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Inconsistent Restrictions on Redistricting: Equal Protection, Effective Representation, and Respect for County Boundaries—*Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992)

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Note

Inconsistent Restrictions on Redistricting: Equal Protection, Effective Representation and Respect for County Boundaries—*Day v. Nelson*, 240 Neb. 997, 485 N.W.2d 583 (1992)*

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I. INTRODUCTION

In a representative state government, those who draw the boundaries of the state's election districts wield considerable power. Unchecked, legislators responsible for creating plans of apportionment might abuse this power by acting improperly, either in their own in-

terests or to the detriment of their constituents. This is simply one drawback to a system where the majority rules.

The federal and state constitutions, as countermajoritarian documents, are drafted to provide checks on the potential for discriminatory abuse of power by the ruling majority.[1] Accordingly, many restrictions are promulgated under the Constitution of the United States and the various state constitutions to curb any impropriety in the redistricting process.[2] State constitutions may also provide redistricting guidelines designed to provide administrative convenience and serve other local goals.[3] Common examples of these restrictions are compactness, contiguity, and the respect of political boundaries when drawing the boundaries of legislative districts.[4]

In July 1992, the Nebraska Supreme Court was presented the opportunity to interpret a provision in the Nebraska Constitution requiring the boundaries of the state's election districts to follow county lines whenever "practicable."[5] In *Day v. Nelson*,[6] the court apparently interpreted this provision to require that the legislature respect the boundaries of any county with population within an acceptable range.[7] This Note will examine the impact of the court's decision in *Day*, noting the potential for conflict between the holding of the court and the requirements imposed upon a redistricting legislature by the state constitution, the Constitution of the United States, and other federal law.

Part II begins with a historical discussion of the state and federal requirements of equal population, compactness, contiguity, and the respect for county boundaries, providing the framework in which a Nebraska redistricting legislature must operate. Part III provides a discussion of the *Day* opinion itself, presenting the relevant facts and the court's path to its interpretation of the Nebraska county line provision.

Part IV closely examines the interactive nature of the many requirements placed upon a redistricting legislature, and concludes that the holding of the Nebraska Supreme Court in *Day v. Nelson* has the potential to conflict with the anti-discrimination and anti-gerryman-

1. *See* Martin H. Redish, *Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review*, 88 MICH. L. REV. 1340, 1346 (1990).
2. *But see* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 171 (1985)(strict adherence to such restrictions cannot be relied upon to prevent impropriety in redistricting, and may simply provide a "cloak of legitimacy" to a gerrymandered plan).
3. *See* discussion *infra* section II.B.
4. *See, e.g.*, NEB. CONST. art. III, § 5.
5. NEB. CONST. art. III, § 5.
6. 240 Neb. 997, 485 N.W.2d 583 (1992).
7. *Id.* at 1000-01, 485 N.W.2d at 586. *See also* Neb. Op. Att'y Gen. 92096 (1992).

dering[8] standards of the United States Constitution and other federal law. It then presents an alternate interpretation of the provision which would give the legislature the flexibility necessary to comply with the many requirements placed upon it. Part IV ends with a discussion of a plausible motivation for the decision of the *Day* court. Part V concludes the note with a brief summary and suggestions for future Nebraska legislators confronted with the task of legislative redistricting after *Day*.

II. BACKGROUND

The state of Nebraska is divided into 49 single-member voting districts encompassing its 93 counties. The 49 representatives elected from those districts form Nebraska's Unicameral Legislature.[9] The Legislature itself has the responsibility to redraw the boundaries of the state's legislative districts as required after each federal decennial census.[10] In order to protect the rights of individual voters, as well as certain groups of voters, the Constitution of the United States and the Constitution of the State of Nebraska provide several checks on the potential abuse of this responsibility by the Legislature, such as equality of population, compactness, contiguity, and the respect for political boundaries.[11]

A. Equal Population

Imagine a state with a two member legislature and only two voting districts. Suppose that District One of this state contains 100 citizens. District Two, on the other hand, contains only 10 citizens. Since each district will elect only one representative to the legislature, it is clear that the citizens of District Two have 10 times the voting strength of citizens of District One. As a result, the citizens of District One are likely to be unhappy with the legislative apportionment plan describing the boundaries of the state's voting districts.[12]

8. Gerrymandering is "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969). The term is also used to describe racially discriminatory apportionment of legislative districts.
9. For a historical discussion of Nebraska's unique Unicameral Legislature, see ADAM CARLYLE BRECKENRIDGE, ONE HOUSE FOR TWO: NEBRASKA'S UNICAMERAL LEGISLATURE (1957).
10. NEB. CONST. art. III, § 5.
11. Historically, the requirements of compactness, contiguity and respect for political boundaries were to facilitate transportation and communication within a district. Today, they serve "indirect" goals, such as preserving communities of interest. BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 33 (1984).
12. This simplified example assumes that all citizens are eligible, registered voters. For an examination of the complex problems of voter registration, see Mark Thomas Quinlivan, *One Person, One Vote Revisited: The Impending Necessity of*

