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THE DEMISE OF "ONE MAN, ONE VOTE": CHANGES IN LEGISLATIVE REPRESENTATION IN THE UNITED STATES SINCE BAKER V. CARR AND REYNOLDS V. SIMS

A Dissertation

Presented to

the Department of Political Science

University of Oklahoma

In Partial Fulfillment

of the Requirements for the Degree

Doctor of Philosophy

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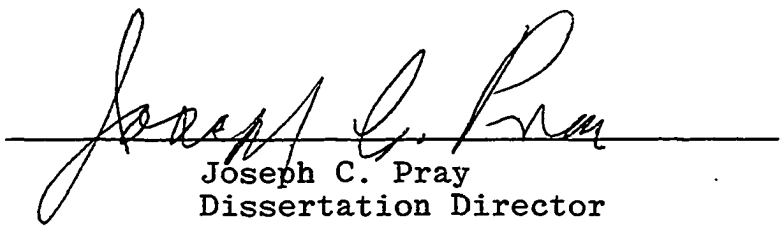
by

C. David Peters

December 1977

APPROVAL



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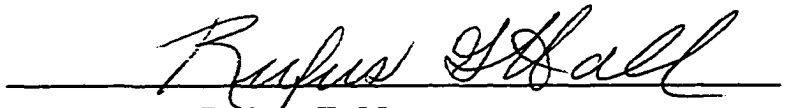

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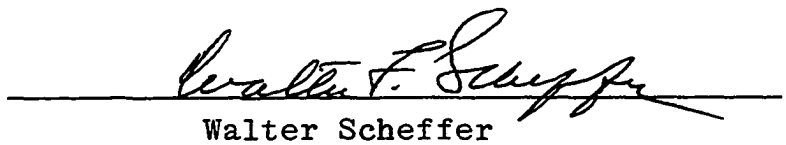

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CHAPTER I

A CASE HISTORY OF REAPPORTIONMENT TO THE PRESENT

When reflecting upon the multitude of issues, which one might with regard to representative government, perhaps there is no question more essentially political than how the boundaries should be drawn which determine who represents whom, whether in Congress, state legislatures, or other governing bodies. This highly political question, the drawing of boundaries, drew much attention and became an important judicial issue in the early 1960s because of a number of Supreme Court decisions. These decisions held, first, that the Court could determine whether the boundaries were drawn in accordance with commands of the Constitution. The Court then interpreted these constitutional commands as forbidding inequalities in the numbers of persons enclosed by the boundaries of congressional, state legislative, and other districts.

This chapter, beginning with Baker v. Carr,[1] the originating case in the apportionment discussions, identifies and reviews the list of landmark and influential cases from the time of their emergence proceeding through

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[1] 369 U.S. 186 (1962).

Reynolds v. Sims[2] and on to the most relevant contemporary cases of the present day. While not providing an exhaustive consideration of all cases touching the subject of "one man, one vote," this chapter provides an examination and analysis of those cases framing the issues of the increasing deviations and movement away from the earlier important apportionment decisions.[3] Many of the issues and nuances of significance of the cases first presented in this chapter of the dissertation are discussed in later chapters.

In 1962 in an epic Supreme Court decision, Baker v. Carr,[4] the Court reversed a longstanding position of the high Court and held that federal courts have jurisdiction over the lawsuits challenging the apportionment of legislative districts. It did so on the ground that malapportioned districts may violate the equal protection clause of the Fourteenth Amendment. The case had the effect of overturning Colegrove v. Green[5] in which the Court held that the issue of malapportioned districts was a "political" question and relief should be sought through the political process. Baker established apportionment as a justiciable province of the Court. Coupled with subsequent decisions following

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[2]377 U.S. 533 (1964).

[3]For an exhaustive consideration and analysis of all cases touching the subject of "one man, one vote," see Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (New York: Oxford Press, 1968).

[4]369 U.S. 186 (1962). [5]328 U.S. 549 (1946).

Gray v. Sanders[6] and Reynolds v. Sims,[7] the Court announced the entry of the federal courts into an area which had until this time been thought left to other branches of government. Apportionment had previously been the exclusive domain of state legislatures, congressional districts, and local governing bodies. Thereupon the 1960s saw for the first time the federal courts take jurisdiction of apportionment cases and in practical effect announce the principle of "one man, one vote."[8] What had been earlier called a "political"[9] question and thus left for other branches of government to decide came under the now discerning eyes of the federal judiciary. Justice Frankfurter had described what the federal courts were now entering into as a

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[6]372 U.S. 368 (1963). In Gray v. Sanders Justice Douglas first articulated the policy which was to govern all future reapportionment cases: one person, one vote. In his majority opinion he declared that the only exceptions to the doctrine are the allotment of two senators for each state in the Federal Congress and the election of the president by the electoral college provided for in the Twelfth Amendment.

[7]377 U.S. 533 (1964).

[8]Id. at 560-61. The Court held that voting strength in legislative bodies must be apportioned on the basis of population.

[9]"Political" herein refers to a doctrine enunciated by the Supreme Court holding that certain constitutional issues cannot be decided by the courts but are to be decided by the executive or legislative branches. The significance of the doctrine of the "political" question is that it is a self-imposed restraint on the Court's power of judicial review. Jack C. Plano and Milton Greenberg, The American Political Dictionary, 4th ed. (Hinsdale, Illinois: Dryden Press, 1976).

"political thicket."[10]

The upshot of this was that both houses of state legislatures,[11] congressional districts,[12] and local governing bodies[13] were apportioned according to population.

Within the last few years the Supreme Court has begun to allow a divergence from this strict population standard in regard to the apportionment of local[14] and state legislatures,[15] but even today still rigidly adheres to this standard for congressional districts.[16]

Traditionally the federal courts had refused to exercise jurisdiction in cases attacking malapportionment of congressional districts or the legislatures or other governing bodies of the states and their political subdivisions.[17] The constitutions of the various states provide for the apportionment of the legislatures of these states according to fixed standards. In addition they provide that these bodies be reapportioned at fixed intervals.[18]

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[10] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[11] Reynolds v. Sims, 377 U.S. 533 (1964).

[12] Wesberry v. Sanders, 376 U.S. 1 (1964).

[13] Avery v. Midland County, 390 U.S. 474 (1968).

[14] Abate v. Mundt, 403 U.S. 182 (1971).

[15] Mahan v. Howell, 410 U.S. 315 (1973).

[16] White v. Weiser, 412 U.S. 783 (1973).

