at 47, 47 n.7; *see In re* Legislative Districting of State, 805 A.2d 292, 306 (Md. 2002).

250. *In re Legislative Districting of State*, 805 A.2d at 306 (internal quotation marks omitted). The Court of Appeals of Maryland is the state's highest court.

While there is no state constitutional or statutory authority imposing a good faith standard on Missouri courts, judicial precedent in other states suggests that it would not be outside the court's authority to adopt this system. If the court would apply such a good faith, burden-shifting framework, it could strengthen the standard it weakened in *Pearson II* and in doing so advance the ultimate goal of Missouri's compactness requirement: to ensure that every person's vote is granted equal weight.[251] In *Pearson I*, the court stated that "the duty to draw the district lines of a contiguous territory as compact . . . as may be is one that is mandatory and objective, not subjective."[252] However, by not imposing any accountability on the General Assembly, the Supreme Court of Missouri is allowing its subjective whims to remain perilously unchecked.

VI. CONCLUSION

Pearson II is the last in a line of Missouri cases that have steadily loosened the compactness requirement and, in repeatedly denying a good faith standard, continuously refused to hold the redistricting body accountable for its decisions. Rendering this trend even more distressing is the lack of federal redress for claims of gerrymandering. Missouri's compactness provision was intended to provide a second line of defense; yet the state's judiciary has instead lent its muscle to the legislature, strengthening its discretion while weakening the objective constraints on such exercises of power. In order to protect against political vote dilution, it is critical that Article III, section 45 be interpreted in a way that requires the General Assembly to justify its deviations from compactness.

251. *See Pearson I*, 359 S.W.3d 35, 39 (Mo. 2012) (en banc) (quoting Burdick v. Takushi, 504 U.S. 428, 441 (1992)).

252. *Id.* at 40.