In 1964, a similar situation reached the United States Supreme Court. In *Reynolds v. Sims*,[13] the legislative districts of the State of Alabama had not been redrawn since the 1900 census.[14] Due to shifts in the population distribution of the state, the districts of the existing apportionment plan had large population deviations.[15] The existing plan was challenged, and the Supreme Court held that in order to satisfy the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, seats in a state legislature must be apportioned on a population basis.[16] This concept of "one person, one vote"[17] is intended to ensure that each person's vote has approximately the same mathematical weight.[18] Recognizing the difficulty of achieving exact mathematical equality among districts, the *Reynolds* Court held that a good faith effort is required of the legislature to construct districts of as nearly equal population as is practicable.[19]

Over the next two decades, the Supreme Court refined the Constitutional requirement of equal population set forth in *Reynolds*.[20] Ultimately, the Court set a threshold of a 10% population deviation among districts, beyond which the state is required to justify its apportionment plan.[21] Population deviations less than 10% are considered *de minimis*.[22] This requirement of equal population, established under Equal Protection doctrine, is settled constitutional law.[23]

Since the population of a state is in constant flux, periodic adjustment to the boundaries of voting districts is necessary for the state to continue to satisfy the constitutional requirement of equal population

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Judicial Intervention in the Realm of Voter Registration, 137 U. PA. L. REV. 2361 (1989).

13. 377 U.S. 533 (1964).
14. *Id.* at 540.
15. *Id.*
16. *Id.* at 568. The *Reynolds* court held that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* Noting that seats of the United States Senate are not similarly apportioned, the court held the "federal analogy" inapposite. *Id.* at 573.
17. This famous phrase was used by Justice Douglas in Gray v. Sanders, 372 U.S. 368, 381 (1963).
18. Reynolds v. Sims, 377 U.S. 533, 577 (1964).
19. *Id.*
20. *See, e.g.*, Connor v. Finch, 431 U.S. 407 (1977); White v. Regester, 412 U.S. 755 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973).
21. Brown v. Thomson, 462 U.S. 835, 842 (1983)(citing Connor v. Finch, 431 U.S. 407, 418 (1977) and White v. Regester, 412 U.S. 755, 764 (1973)).
22. *Id.*
23. *See, e.g.*, Brown v. Thomson, 462 U.S. 835 (1983), Connor v. Finch, 431 U.S. 407 (1977), White v. Regester, 412 U.S. 755 (1973), Gaffney v. Cummings, 412 U.S. 735 (1973). *See also* John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984); Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. REV. 185 (1985).

among its districts.[24] Consequently, states generally require that their legislative districts be reapportioned on a population basis after each federal decennial census.[25]

B. Compactness, Contiguity, and Respect for Political Boundaries

Even subject to the requirement of substantially equal population among districts, the process of legislative reapportionment is not without its abuses. For example, the majority political party may attempt to construct districts in a manner most favorable to that party. In creating a redistricting plan, that party may divide groups of the minority political party in order to ensure the continued election of the majority party's incumbent representatives.[26] This technique is referred to as political or partisan gerrymandering,[27] and has been recognized by the United States Supreme Court as a justiciable wrong in violation of the Equal Protection Clause of the Constitution of the United States.[28]

Similarly, the legislature may apportion legislative districts in a racially discriminatory fashion.[29] They may attempt to stack minority votes into one district in order to minimize their influence in other districts.[30] Alternatively, they may attempt to split minority votes among many districts, thereby diluting their overall voting strength.[31] The Supreme Court has determined that this type of discrimination, known as minority vote dilution or racial gerrymandering, may be a violation of the Voting Rights Act of 1965[32] and the Equal Protection

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24. *See* In re Reapportionment of Town of Hartland, 624 A.2d 323, 325 (Vt. 1993).

25. *See, e.g.*, ALA. CONST. art. IX, § 200; MD. CONST. art. III, § 5; NEB. CONST. art. III, § 5; WYO. CONST. art. 3, § 48.

26. The majority party may attempt to protect incumbents in other ways. This was a major contention of the Appellants in Day v. Nelson. Brief for Appellants at 9-11, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229). *See* discussion *infra* section IV.F.

27. *See generally* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325 (1987); David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerrymandering and the Status Quo Ante*, 42 STAN. L. REV. 1549 (1990).

28. Davis v. Bandemer, 478 U.S. 109, 119 (1986). For an interesting discussion of the jurisprudence of political gerrymandering after *Davis*, see Evan Geldzahler, Comment, *Davis v. Bandemer: Remedial Difficulties in Political Gerrymandering*, 37 EMORY L.J. 443 (1988); Jon M. Anderson, Comment, *Politics and Purpose: Hide and Seek in the Gerrymandering Thicket after Davis v. Bandemer*, 136 U. PA. L. REV. 183 (1987).