[17] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[18] See, e.g., California Constitution, Article IV,

Normally the duty of reapportionment is delegated to the legislature, although in a few states another officer, such as the governor, is given the task.[19]

The requirements of the various constitutions were not often followed. Legislatures were not reapportioned for long periods or, if they were reapportioned, it was not done in conformity with the mandated constitutional provisions. This often resulted in various areas of a state being represented in the legislature with strength far greater than its population would warrant. Certain areas of a state often came to be vastly overrepresented.[20] Some litigation in the various state courts occurred in the late nineteenth and early twentieth centuries for the purpose of forcing the various legislatures to reapportion according to the mandated standards. The decisions generally held that the issue was justiciable but that the courts could not fashion

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Section 6; and New York Constitution, Article III, Sections 4-5. For a complete list of all applicable state constitutional sections see Advisory Commission on Intergovernmental Relations, A Commission Report: Apportionment of State Legislatures (Washington, D.C.: Government Printing Office, 1962), Appendix A.

[19]E.g., the Hawaii Constitution commits the task of reapportionment to the executive. Hawaii Constitution, Article III, Section 4.

[20]Justice Douglas, concurring in Baker v. Carr, stated "that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County." 369 U.S. at 245 (1962).

a positive remedy.[21]

Colegrove v. Green[22] was a landmark case which predates the reapportionment cases of the 1960s. It involved the apportionment of congressional districts in Illinois, which at that time (1946) had both the largest and smallest congressional districts in the entire nation.[23] A seven-man Court, though not handing down a majority opinion, refused to involve the federal courts in the issue and affirmed the decision of the lower court.[24] Justice Frankfurter, joined by Justices Burton and Reed, upheld the dismissal of the suit for want of both jurisdiction and equity. Justice Frankfurter stated that "courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[25] Justice Rutledge concurred with Justices Frankfurter, Burton, and Reed, but he stated that the complaint should be dismissed for want of equity only, and noted that

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[21] R. Cortner, The Apportionment Cases (Knoxville: University of Tennessee Press, 1970), pp. 5-8.

[22] 328 U.S. 549 (1946).

[23] Cortner, The Apportionment Cases, pp. 5-8.

[24] Colegrove v. Green, 64 F.Supp. 632 (N.D. Ill., 1946). A group of voters had instituted suit praying that the Illinois apportionment act be declared unconstitutional. The district court dismissed their suit on the sole authority of Wood v. Brown, 287 U.S. 1 (1932).

[25] 328 U.S. at 556.

the courts should not enter so delicate an area unless clearly compelled to do so.[26] Justice Black, joined by Justices Douglas and Murphy, felt that the Court should fashion a remedy, since the apportionment situation in Illinois at that time denied the voters of that state the equal protection of the law as required by the Fourteenth Amendment of the Federal Constitution.[27]

While there was no majority opinion in Colegrove v. Green,[28] a series of per curiam dismissals of reapportionment cases followed.[29] In South v. Peters,[30] involving a challenge to the county unit system of primary elections in Georgia,[31] the Court stated that federal courts would refuse to use their equity powers in cases posing political issues arising from a state's geographical distribution of

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[26] Id. at 565.

[27] Id. at 566-74. Even though the Court would not enter the so-called political thicket, various earlier cases had held that the direct denial of a voting right was a violation of the equal protection clause of the Fourteenth Amendment, e.g., Nixon v. Herndon, 273 U.S. 536 (1927), and Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[28] 328 U.S. 549 (1946).

[29] Cox v. Peters, 342 U.S. 936 (1952) (Georgia); Remmey v. Smith, 342 U.S. 916 (1952) (Pennsylvania); Cook v. Fortson, 329 U.S. 675 (1946) (Georgia); Turman v. Duckworth, 329 U.S. 675 (1946) (Georgia).

[30] 339 U.S. 276 (1950).

[31] Here the county unit system allotted six unit votes to eight most populous Georgia counties, and two each to most of the other counties. Votes in the most populous county allegedly had 10 percent of the voting impact of those in other counties. Id. at 277.

electoral strength.[32] In this case the dissent emphasized the "invidious discrimination" aspect[33] of the action of the state of Georgia.[34]

An overview of the century prior to Baker would reveal an era in which the federal courts had adopted a "hands-off" policy with respect to apportionment, even though it was widely realized that malapportionment existed. As Robert Eimers pointed out in "Legislative Apportionment: The Contents of Pandora's Box and Beyond," "For over a century the federal courts adopted a 'hands-off' policy in regard to apportionment, although it was widely realized that malapportionment did exist. They were afraid of the contents of Pandora's Box."[35] He went on to point out that Justice Frankfurter had stated that both the legislatures of the several states and Congress possessed ample powers to deal with the situation.[36]

Therefore, until the early 1960s, those citizens trying to receive a judicial remedy for malapportionment met with no success. Ostensibly the Court felt that if the

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[32]Id. at 276-77. [33]Id. at 277-81.

[34]The county unit system of primary elections in Georgia was ultimately held to violate the equal protection clause of the Fourteenth Amendment. Gray v. Sanders, 372 U.S. 368 (1963).

[35]Robert F. Eimers, "Legislative Apportionment: The Contents of Pandora's Box and Beyond," Hastings Constitutional Law Quarterly, Spring 1974, p. 292.

[36]Colegrove v. Green, 328 U.S. 549, 556 (1946).

voters would press the various legislatures or Congress, reform would be forthcoming. Indeed, if this were the hope of the Court, it was not to be realized.

A state in which no reapportionment had taken place since 1901 was Tennessee. Due to urbanization the rural areas of the state eventually held disproportionate political power and were not about to relinquish it willingly. A voters' suit was instituted in the Middle District of Tennessee in 1959 under the Civil Rights Act[37] to redistrict the legislature. A three-judge court relying on Colegrove v. Green[38] dismissed the suit both for want of jurisdiction and because no claim had been stated upon which relief could be granted.[39] A direct appeal was taken to the Supreme Court,[40] and one might have expected that the Court, under the hallowed doctrine of stare decisis, would have affirmed the dismissal of the suit under the authority of Colegrove v. Green.[41] Instead the Court was persuaded to cast aside previous rulings. This was indeed a major breakthrough!

In Baker v. Carr[42] the majority of the Court reversed the decision of the district court, holding that the petitioners' complaint stated a cause of action, finding

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[37] 42 U.S. Code 1983, 1988 (1970).

[38] 328 U.S. 549 (1946).

[39] Baker v. Carr, 179 F.Supp. 824 (M.D. Tenn., 1959).

[40] 28 U.S. Code 1253 (1948).