29. *See generally* Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment, in* MINORITY VOTE DILUTION 85 (Chandler Davidson ed., 1984).

30. *Id.* at 92.

31. *Id.* at 89. This technique is also referred to as "cracking."

32. 42 U.S.C. §§ 1971, 1973 (1988). *See, e.g.*, Shaw v. Reno, 113 S. Ct. 2816 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986).

Clause.[33]

One major symptom of these types of creative apportionment is the existence of irregularly shaped districts.[34] The gerrymandering legislature will often have to stretch and twist district boundaries to reach the desired political or racially discriminatory results.[35] As a result, many state constitutions contain provisions providing objective geometric standards for the creation of legislative districts. Compactness and contiguity are the most common examples of these standards.[36]

A compact district has been defined as one that is "closely united in territory."[37] Although such a definition may be difficult to apply, the Illinois Supreme Court has recognized compactness as an appropriate anti-gerrymandering standard.[38] If a legislature is required to create geometrically compact districts, it will be more difficult for them to stretch districts to reach discriminatory results.[39]

The standard of contiguity is somewhat more clear. A contiguous district is one that "cannot be made up of two or more pieces of detached territory."[40] Like the requirement of compactness, this requirement also tends to make it more difficult for a legislature to intentionally dilute the votes of political or racial minorities.

Many state constitutions, in addition to the requirements of equal population, compactness, and contiguity, require some degree of respect for the boundaries of political subdivisions, typically counties.[41]

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33. *See, e.g.*, Shaw v. Reno, 113 S. Ct. 2816 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986); Whitcomb v. Chavis, 403 U.S. 124 (1971).
34. *See* Shaw v. Reno, 113 S. Ct. 2816, 2841 (1993)(White, J. dissenting)("Lack of compactness or contiguity, like uncouth district lines, certainly is a helpful indicator that some form of gerrymandering (racial or other) might have taken place"); *but see* BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 32 (1984)(noting that irregularly shaped districts are not necessarily "bad," and that neatly geometric districts are not always preferable).
35. *See generally* CAIN, *supra* note 34.
36. *See, e.g.*, ALA. CONST. art. IX, § 200 (requiring equal population, contiguity, and respect for county boundaries); MD. CONST. art. III, § 4 (requiring compactness, "adjoining territory," and substantially equal population); NEB. CONST. art. III, § 5 (requiring equal population, compactness, contiguity, and respect for county boundaries); WYO. CONST. art. 3, § 3 (requiring equal population and respect for county boundaries).
37. Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 634 (E.D. Wis. 1982).
38. Burris v. Ryan, 588 N.E.2d 1023 (Ill. 1991).
39. *See* CAIN, *supra* note 34. For a thorough discussion of compactness as related to cases of racial vote dilution, see Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989).
40. Wisconsin State AFL-CIO v. Elections Bd., 543 F. Supp. 630, 634 (E.D. Wis. 1982)(quoting State *ex. rel.* Lamb v. Cunningham, 53 N.W. 35, 57 (1892)).
41. *E.g.*, ALA. CONST. art. IX, § 200 ("No county shall be divided between two districts"); MD. CONST. art. III, § 4 ("Due regard shall be given to . . . the boundaries of political subdivisions"); NEB. CONST. art. III, § 5 ("county lines shall be followed whenever practicable"); VT. CONST. ch. II, § 13 ("the General Assembly

In addition to providing another objective anti-gerrymandering standard to the legislature, this type of requirement serves several other purposes. Since voters are generally familiar with the boundaries of their county, the county line may be an administratively convenient district boundary.[42] Also, county governments may wish to have an exclusive voice in the state legislature.[43] In addition, "the sense of community derived from established governmental units tends to foster effective representation."[44]

III. *DAY V. NELSON*[45]

A. Facts of the Case

Upon the completion of the 1990 federal decennial census, the Nebraska Legislature set out to reapportion the state's 49 legislative districts as required by the Nebraska Constitution.[46] The 1990 census showed a general shift of population from Nebraska's rural areas to its urban centers, Douglas, Lancaster and Sarpy Counties.[47] In order for the new apportionment plan to satisfy the requirement of substantially equal population, it was necessary for the Legislature to create two additional districts in the area of these urban counties.[48] To retain the state's 49 districts, the Legislature had to eliminate two districts in other parts of the state.[49]

To aid in the redistricting process, a committee of the Nebraska Legislature drafted guidelines for reapportionment.[50] Among these was the recommendation that districts of the new plan not deviate more than 2% from the "ideal" district population, calculated as the total population of the state divided by the number of districts.[51] This standard is well below the 10% threshold suggested by the United States Supreme Court.[52] The Legislature considered the proposed plans, and in June 1991 Nebraska's new legislative redistricting plan, L.B. 614, was passed into law.[53]

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shall seek to . . . adhere to boundaries of counties and other existing political subdivisions"); WYO. CONST. art. III, § 3 ("Each county shall constitute a senatorial and representative district").

42. *See* In re Reapportionment of Town of Hartland, 624 A.2d 323, 330 (1993).
43. *Id.*
44. *Id.* (quoting Carstens v. Lamm, 543 F.Supp. 68, 88 (D.Colo. 1982)).
45. 240 Neb. 997, 485 N.W.2d 583 (1992).
46. NEB. CONST. art. III, § 5. *See* discussion *supra* section II.A.
47. Day v. Nelson, 240 Neb. 997, 999, 485 N.W.2d 583, 585 (1992).
48. *Id.* at 999-1000, 485 N.W.2d at 585.
49. *Id.*
50. *Id.* at 999, 485 N.W.2d at 585.
51. *Id.* Only two of Nebraska's 93 counties, Lincoln and Madison, satisfied the 2% maximum population deviation guideline of the committee. *Id.*
52. *Id. See supra* notes 20-23 and accompanying text.
53. NEB. REV. STAT. §§ 50-1101 to 50-1152 (Supp. 1991).

Madison County, in northeastern Nebraska, had historically been treated as a single voting district or the great majority of one.[54] Applying the common definitions, Madison County appears to be a compact and contiguous territory.[55] Since the 1990 census showed that the population of Madison County was within the guidelines set forth by the committee,[56] Madison County apparently satisfied all of the requirements demanded of a valid legislative district.[57] Nevertheless, L.B. 614 eliminated Madison County's district, District 21, dividing the population of Madison County among the neighboring Districts 18 and 40.[58] Unhappy with the elimination of their district, several citizens of Madison County brought suit to enjoin the enforcement of L.B. 614.[59]

B. Applicable Law

Article III, section 5 of the Constitution of the State of Nebraska addresses the legislative redistricting process. That provision provides:

> At the regular session of the Legislature held in the year nineteen hundred and thirty-five the Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, *as nearly equal in population as may be and composed of contiguous and compact territory.* One member of the Legislature shall be elected from each such district. The basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census. *The Legislature shall redistrict the state after each federal decennial census. In any such redistricting, county lines shall be followed whenever practicable, but other established lines may be followed at the discretion of the Legislature.*[60]

This provision incorporates the requirements of equal population, compactness, contiguity, and respect for county boundaries.

C. Claims and Holding

The *Day* plaintiffs alleged, among other things, that L.B. 614 was in violation of article III, section 5 of the Nebraska Constitution.[61]

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54. Brief for Appellants at 6, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229).
55. See *supra* notes 37-40 and accompanying text.
56. Day v. Nelson, 240 Neb. 997, 999, 485 N.W.2d 583, 585 (1992).
57. In addition, Madison County was one of only ten Nebraska counties to experience a population increase over the preceding decade. *Id.* at 999, 485 N.W.2d at 585.
58. *Id.* at 1000, 485 N.W.2d at 585.
59. *Id.* at 998, 485 N.W.2d at 584.
60. NEB. CONST. art. III, § 5 (emphasis added).
61. In addition to the alleged violation of the Nebraska Constitution, the Madison County plaintiffs claimed that L.B. 614 was in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and that it was enacted in violation of the Due Process Clause. Brief for Appel-

Although the district court disagreed and upheld the plan, the Nebraska Supreme Court reversed, agreeing with the Madison County plaintiffs.[62]

The court reasoned that since other plans were proposed to the legislature that left Madison County intact, and the population of Madison County was within a constitutionally acceptable range, it was "practicable" to follow the Madison County line, within the meaning of article III, section 5.[63] Since L.B. 614 did not follow the Madison County line, those sections of the redistricting plan which divided Madison County[64] were in violation of article III, § 5 of the Nebraska Constitution, and were therefore enjoined from enforcement.[65]

IV. ANALYSIS

A. The "Practicability" of Following County Lines

After *Day*, the court would apparently hold that if any county has been treated as its own district on any proposed redistricting plan, and that county satisfies the requirement of substantially equal population, it is "practicable" to respect that county's borders in a redistricting plan.[66] Consequently, without any analysis of the plan as a whole, the Legislature must consider that county as its own district in the new plan of reapportionment.[67]

There is a potential conflict between this apparently absolute requirement of respecting the boundaries of a sufficiently populous county and the equal population requirement itself as applied to an entire redistricting plan.[68] A legislature must have the flexibility to reach a balance among the many restrictions placed upon it in creating a legislative apportionment plan.[69] The result of *Day v. Nelson* may restrict that flexibility, and future compliance with the *Day* holding

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lants at 2, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229). However, this Note is limited to the effects of the Plaintiffs' successful claim under the Nebraska Constitution.