[41] 328 U.S. 549 (1946). [42] 369 U.S. 186 (1962).

that the issue was justiciable, and stating that the petitioners were entitled to a trial on the merits of the complaint. Justice Brennan, writing for the majority, noted that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."[43] The constitution of the state of Tennessee stated that both houses of the legislature must be apportioned on the basis of population and that reapportionment must occur every ten years.[44] The legislature, however, had failed to reapportion for over fifty years. Justice Douglas, in a concurring opinion, noted the vast differences in representation which had occurred among the various counties in Tennessee as a result of nonreapportionment.[45] While generally referred to as a landmark case, Baker v. Carr[46] was a narrow decision which announced that the petitioners had standing to sue, that the federal court had jurisdiction, that a remedy could be fashioned, and that the case would be remanded to the lower court for further proceedings.[47]

Even with enormous pressure from various interest groups in the state, the Tennessee legislature had failed to reapportion.[48] Perhaps on the practical side the Court was

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[43] I.d. at 209.

[44] Tennessee Constitution, Article II, Sections 3-5.

[45] See note 18.

[46] 369 U.S. 186 (1962). [47] Id. at 237.

[48] Gene Graham, One Man, One Vote: Baker v. Carr and

faced with a situation for which really no solution existed other than a judicial one. The history of attempts to force the Tennessee legislature to reapportion was long and without result. It may be said that the situation was finally "dropped into the lap of the Court." Justice Clark, in a concurring opinion, perceptively stated that the apportionment situation in Tennessee was a "crazy quilt without rational basis."[49]

The real solution to the problem of malapportionment demanded an equitable remedy. For many decades the apportionment question had been labeled "political,"[50] which precluded intervention by the judiciary. At this time, however, the pressure for correction was so great that the judiciary was pressed to act to relieve the inequitable situation. The entire question of reapportionment suddenly became a problem for the judiciary, thus in effect removing it from the "political" sphere.

Following the decision of Baker v. Carr,[51] the

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the American Levellers (Boston: Atlantic Monthly Press, 1972). Graham chronicles in highly readable style the landmark Tennessee case zeroing in on key personalities, issues, and details otherwise not found in court decisions.

[49]369 U.S. 186, 254 (1962). Justice Frankfurter dissented, providing a long treatise on the historical development of legislative apportionment, both in Great Britain and in America, and noting that large discrepancies in regard to population strength in legislative districts always existed; but he touched only slightly on the political doctrine issue. Id. at 301-24.

[50]See note 7. [51]369 U.S. 186 (1962).

federal district court in Nashville, Tennessee, stated that it would consider the merits of the case and fashion a remedy, if appropriate. The case, however, was briefly continued until an extraordinary session of the legislature was completed.[52] The legislative districts of the state were reapportioned. The lower court, although not completely satisfied with the resulting plan, accepted it.[53]

A year later in Gray v. Sanders[54] the Court rendered the decision from which is derived the concept "one man, one vote." In this case the county unit vote system in the election of state-wide officials was struck down. The Court held that the "unit system" used in Georgia primary elections was unconstitutional because it deprived city dwellers of the equal protection of the laws by giving them less than their fair share of the weighted state-wide vote. The unit vote system, a "miniature electoral college," gave each county a certain number of votes (usually the number of seats in the state legislature). The candidate could easily win the popular vote but lose the nomination by running poorly in rural areas which had more unit votes.

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[52]Cortner, note 19, at 151-55.

[53]Baker v. Carr, 296 F.Supp. 341 (M.D. Tenn., 1962). For a review of what happened in each state as a result of the Supreme Court's decision of Baker v. Carr, 369 U.S. 186 (1962), see R. B. McKay, Reapportionment: The Law and Politics of Equal Representation (New York: Simon & Schuster, 1970), pp. 275-458.

[54]372 U.S. 368 (1963).

In this decision the Court gave an indication as to how it would apply Baker. Justice William O. Douglas, writing for the majority, said that "the conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing--one person, one vote."[55]

The Gray case marked the first explicit application of the "one man, one vote" principle by the Supreme Court. The Court stressed that the concept of political equality found in the Fifteenth, Seventeenth, and Nineteenth Amendments required equality of voting power when all voters are members of the same constituency, as in a state-wide election of a governor or senator.

Approximately two years following Baker the United States Supreme Court advanced even further into the entanglements of the political thicket. In Reynolds v. Sims,[56] one of the most important of all cases, and in a number of similar cases,[57] the Court announced a broad policy decision

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[55] Id. at 381-82. [56] 377 U.S. 533 (1964).

[57] Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964) (Colorado); Roman v. Sincock, 377 U.S. 695 (1964) (Delaware); Davis v. Mann, 377 U.S. 678 (1964) (Virginia); Maryland Comm. v. Tawes, 377 U.S. 656 (1964) (Maryland); WMCA, Inc. v. Tomengo, 377 U.S. 633 (1964) (New York); Hill v. Davis, 378 U.S. 565 (1964) (Iowa); Pinney v. Butterworth, 378 U.S. 564 (1964) (Connecticut); Hearne v. Smylie, 378 U.S. 563 (1964) (Idaho); Marshall v. Hare, 378 U.S. 561 (1964) (Michigan); Germano v. Kerner, 378 U.S. 560 (1964) (Illinois); William v. Moss, 378 U.S. 554 (1964) (Washington); Swann v. Adams, 378 U.S. 553 (1964) (Florida).

that both houses of a bicameral state legislature[58] must be apportioned substantially on a population basis.[59] Chief Justice Warren, writing for the majority of the Court in Reynolds, stated: "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[60]

Prior to this time, at least one house of some state legislatures had been apportioned on an other-than-population basis.[61] Typical of this was the assignment of one legislator per county for the upper house.[62] A familiar analogy had been drawn between the United States Senate with a fixed number of members from each state and the upper house of the various state legislatures.[63] It was reasoned

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[58]Currently forty-nine of the fifty states have a bicameral (two-house) legislature. Nebraska has a unicameral (one-house) legislature.

[59]In the Middle District of Alabama shortly before the decision of Baker v. Carr, a voters' suit under the Civil Rights Act, note 36, had been brought. Following this decision, the Alabama State Legislature decided to reapportion, but the resulting plan included great variance in population among the several districts for both houses of the legislature. Sims v. Frink, 208 F.Supp. 431, 440-41 (M.D. Ala., 1962).

[60]377 U.S. at 568.

[61]To see how all of the states apportion both houses of their legislature, see George S. Blair, American Legislatures: Structure and Process (New York: Harper & Row, 1967), pp. 80-83.

[62]E.g., New Mexico Constitution, Article IV, Section 3.

[63]The United States is a union of sovereign

from this analogy that the states could easily justify such an assignment. The Court in Reynolds rejected this comparison by stating that local units of government are not sovereign entities, as are the various states. Chief Justice Warren noted that "political subdivisions . . . counties, cities or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State."[64] The Court reasoned that unless both houses of a state legislature were apportioned according to population, each voter's vote would be debased, which would be a violation of the Fourteenth Amendment. The Chief Justice noted that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[65] The rule or standard, therefore derived from Reynolds is sometimes referred to as the "substantial population" rule.

Another decision in the 1964 Term of the Court, Lucas v. Forty-Fourth General Assembly,[66] affirmed the

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states. U.S. Constitution, Article IV, Sections 3-4, Amendment X. Counties, though, are creatures of the state, authorized by the respective state constitutions. See, e.g., California Constitution, Article XI, Section 1.

[64] 377 U.S. at 575. [65] 377 U.S. at 568.

[66] 377 U.S. 713 (1964). Because of the nature of the case, Lucas has been fittingly called a "majorities in conflict" case.

ruling of Reynolds that both houses of a state legislature must be apportioned according to population. This case was a supreme test for "one man, one vote" theory and was the most important of the cases to follow the Reynolds decision.[67] In it the voters of Colorado had approved a referendum which apportioned the upper house of the state legislature on the basis of population, together with other criteria. The district court had sustained the apportionment plan, holding that population was recognized as a prime factor in the plan, that the other criteria used served a rational state purpose, and that the "popular will of the People" had been exercised by the referendum.[68] The Supreme Court disagreed and stated that the plan did not meet the population test of Reynolds. Here is a unique situation where the voters approved an apportionment plan and the Court did not accept it. In the decision Chief Justice Warren noted:

> We hold that the fact that a challenged legislative apportionment plan was approved by the electorate is without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion of Reynolds v. Sims.[69]

Advancing deeper into the "political thicket," the Supreme Court extended the one man, one vote rule to

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[67]Robert Dixon, Jr., Democratic Representation, p. 234.

[68]Lisco v. Love, 219 F.Supp. 922 (D. Colo., 1963).

[69]377 U.S. at 737.

congressional apportionment. In a case from Georgia, Wesberry v. Sanders,[70] the Court examined the narrow issue on which the Constitution was silent, that is, whether the districting of House seats had to be on a fairly tight, equal-population basis. The Wesberry decision opened a line of cases unbroken to the present day. With Justice Black writing the majority opinion, the Court stated that under the Constitution "the command of Article 1, Section 2, that Representatives to be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[71] The Wesberry case then provided the legal basis for ending overrepresentation of rural areas in the House of Representatives. For example, in a pre-Wesberry Congress, a representative from one district represented eight times as many constituents as another congressman. This kind of disparity resulted from redistricting patterns established by state legislatures that were themselves malapportioned in favor of rural minorities. Eventually, the gross inequities of representation among House seats were substantially corrected because of this decision.

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[70] 376 U.S. 1 (1964).

[71] 376 U.S. at 7-8. The specific constitutional reference is as follows: "The House of Representatives shall be composed of Members chosen every second year by the people of the several states and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." U.S. Constitution, Article I, Section 2.

The most important of the congressional redistricting cases after Wesberry was Kirkpatrick v. Preisler,[72] a 1969 case, together with a companion decision.[73] Justice Brennan, speaking for the Court, noted that each variance in regard to population in a congressional district must be justified and that no arbitrary cutoff point exists at which a deviation can be said to be de minimis.[74] In Wells v. Rockefeller,[75] decided on the same day, the Court relied on the Kirkpatrick language to strike down New York's 1968 redistricting plan. The scheme divided the state into seven homogeneous regions of markedly different populations and subdivided each region into congressional districts of virtually identical population.[76] The majority of the Court held that congressional districts must be divided as equally as possible, using the whole state as the starting point.[77] These rulings were affirmed in 1973 when the Court voided a congressional apportionment plan from Texas in White v. Weiser.[78] The Court voided the plan because the districts

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[72]394 U.S. 526 (1969).

[73]Heinkel v. Preisler, 394 U.S. 526 (1969).

[74]394 U.S. at 530-31. [75]394 U.S. 542 (1969).

[76]Id. at 545-46. The maximum variation between districts was 13.96 percent. Id. at 549.

[77]Justice Brennan, writing the majority opinion, stated that the "general command, of course, is to equalize population in all the districts of the state and is not satisfied by equalizing population only within defined sub-states." 394 U.S. at 546.

[78]412 U.S. 783 (1973).

were not mathematically as equal as reasonably possible in regard to population.[79]

The Court also advanced into the "political thicket" at the local level. Following the tightening of the reapportionment principles to achieve a more precise mathematical equality in Kirkpatrick and Wells, the Court expanded the scope of the doctrine to encompass local elections. In 1968 the Court, in effect, completed the implementation of the "one man, one vote" principle in Avery v. Midland County.[80] It was announced that there could be no deviation from the population standard set forth in Reynolds in the apportionment of local units of government which possess any semblance of a legislative function. The Midland County (Texas) Commissioners' Court possessed, in the words of the Supreme Court, "general governmental powers over the entire geographical area served by the body."[81] The Court viewed with disfavor the holding of the Supreme Court of Texas that criteria other than population could be considered in the apportionment of the districts from which the members of the local governing body were elected.[82]

The Court later applied this doctrine to the election of junior college trustees in Hadley v. Junior

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[79]Id. at 485. [80]390 U.S. 474 (1968). [81]Id. at 485.

[82]Avery v. Midland County, 406 S.W.2d 422 (Texas, 1966).

College,[83] a 1970 case. The ruling, which involved apportionment of seats for the local junior college school board of Kansas City, Missouri, was ultimately refined. The Court held, with Justice Black writing the majority opinion, that the popular election of persons to perform public functions requires proportional districting under the authority of Reynolds.[84] The Missouri Supreme Court had dismissed the case, noting that the "one man, one vote" principle did not apply.[85] From this the Supreme Court reasoned that such powers as levying and collecting taxes, issuing bonds with certain restrictions, and hiring and firing teachers were sufficient governmental powers to allow the decision of Avery v. Midland County[86] to justify ruling in this case.[87] Therefore, the Hadley decision climaxed a series of apportionment cases which had begun with Baker. It declared conclusively that equal voting power in all popular elections is a fundamental right enjoyed by every American. According to the Court, this is "protected by the United States Constitution against dilution or debasement."

In 1969 when retiring from the Supreme Court,

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[83] 397 U.S. 50 (1970). [84] Id. at 52.

[85] Hadley v. Junior College Dist., 432 S.W.2d 328, 334 (Mo., 1968).

[86] 390 U.S. 474 (1968).

[87] 397 U.S. at 53-54. See also Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Mouma, 395 U.S. 701 (1969); Kramer v. Union Free School District, 395 U.S. 621 (1969).

Chief Justice Warren stated among his many accomplishments that he considered the apportionment rulings to be the most significant of his sixteen-year tenure.[88] Prior to this time, in a number of the states political power had been held in the hands of the few. Now it had been returned to the hands of the many. The Court in essence was confronted with the problem of returning the control of legislatures to the general population. The apportionment decisions asserted guidelines that the federal courts could exercise jurisdiction in malapportionment cases.[89] Therefore, if a legislature fails to reapportion according to constitutional guidelines,[90] voters in that state may invoke judicial machinery to effect reapportionment. Therefore, the legislatures have been compelled to reapportion as mandated, as failure to do so could result in the courts performing the task.[91] Indeed the Court's willingness to deal with this political[92] question and make it a judicial one puts it among the notable accomplishments of the Warren Court.