62. Day v. Nelson, 240 Neb. 997, 1001, 485 N.W.2d 583, 586 (1992).
63. *Id.*
64. NEB. REV. STAT. §§ 50-1119, 50-1141 (Supp. 1991)(superseded by NEB. REV. STAT. §§ 50-1119.01, 50-1141.01 (Cum. Supp. 1992)).
65. Day v. Nelson, 240 Neb. 997, 1001, 485 N.W.2d 583, 586 (1992).
66. *See* Neb. Op. Att'y Gen. 92096 (1992).
67. *Id.*
68. *See* Brown v. Thomson, 462 U.S. 835, 853 (1983)(Brennan, J. dissenting)("We have warned that although maintenance of county or other political boundaries can justify small deviations [in population], it cannot be allowed to negate the fundamental principle of one person, one vote.")
69. *Id.* at 848 (O'Connor, J., concurring)("There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities.") *See also* In re Reapportionment of Town of Hartland, 624 A.2d 323, 326 (Vt. 1993)("[T]he Legislature must resolve the tension that exists between the one-person, one-vote require-

could result in a violation of other restrictions on redistricting.[70]

B. Compromise Among the Requirements

Restrictions on redistricting can be split into two general categories: numerical restrictions and nonnumerical restrictions.[71] The numerical category contains the requirement of equal population under the Equal Protection Clause. The goal of this requirement is to ensure mathematical equality among votes throughout the state.[72] The nonnumerical category contains requirements such as compactness, contiguity, and the respect for political boundaries.[73] One goal of this group is to provide voters with fair and effective representation.[74] Another goal of this group is to create an administratively workable redistricting plan. Restrictions in these categories must work together to guarantee a plan that is fair, neutral, and reasonable.[75]

Taken alone, the numerical restrictions would result in perfect mathematical equality of voting strength among the voters of all districts. However, the possibilities of gerrymandering or racial vote dilution are not checked by this Constitutional requirement.[76] At another extreme, the nonnumerical requirements taken alone might neutralize such creative apportionment, but would result in inequality of voting strength between voters of different districts in any state with a less than perfectly uniform population distribution.[77]

Clearly, a balance must be reached among these restrictions to allow both equal voting strength and fair and effective representation in

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ment and state laws concerning the maintenance of compact and contiguous districts made up of communities with common interests.")

70. In fact, the Legislature's response to *Day*, LB 7, which reapportioned and renumbered parts of districts 18, 19, and 40, has since been challenged. In that action the Plaintiff claimed that LB 7 violated her constitutional right to run for public office, her First Amendment Right to freedom of association, and her Fourteenth Amendent right to due process. However, Plaintiff's motion for preliminary injunction was denied by the U.S. District Court of Nebraska. Carlson v. Nelson, No. 4: CV92-3300 (D. Neb. Sept. 3, 1992)(Order denying preliminary injunction).
71. In re Reapportionment of Town of Hartland, 624 A.2d 323, 329 (Vt. 1993).
72. *Id. See generally* Reynolds v. Sims, 377 U.S. 533 (1964) and discussion *supra* section II.A.
73. In re Reapportionment of Town of Hartland, 624 A.2d 323, 328-29 (Vt. 1993).
74. *Id.*
75. It is interesting to note that computer models have been employed, with limited success, to try to reach a perfect compromise among the restrictions placed upon a redistricting legislature. *See, e.g.*, Michelle H. Browdy, *Simulated Annealing: An Improved Computer Model for Political Redistricting*, 8 YALE L. & POL'Y REV. 163 (1990).
76. *See* In re Reapportionment of Town of Hartland, 624 A.2d 323, 334 (Vt. 1993).
77. See Brown v. Thomson, 462 U.S. 835, 845 (1983)("Even a neutral and consistently applied criterion such as use of counties as representative districts can frustrate *Reynolds*' mandate of fair and effective representation").

a workable redistricting plan.[78] At first glance, it would appear that the Nebraska Supreme Court reached just that result in *Day v. Nelson*. The court found that Madison County, a historically recognized political subdivision, apparently compact and contiguous and containing nearly the ideal district population, should remain a unitary district.[79] However, this decision arguably misinterprets the county line requirement of the Nebraska Constitution. This interpretation has the potential to carry far beyond the facts of Madison County, Nebraska, in 1991.

In *Day*, the court states that "[i]t is obvious that according to the plain language of Article III, section 5, Madison County must constitute a single district unless not 'practicable.' "[80] It then conclusively asserts that "[i]t is also obvious that the presence of a number of plans that apportion the state leaving District 21 [Madison County] substantially intact makes following that county's boundaries 'practicable.' "[81] It is this "obvious" meaning of the term "practicable," reached by the court without reason or analysis, that is potentially problematic.