Interestingly, when the Warren Court made the previously "political" question a "judicial" one, it couched the

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[88] N.Y. Times, June 27, 1969, p. 17, col. 6.

[89] See, e.g., Baker v. Carr, 369 U.S. 186 (1962).

[90] See note 17.

[91] Cf. Legislature v. Reinecke, 10 Cal.3d 396, 516 P.2d 6, 110 Cal.Rptr. 718 (1973).

[92] See note 7.

change in such language as to open the door to other possibilities as well. The majority opinion in Reynolds also stated that criteria other than population might be taken into account in the apportionment plan, provided population was regarded as the chief criterion. Chief Justice Warren stated that

> somewhat more flexibility . . . be constitutionally permissible with respect to state legilsative apportionment than in congressional districting . . . . So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.[93]

The Chief Justice, however, did not state what might be the permissible numerical deviation from the population norm allowed, nor did he give any idea as to what might constitute a rational state policy.

The minority of the Court in Reynolds v. Sims felt that some basis other than population should be considered in the apportionment of one house of a state legislature.[94] Justice Clark observed that

> if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State.[95]

Regretfully, Justice Clark did not elaborate upon what these

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[93] 377 U.S. 533, 578-79 (1964).

[94] Id. at 587-88, 588-89. [95] Id. at 588.

rational criteria might be.[96]

The earliest significant apportionment case[97] to come before the Court after the 1964 Term was Swann v. Adams.[98] Supposedly to comply with Reynolds, the Florida legislature had adopted an apportionment plan. It provided for a maximum population variance of 26.65 percent and 33.55 percent in the upper and lower houses of the legislature, respectively. The lower district court sustained the plan as substantially taking into account the population criterion established in Reynolds, and furthering a rational state purpose in regard to the population deviations.[99] In writing the majority opinion of the Court, Justice White noted:

> As this case comes to us we have no alternative but to reverse. The District Court made no attempt to explain or justify the many variations among the legislative districts. As for the State, all it suggested in either the lower court or here is that its plan comes as close as "practical" to complete population equality and that

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[96] In dissenting Justice Harlan stated that he believed reapportionment is not within the scope of judicial review and that the ruling of the majority failed to take into account such items as history, economic or other sorts of group interests, area geographical considerations, a desire to insure effective representation for sparsely settled areas, access of citizens to their representative theories of bicameralism, occupation, an attempt to balance urban and rural power, and the preference of the majority of the voters of the state. 377 U.S. at 589-632.

[97] Burns v. Richardson, 384 U.S. 73 (1966), a Hawaii case, held that Reynolds v. Sims, 377 U.S. 533 (1964) might apply to redistricting of a state legislature.

[98] 385 U.S. 440 (1967).

[99] Swann v. Adams, 258 F.Supp. 819 (S.D. Flo., 1965).

> the State was attempting to follow congressional district lines. There was however, no attempt to justify any particular deviations, even the larger ones, with respect to either of these considerations.[100]

He went on to observe that "de minimis deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed de minimis . . . ."[101] Clearly the case placed the burden of proof on the states to delineate acceptable reasons for any deviations from the population standard that might be permitted under the authority of Reynolds.

Kilgarlin v. Hill,[102] decided in the same term, saw the Court in a per curiam opinion state that a deviation of 26.48 percent in the apportionment of the Texas House of Representatives was not acceptable, but remanded the case to the district court for further consideration in light of the burden of proof standard articulated in Swann.[103] Through Kilgarlin, the Court held that the mere assertion of a policy of protecting county boundaries would not immunize a plan containing significant deviations; the state also must prove that the variations are necessary in order to effectuate the state policy.[104] On the same day as Kilgarlin, the Swann rationale was applied to a congressional plan in Missouri as well.[105]

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[100] 385 U.S. at 445. [101] Id. at 444.

[102] 386 U.S. 120 (1967). [103] Id. at 122.

[104] Id. at 123-24.

[105] Duddleston v. Grills, 385 U.S. 455 (1967).

Finally, the Court relaxed its "one man, one vote" rule. In 1971, in Abate v. Mundt,[106] a case involving local government, the Court began to deviate from the "one man, one vote" principle of Reynolds. An 11.9 percent deviation was permitted by the Court in the apportionment scheme for the county legislature of Rockland County, New York. The smallest town in the county was the basis for the plan, which took into account the overlapping city-county governmental functions in which the county legislature participated. The Court invoked the Reynolds standard of review and emphasized: "And nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality."[107] Ostensibly the Court gave recognition to political boundaries as a rational state criterion for allowing some deviation in population under the authority of Reynolds. The Court did not, however, clearly state this, and rendered its decision narrowly according to the facts of the case.[108]

Abate v. Mundt[109] was decided only six months following Hadley v. Junior College Dist.,[110] in which no deviation from the population standard was permitted in regard to apportionment of a local body with quasi-governmental powers. One might ask why the Court should

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[106] 403 U.S. 182 (1971). [107] Id. at 187.

[108] Id. at 187. [109] 403 U.S. 182 (1971).

[110] 397 U.S. 50 (1970).

precipitously deviate from its apportionment scheme at this juncture. The Court noted in Abate v. Mundt[111] that "we emphasize that our decision is based on the long tradition of overlapping functions and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas."[112] In Hadley the Junior College District of Kansas City, Missouri, had been apportioned according to the number of individuals in the district between the ages of six and twenty years with a resulting population deviation greater than that permitted in Abate.[113] The Court chose not to distinguish Hadley or offer any reason why Abate might have been different.

Mahan v. Howell,[114] a 1973 case, permitted an even greater population deviation in an apportionment plan. Mahan was adopted along with two companion cases.[115] In Mahan the Court permitted a maximum population deviation of 16.4 percent[116] in the apportionment plan for the lower house of the Virginia state legislature (the House of Delegates), resulting from a state policy of respecting the

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[111] 403 U.S. 182 (1971). [112] Id. at 187.

[113] 397 U.S. at 51. [114] 410 U.S. 315 (1973).

[115] City of Virginia Beach v. Howell, 410 U.S. 315 (1973); Weinberg v. Prichard, 410 U.S. 315 (1973).

[116] Justice Brennan, in a partial dissent, noted that the record was unclear as to the maximum population deviation and that it might have been as high as 23.6 percent. 410 U.S. at 336.

traditional political boundaries of the state.[117] Ostensibly the Court majority felt that this was a "rational state policy" that justified such a high population deviation. The Court's majority opinion did not distinguish this case from earlier rulings and did not offer any justification for the population deviation allowed. A minority stated that the states could have more leeway in the apportionment of their respective legislatures, but felt that the bounds of permissible deviation had been exceeded in this case.[118]

Also in 1973, two other cases permitted states to have more latitude in the apportionment of their legislatures. Gaffney v. Cummings,[119] a case from Connecticut, allowed a maximum population deviation of 1.81 percent and 7.83 percent for the upper and lower houses respectively in an apportionment plan for the Connecticut legislature. A federal court, comprised of three judges, had invalidated the plan as repugnant to the equal protection clause of the Fourteenth Amendment.[120] In Connecticut, towns rather than counties constitute the basic unit of local government. None of the towns in the apportionment scheme was divided, since such a division would be prohibited under the state

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[117] 410 U.S. at 330-33. [118] 410 U.S. at 343-44.

[119] 412 U.S. 735 (1973).

[120] Cummings v. Meskill, 341 F.Supp. 139 (D. Conn., 1972).

constitution.[121] The feeling of the Court was that this should be allowed in the interest of "political fairness,"[122] even though Justice Rehnquist, who wrote the majority opinion, did not clearly define this term. Through Gaffney the Court indicated that census figures were not the only data base for drawing a state legislative district boundary line.

White v. Regester,[123] a companion case, permitted a maximum population deviation of 9.9 percent in an apportionment plan for the Texas state legislature, although again it did not clearly state why this was allowed.[124] The Court, however, upheld the ruling of a lower federal court[125] invalidating a provision in the plan for multi-member districts[126] in both Bexar and Dallas Counties because of the historic discrimination against Mexican and black Americans in these counties.[127]

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[121]Connecticut Constitution, Article III, Section 4.

[122]412 U.S. 752-53. [123]412 U.S. 755 (1973).

[124]Gaffney v. Cummings, 412 U.S. 735 (1973) was cited by the Court, however, as controlling.

[125]Graves v. Barnes, 343 F.Supp. 704 (W.D. Texas, 1972).

[126]Districts which have more than one person elected to the same legislative body to represent the district at large is a multi-member district.

[127]The Court has stated that multi-member districts are not per se unconstitutional, though in this case upheld the invalidation of their use in the apportionment plan, because of the historic discrimination. 412 U.S. at 765-70. Accord, Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966).

Presently, the Supreme Court has adopted a divergent approach to the issue of apportionment. No deviation from the "one man, one vote" principle has been allowed in the apportionment of congressional districts.[128] A deviation up to 16.4 percent in population in the apportionment plan of a state legislature has been allowed[129] under the substantial population ruling of Reynolds. It is difficult to know what the Court's attitude will be in the future regarding apportionment at the federal, state, and local levels.

However, with regard to congressional apportionment, the decisions of the Court clearly state that Article I, Section 2 of the Constitution mandates congressional districts be apportioned as equally as possible in regard to population,[130] using the entire state as the starting point of the process.[131] On the practical side, the Court fully realizes that absolute numerical equality is impossible to achieve, so it places the burden on the states to show that a good faith attempt has been made to achieve mathematical equality.[132]

In addition the Court has separated state

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[128] White v. Weiser, 412 U.S. 783 (1973); Wesberry v. Sanders, 376 U.S. 1 (1964).

[129] Mahan v. Howell, 410 U.S. 315 (1973).

[130] E.g., Wesberry v. Sanders, 376 U.S. 1 (1964).

[131] Wells v. Rockefeller, 394 U.S. 542 (1969).

[132] White v. Weiser, 412 U.S. 783 (1973).

apportionment from congressional apportionment. In Reynolds the Court stated that "Gray and Wesberry are of course not dispositive of or directly controlling on our decision in these cases involving state legislative reapportionment controversies."[133] In spite of this language, the district court in Howell v. Mahan[134] relied on Wesberry v. Sanders[135] and later congressional apportionment decisions[136] to justify their ruling in regard to the Virginia state apportionment scheme. The district court did not argue by analogy from these cases, but simply cited them as controlling in the controversy before the court.[137] The Supreme Court stated in a very clear fashion that these cases did not apply to state apportionment controversies.[138] In that the decision of the district court had allowed some deviation in regard to population in the apportionment scheme under the authority of Reynolds, the Supreme Court distinguished these congressional apportionment cases from the state cases by noting that no rational state purpose could be achieved by deviation from numerical equality in congressional

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[133] 377 U.S. 533, 560 (1964).

[134] 330 F.Supp. 1138 (E.D. Va., 1971).

[135] 376 U.S. 1 (1964).

[136] Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

[137] 330 F.Supp. at 1139.

[138] Mahan v. Howell, 410 U.S. 315, 320 (1973).

apportionment.[139] Therefore, the Supreme Court clearly separates the issue of congressional apportionment from state and local apportionment.

The pattern or trend of cases in the area of state and local apportionment is not as clear. One must surely ask, When does the deviation of population become too great for acceptance by the Court under the substantial population test of Reynolds? Too, What are legitimate state interests? And finally, Can a certain legitimate state interest justify a greater population deviation than another?

It appears there are two possibilities as to the direction the Court will take in regard to the "substantial population" test of Reynolds. The first possibility is to draw a line beyond which population deviation will violate this test. It is not at all known where the Court wants to draw this line. The Court had in earlier apportionment decisions overruled deviations of 26.48,[140] 26.65,[141] and 33.55 percent.[142] However, departures from strict numerical equality by 11.9,[143] 7.83,[144] and 9.9 percent[145] have been

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[139] Id. at 322.

[140] Kilgarlin v. Hill, 386 U.S. 120 (1967).

[141] Swann v. Adams, 385 U.S. 440 (1967).

[142] Id.

[143] Abate v. Mundt, 403 U.S. 186 (1971).

[144] Gaffney v. Cummings, 412 U.S. 735 (1973).

[145] White v. Regester, 412 U.S. 755 (1973).

permitted. A deviation of 16.4 percent[146] was approved by the Court in Mahan. In spite of these decisions the Court has not given any indication of an arbitrary point at which it might state that the deviation is too great to meet the substantial population test of Reynolds. As well, the Court has failed to decide whether a "balancing test" might be used in apportionment cases, that is, whether the percentage of population deviation permitted depends on what reasons are offered to justify it.

The second possibility is that the Court will overrule the specific holding of Reynolds which requires both houses of a state (and local) legislature be apportioned on substantially a population basis, but retain the portion of Reynolds that requires that the criteria used in an apportionment plan meet the test of the equal protection clause of the Fourteenth Amendment and that they serve a legitimate state purpose.