C. The Redistricting "Puzzle"

A redistricting plan has been compared to a puzzle.[82] Like the pieces of a puzzle, each district of a plan must fit perfectly together with the next, with the resulting completed puzzle exhausting the territory of the state. There can be no gaps nor overlapping pieces. In this puzzle, each piece is constitutionally required to encompass approximately the same number of citizens.[83] Consequently, any adjustment to or restriction placed upon a boundary of a piece causes a chain reaction of necessary adjustments to the other pieces, potentially throughout the entire state.[84] A redistricting plan, therefore, cannot be discretely analyzed in terms of its individual districts since there is an interactive relationship among the boundaries of all of its districts.[85] A plan must be analyzed in its entirety to determine if following a certain county line is "practicable."[86]

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78. *Id.* at 845-46.
79. Day v. Nelson, 240 Neb. 997, 1001, 485 N.W.2d 583, 586 (1992).
80. *Id.* at 1000-01, 485 N.W.2d at 586.
81. *Id.* at 1001, 485 N.W.2d at 586.
82. *See, e.g.*, BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE (1984).
83. Reynolds v. Sims, 377 U.S. 533 (1964). *See* discussion *supra* section II.A.
84. Neb. Op. Att'y Gen. 92098 (1992)("a change in one aspect of a plan may have an impact on other aspects of the plan").
85. *See* Brown v. Thomson, 462 U.S. 835, 857-58 (1983)(Brennan, J., dissenting)(rejecting the majority's assumption that one feature of a plan can be "severed" and analyzed in isolation).
86. Brief for Appellees at 10-11, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229). *See also* Brown v. Thomson, 462 U.S. 835, 859 (1983)(Brennan, J. dissenting)("Only by analyzing the plan 'in its totality' may we judge

However, the *Day* court seems to employ a district-by-district analysis in its reasoning, ignoring the potential effects of one district on the entire plan.[87] Following *Day*, it appears that if any county contains population sufficient to satisfy the requirement of substantially equal population, and has been proposed to the Legislature as its own district, that county may be able to enjoin the enforcement of any redistricting plan that fails to respect its boundaries.[88] This result does not recognize the interactive nature of districts within a given plan.

There must be give and take among the requirements imposed upon the legislature, as well as the physical restrictions imposed by the geography of the state and the distribution of its population. This flexibility is necessary to complete the "puzzle" of reapportionment.[89]

Following *Day*, in creating a redistricting plan, those districts with satisfactory populations must be the fixed starting point for the legislators, since there is little flexibility granted to the legislature with respect to these counties.[90] The flexibility necessary to complete the "puzzle," exhausting the territory of the state without any overlapping districts, must then be exercised in drawing the boundaries of the remaining districts.[91] In a state like Nebraska, with a widely variable population distribution, one potential result of such a rigid starting point is the creation of irregularly shaped districts that are not compact or contiguous, or districts that violate the requirement of equal population.[92] As long as the requirement of equal population is considered paramount,[93] then the standards of compactness and contiguity may have to be abandoned, leaving the door open to gerrymandering.[94] The interactive nature of the boundaries of voting districts, therefore, has the potential to translate the rigid enforcement of a state constitutional provision into a violation of established federal requirements.

A more reasonable reading of the county line provision would

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whether the allocation of any seat in the House is constitutional")(citation omitted).

87. Justice Brennan pointed out the difficulties associated with attempting to sever one district from an entire plan in his dissent in Brown v. Thomson, 462 U.S. 835, 856-60 (1983).

88. Day v. Nelson, 240 Neb. 997, 1000-01, 485 N.W.2d 583, 586 (1992). *See also* Neb. Op. Att'y Gen. 92096 (1992).

89. *See* Brown v. Thomson, 462 U.S. 835, 853 (1983)(Brennan, J. dissenting).

90. Neb. Op. Att'y Gen. 92096 (1992).

91. *Id.* at 3-4.

92. See Brown v. Thomson, 462 U.S. 835, 841, 844 (1983). However, the problem arguably is easier to avoid in a state like Nebraska where the number of election districts greatly exceeds the number of counties.