The Fourteenth Amendment guarantees that no person will be denied the equal protection of the laws by any state. The role of the Court in upholding this constitutional principle over the past fifteen years, as seen in the foregoing cases, has been directed to the weight of the ballot cast. Therefore, such cases have focused "on something called individual voter weight"[147] without any real

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[146] 410 U.S. 315 (1973).

[147] Robert Dixon, Jr., "The Court, the People, and

detailed analysis of the concept of representation. Critics note that the voters' best interest would be served if the Court were more interested in the voters being represented than in a mathematically equal vote.[148] The high Court besides policing numbers might examine more thoroughly the concept of representation and some of its many-faceted problems.

When considering representation and mathematical equality, proportional representation (PR) should not be overlooked. Proportional representation is recognized as an electoral system that allocates seats in a particular legislative body to each party or group approximately equal to its popular voting strength.[149] When using a system of proportional representation, for example, a number of legislators may be elected from the same district by the same voters. If a minority party receives 5 percent of the total

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'One Man, One Vote,'" in Reapportionment in the 1970's, ed. Nelson W. Polsby (Berkeley: University of California Press, 1971), pp. 7, 18.

[148]Gerhard Casper, "Apportionment and the Right to Vote: Standards of Judicial Scrutiny," The Supreme Court Review (1970), p. 1.

[149]For a succinct definition of proportional representation, see Plano and Greenberg, The American Political Dictionary, p. 139. Perhaps the best single work on the subject of PR is Enid Lakeman and James D. Lambert, Voting in Democracies: A Study of Majority and Proportional Electoral Systems (London: Faber & Faber Press, 1955); see also Douglas W. Rae, Political Consequences of Electoral Laws (New Haven, Connecticut: Yale University Press, 1971); as well see F. A. Hermens, Democracy or Anarchy: A Study of Proportional Representation (Notre Dame, Indiana: University of Notre Dame Press, 1941).

vote in that election it will win about 5 percent of the legislative seats. The PR systems most frequently used are the list system, based on voting by party, and the Hare system, based on voting for individuals using the single transferable vote.

A system of proportional representation or cumulative votings is an arrangement in which the voter casts more than one vote in simultaneous election of several officials. He does so as a method of securing greater representation for minor parties. Under this arrangement each voter is allowed two or more votes, which he can cast for a single candidate or distribute among several. Minor party candidates normally are able to win seats because their supporters concentrate their additional votes for them, whereas major party supporters tend to distribute their votes among a number of candidates. Today, cumulative voting is used in electing members of the lower house of the Illinois legislature, with three representatives elected from each district and with each voter casting three votes.[150]

It is recognized that cumulative voting is an attempt to make possible some amount of direct representation for minority groups. Those who favor cumulative voting contend that it is more accurately representative

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[150]Plano and Greenberg, The American Political Dictionary, p. 117.

and consequently more democratic than the two-party system. On the other side, those who oppose it draw attention to the fact that it may have a tendency to encourage a number of splinter parties with the result that, not uncommonly, none is able to gain a majority and unstable coalition government results.

An additional system of proportional representation is the single transferable vote sometimes referred to as the Hare Plan.[151] Under this voting arrangement candidates vie in open competition for a number of elective offices. A quota is established. Thereupon all candidates securing sufficient votes to satisfy it are designated elected. The surplus votes of winning candidates and the votes of candidates eliminated for low-vote totals are distributed according to the second choices indicated by the voters on their ballots.[152] Thus votes are transfered in this manner until an adequate number of candidates have been designated elected to fill all elective seats.

Proponents of the Hare Plan point out that it seeks to record the voters' wishes more accurately than can be achieved through the common American elective system of single-member districts, in which all votes not cast for the winning candidate are discarded. Under the Hare Plan

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[151]Thomas Hare, Election of Representatives (n.p.: 1865).

[152]Plano and Greenberg, The American Political Dictionary, p. 123.

economic and social minority interest groups are more likely to gain representation, thus giving a broader consensus to the government. The rather distinct weakness of the Hare Plan, and a common shortcoming of all proportional representation systems, is the difficulty of building in the government a majority that can make decisions. Varied interest groups often have conflicting views on matters of public policy, and frequently these cannot be reconciled. In this connection Plano and Greenberg have pointed out, "Government by compromise tends to replace government by majority rule."[153] Presently only a dozen or so cities have adopted the Hare Plan in the United States. Others, including New York City, have experimented with the plan to make possible some measure of minority representation. Many cities have dropped it after a brief trial period.[154]

Several, if not most, democratic countries use the Continental European PR list system in preference to the Anglo-American, single-member district system. Those who advocate PR point out that it provides representation for minority parties, reduces or eliminates machine politics, and is simply more democratic. Detractors argue that PR tends to proliferate parties, is too complicated for the average voter, and inevitably results in unstable coalition government. Strong proponents and detractors of PR are hardly influenced by the others' arguments.

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[153]Ibid. [154]Ibid.

The possibilities of proportional representation aside, the problem of representation as indicated earlier does not lie entirely with the Supreme Court. Both Prewitt and Eulau, even with the great increase of representative governments over the past century (they suggest that ninety thousand different political units exist in the United States), state: "theory about representation has not moved much beyond the eighteenth century formulation of Edmund Burke."[155]

Thus, in connection with the Fourteenth Amendment's guarantee that no person will be denied the equal protection of the laws by any state, a group of people do not necessarily have to be "equal in numbers." Groups are formed according to classifications. A common interest unites a group. "The principle of proportional . . . equality does take cognizance of differences among men and may require numerically different treatment because of those differences."[156] The difference of each group must be real and not just illusory. One method of discerning whether a group

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[155]Kenneth Prewitt and Heinz Eulau, "Political Matrix and Political Representation: Prolegomenon to a New Departure from an Old Problem," 63 American Political Science Review 427 (1969). For a general background on representation, see H. Pitkin, The Concept of Representation (Berkeley: University of California Press, 1967); J. Pennock and J. Chapman, Political Representation: An Overview in Representation (New York: Atherton Press, 1968); Lawrence E. Hough, "Representation Theory: An Appraisal" (Ph.D. dissertation, Oklahoma University, 1973).

[156]Note, "Developments in the Law--Equal Protection," 82 Harvard Law Review 1065, 1166 (1969).

is real is to decide whether they possess a common interest. This is clearly a subjective judgment at best.[157] Perhaps in many cases the decision is apt to be arbitrary even though arrived at by the use of formulated best evidence criteria. Once a common group is established, it must be scrutinized to see if it contains "all persons who are similarly situated in respect to the purpose of the law."[158]

One must again ask, What might the other criteria be? Urban and rural groups could be considered such a criterion.[159] Viewed in the abstract it is quite possible that a state could show that each of these groups possessed special interests that could be made known by the use of proportional representation. Exactly what these criteria of justification might be remains a speculative matter. The Court should review such proposed criteria very critically under the standards of the equal protection clause of the

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[157] See generally, H. Pitkin, The Concept of Representation.