93. Reynolds v. Sims, 377 U.S. 533, 579 (1964). *See also* Neb. Op. Att'y Gen. 92096 (1992).

94. Brief for Appellees at 16, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229).

leave the Legislature with the flexibility needed to accommodate the many restrictions placed upon it. The county line restriction should not be considered mandatory, even for counties with populations sufficient to satisfy the Equal Protection Clause.[95] Initially, the term "practicable" must take the entire "puzzle" into consideration, rather than examining each county individually.[96] Under this reading, if a plan respecting the boundaries of certain counties would result in *other* counties being noncompact, noncontiguous or unacceptably disparate in population, then respecting the boundaries of those certain counties is *not* practicable.[97]

Although the court states that other plans were proposed leaving Madison County substantially intact,[98] it refuses to address the reasons that the Legislature discarded these other plans in favor of L.B. 614. Perhaps these proposed plans contained districts that were not compact or contained unacceptable population deviations among districts. There may have been many factors which would have rendered the respect of Madison County's borders impracticable, considering the apportionment plan as a whole.[99]

As long as redistricting remains a legislative function, the Legislature appears to be in a superior position to make an informed decision as to which redistricting plans are "practicable," considered in their entirety. Simply because a plan apparently results in politically favorable consequences should not deem it invalid.[100] The court's assertion that the *proposal* of alternative plans which respected the Madison County line automatically renders following the County line "practicable" does not withstand a realistic analysis in light of the actual process of legislative reapportionment.

D. Discretion of the Legislature

In addition to its questionable reading of the term "practicable," the court ignores some of the plain language of the provision that it claims to be following. In its brief conclusion, the court states that the State of Nebraska, in its more permissive interpretation of the county

95. Brief for Appellees at 9-10, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229).

96. *Id.* at 10, 11. *See also* Brown v. Thomson, 462 U.S. 835, 859 (1983).

97. Brief for Appellees at 10-11, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229).

98. Day v. Nelson, 240 Neb. 997, 1000, 485 N.W.2d 583, 586 (1992).

99. Appellees noted that "each of the various plans submitted . . . called for splitting of counties. . . . The principal difference between the plans was in which counties would end up being split." Brief of Appellees at 6, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229). Interestingly, Appellees also contended that the Appellants' favored plan would have split Madison County as well. *Id.* at 14.

100. Davis v. Bandemer, 478 U.S. 109, 129 (1986).

line provision, "ignores the mandatory 'shall' in the constitutional section and would equate it with the permissive 'may.' "[101] However, the court has apparently not completed its reading of the last sentence of the provision, which states that "[i]n any such redistricting, county lines shall be followed whenever practicable, *but other established lines may be followed at the discretion of the Legislature.*"[102] The plain meaning of this clause clearly adds a discretionary element to the requirement.[103] Whether or not L.B. 614 actually followed "established lines" in its division of Madison County is not important. What is important is that the court's holding in *Day* effectively nullifies this patently discretionary language, at least in the case of a sufficiently populous county. Borrowing another quote upon which the court relies, "[i]t is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose."[104] Yet, the court appears to have ignored any purpose that this particular discretionary clause may have.[105]

E. *Brown v. Thomson*[106] Distinguished

It has been argued that the benefits of respecting county boundaries are so great that they should outweigh the equal population and anti-gerrymandering requirements. As discussed above,[107] a county boundary is an administratively convenient district boundary, since the local voter is generally familiar with his county. In addition, county governments may wish to have their own voice in the legislature and may not want to share their representative with another county.

The United States Supreme Court has recognized that, under certain circumstances, the desire to maintain county boundaries may be a sufficient justification for deviations from population equality.[108] In *Brown v. Thomson*, the 1981 Wyoming legislative apportionment plan strictly followed county boundaries in order to fulfill the state's constitutional guarantee of at least one representative to each county.[109] The resulting districts showed significant deviations among their

101. Day v. Nelson, 240 Neb. 997, 1001, 485 N.W.2d 586, 586 (1992).
102. NEB. CONST. art. III, § 5 (emphasis added).
103. Brief for Appellees at 9-10, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 883 (1992)(No. S-92-0229).
104. Day v. Nelson, 240 Neb. 997, 1000, 485 N.W.2d 583, 585-86 (1992)(quoting Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967)).
105. Brief for Appellees at 9-10, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229).
106. 462 U.S. 835 (1983).
107. *See* discussion *supra* section II.B.
108. Brown v. Thomson, 462 U.S. 835, 847 (1982).
109. WYO. CONST. art. III, § 3.

populations.[110] However, despite these gross violations of the equal population standard, the Court upheld the plan.[111]

The Court's reasoning in *Brown*, however, does not lend itself to the facts underlying *Day*. To be sure, the Court recognized the benefits of respecting county boundaries, but did so only under limited circumstances. The *Brown* Court stressed the fact that the requirement of respect for county boundaries was a mandatory requirement of the Wyoming Constitution.[112] In addition, the court considered it important that the mandatory requirement of respecting county boundaries had been consistently applied in a nondiscriminatory fashion since Wyoming's statehood.[113] Under these circumstances, the Wyoming county line requirement was held to advance a rational state interest justifying deviation from the equal population principle.[114]

In contrast to Wyoming's longstanding constitutional requirement, even under the *Day* court's reading of the Nebraska constitutional provision it can hardly be contended that Nebraska's "requirement" of following county lines is mandatory. Such a reading is contrary to the plain meaning of the provision, regardless of how the term "practicable" is interpreted.[115]

The narrow reach of the Court's holding in *Brown* was stressed by Justice Brennan in his dissenting opinion,[116] and another court has referred to the Brown decision as "an aberration with little precedential value."[117]

F. Possible Motivation of the Court

A closer look at the facts surrounding the conflict resulting in *Day v. Nelson* reveals a possible motivation for the court's decision. The chairman of the committee in charge of structuring the redistricting plan was a state senator from another northeastern Nebraska county.[118] Although several of the proposed plans divided this senator's county among other districts, the committee, and ultimately the

110. The challenged plan had an average population deviation of 16% and a maximum deviation of 89%. Brown v. Thomson, 462 U.S. 835, 846 (1983).

111. *Id.* at 847.

112. *Id.* at 843.

113. *Id.* at 843-44.

114. *Id.* at 848.

115. *See* Neb. Op. Att'y Gen. 92096 (1992)("the court in the *Day* case seems to equate the term 'practicable'. . . with 'possible' ").

116. Brown v. Thomson, 462 U.S. 835, 850 (1983)(Brennan, J., dissenting)("[I]t is worth stressing how extraordinarily narrow [the Court's holding] is, and how empty of likely precedential value").

117. In re Reapportionment of Town of Hartland, 624 A.2d 323, 333 (Vt. 1993).

118. Brief for Appellants at 9-11, Day v. Nelson, 240 Neb. 997, 485 N.W.2d 583 (1992)(No. S-92-0229).

Legislature, chose L.B. 614.[119] The *Day* plaintiffs believed that this senator used his influence as chairman to obtain the passage of L.B. 614.[120] They argued that he was attempting to preserve his district in order to remain in office.[121] Perhaps the court agreed, and felt that it was punishing a gerrymandering state senator by finding for the Madison County plaintiffs and enjoining certain portions of L.B. 614.

Whether this scenario is accurate or not in this particular case misses the point. If the court wanted to punish this senator by enjoining his plan, it could have done so explicitly by considering the practicability of the other proposed plans in their entirety. In fact, it is not inconceivable that a plan could have been constructed that respected the borders of Madison County while allowing the entire plan to satisfy the requirements of equal population, contiguity, compactness, and even the respect of the boundaries of other sufficiently populous counties. But rather than conducting this type of analysis on the alternative plans, the court apparently chose to examine Madison County in isolation.

V. CONCLUSION

Although the holding in *Day v. Nelson* appears at first glance to be the rigorous enforcement of a provision of the Nebraska Constitution, a closer reading of that provision reveals that the Nebraska Supreme Court has chosen to enjoin properly enacted state legislation through an erroneous interpretation of that provision. The result of this interpretation is that future legislators, constitutionally bound to create districts of equal population, will also be required to respect the boundaries of certain counties. It is possible that the imposition of these two requirements will result in a redistricting plan with noncompact, noncontiguous districts. This, in itself, is a violation of article III, section 5 of the Constitution of the State of Nebraska. It also creates a climate conducive to discriminatory apportionment, by providing a pre-existing excuse for irregularly shaped districts.

Future Nebraska legislators, in creating plans of apportionment, must attempt to reconcile the holding in *Day* with the constitutional requirements of equal population, compactness, and contiguity. These requirements must be harmonized, if "practicable," through careful planning in the process of redistricting. More often than not, it would appear that careful redistricting will allow all of these requirements to be satisfied. However, if reconciliation of these provisions is not possible and a plan is challenged under the county line provision, the proponents of the plan must attempt to make a clearer showing of why

119. *Id.* at 9-11.
120. *Id.*
121. *Id.* at 10.

alternative plans are somehow not "practicable," even though they were proposed. They may attempt to show that, considering the redistricting plan in its entirety, it is not possible to leave the county in question intact without leaving the plan open to other challenges under the Constitution of the United States. The situation may demand a choice between a violation of the county line "requirement" of the Nebraska Constitution and a violation of the mandate of substantially equal population promulgated under the Equal Protection Clause of the United States Constitution. Or, since the Supreme Court has stated that the requirement of equal population is to be considered paramount,[122] the choice may be between a violation of the county line "requirement" and the requirements of compactness and contiguity—the intention of which is to prevent discriminatory apportionment. In either case, the Supremacy Clause of the United States Constitution[123] suggests that the demands of federal law be respected and the provisions of the state constitution be relaxed.

The *Day* opinion may still allow a showing of "impracticability" in a proposed plan, considered as a whole. This showing may remove the plan from the rule of *Day* requiring strict adherence to county lines. The plain language of the Nebraska constitutional provision is consistent with this interpretation, and perhaps future Nebraska courts will attempt to narrowly limit the holding in *Day* to its facts.

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122. Reynolds v. Sims, 377 U.S. 533, 579 (1964).
123. U.S. CONST. art. VI, cl. 2.