[158] Tussman and ten Brock, "The Equal Protection of the Laws," 37 California Law Review 341, 346 (1949).

[159] Casper, in "Apportionment and the Right to Vote," p. 32, notes: "The facts of a multifaceted notion of representation which became visible last Term are: equal size districts, representation of territories (political subdivisions), guaranteed representation of racial or ethnic interests where opportunities to participate in the political process do not exist, proportional representation of political parties, representation by incumbents so as to make a state delegation in the Congress more effective. I call this a 'notion,' rather than a 'concept' or 'theory,' for the obvious reason that the list is neither exhaustive nor carefully considered in its details."

Fourteenth Amendment, specifically making sure that the reality of the classification has been established and that each group similarly situated is equally represented.[160]

With regard to state interests, in Mahan, Justice Rehnquist stated that "the legislature's plan for apportionment of the House of Delegates may reasonably be said to advance the rational state policy of respecting the boundaries of political subdivisions."[161] But the only justification offered by the Court for this pronouncement was that the people of Virginia had delegated the power to enact local legislation to the legislature. The Court noted:

> We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational. And if that be so, the decision of the General Assembly to provide representation to subdivisions qua subdivisions in order to implement that constitutional power is likewise valid when measured against the Equal Protection clause of the Fourteenth Amendment.[162]

In this case the Court advanced no other reason for its decision to accept traditional political boundaries as rational state criteria. Indeed, it appears that the majority of the Court has established without criticism the legitimacy of political subdivisions as a rational state

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[160]See generally Jerold Israel, "Nonpopulation Factors Relevant to an Acceptable Standard of Apportionment," 38 Notre Dame Lawyer 499 (1963); and Charles V. Laughlin, "Proportional Representation: It Can Cure Our Apportionment Ills," 49 A.B.A.J. 1065 (1963).

[161]410 U.S. 315, 328 (1973). [162]Id. at 325-26.

interest. No particular reason was advanced by the Court other than the fact that the people of Virginia delegated the power to enact local legislation to the state legislature. The Court did not justify why they used this as the reason for approving political subdivisions as a legitimate state interest in this case. Mahan appears to be contrary to the ruling in Swann v. Adams,[163] which requires that the state present acceptable criteria for rational state purposes used in apportionment plans. Mahan suggests that the Court will accept any criteria, without much examination to see whether the criteria advanced are "acceptable" under the test of Swann v. Adams[164] and will apply the particular fact situation to the specific apportionment plan.

In Abate v. Mundt[165] the Court gave the "rational state interest" as the reason to justify the deviation from a strict population standard. The rational state interest was described as the historical dual function performed by the county legislature. The smallest town in Rockland County was used as the starting point for the apportionment plan. Although the Court in this case did not call this criterion a political subdivision, it appears that it should have been labeled as such, since towns themselves are political creations of the state. In this case the Court very uncritically accepted this criterion as a rational

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[163] 385 U.S. 440 (1967). [164] Id.

[165] 403 U.S. 735 (1973).

state policy, without an examination of it under the particular fact situation of the case.

In Gaffney v. Cummings[166] political subdivisions were also advanced as rational state policy. Towns constitute the basic unit of government in Connecticut and no town was divided in the apportionment plan because such a division would have violated the state constitution.[167] Also, the majority opinion of the Court additionally stated that the apportionment plan should be allowed in the interest of "political fairness,"[168] although the Court did not even offer any justification for this as a rational state purpose, and furthermore, it did not give a definition of this term. At best, on its face this criterion appears to be ambiguous.

At this time it is difficult to arrive at what might be considered a legitimate apportionment plan. It is difficult because of the lack of precision on the part of the Court in defining what constitutes a legitimate state interest, a failure to formulate a set of criteria by which it could be ascertained whether a proposed classification might constitute a legitimate state interest, and the uncritical acceptance of political subdivisions and political fairness as legitimate state criteria. Beyond these

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[166] 412 U.S. 735 (1973).

[167] Connecticut Constitution, Article III, Section 4.

[168] 412 U.S. at 752-53.

omissions, the Court has failed to provide to the lower federal courts the forums which will initially hear any challenges to state apportionment plans at the federal level or adequate guidelines on which to base a decision.

The Court is now at a critical point in cases involving the apportionment of state legislatures and local governing bodies. It desires to give recognition to the principles of federalism and allow the states more leeway in the apportionment of their respective legislatures and local governing bodies.[169] To date the Court has failed to state clearly, however, exactly how far states may deviate from the population standard and exactly what constitute "legitimate state interests." Indeed this task remains for the future a challenge the Court must surely accept.

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[169] Mahan v. Howell, 410 U.S. 315 (1973).

CHAPTER II

DEVIATIONS FROM A MORE EGALITARIAN ERA

In the preface to Reapportionment in the 1970's, Nelson Polsby, when referring to the 1960's apportionment issue, notes: "To be sure, each decennial census took a few congressmen away from a few states and gave a few to a few states, and this meant tinkering with the district boundaries in the affected states. But, as a central preoccupation of state governments everywhere, reapportionment is a very young issue as issues in American politics go, and we have by no means learned all we will need to know to make sense of the way it unfolds in future years."[1]

In an effort to understand how the reapportionment of legislative district boundary lines in the mid-1970s is unfolding, it is of value to examine more carefully the deviations of "one man, one vote" since the landmark decisions of the 1960s. This chapter identifies and reviews the cases of the latter 1960s for a clearer understanding of the recent, less egalitarian decisions of the 1970s. As well, it determines and compares the rationale that the majority

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[1]Nelson W. Polsby, ed., Reapportionment in the 1970's (Berkeley: University of California Press, 1971), p. 2.

of the high Court has adopted to explain and justify their decisions of the 1970s.

In the decade immediately following Baker v. Carr,[2] the Supreme Court instituted and regularly implemented a policy of extending voting equality in the electoral process. It was in 1963 in Gray v. Sanders that the high Court first enunciated the controlling "one man, one vote" doctrine[3] for state reapportionment and then expanded it to apply in federal congressional districts[4] in addition to both houses of bicameral state legislatures.[5] Indeed, through the decade of the 1960s the Court made decisively successful strides in reapportioning along the lines of a precise mathematical standard. Later the Court strengthened that standard by refusing to establish acceptable de minimis[6] reapportionment variance levels and by assigning the burden to the states of justifying any deviations from

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[2]369 U.S. 186 (1962).

[3]Gray v. Sanders, 372 U.S. 368 (1963).

[4]Wesberry v. Sanders, 376 U.S. 1 (1964).

[5]Reynolds v. Sims, 377 U.S. 533 (1964).

[6]The legal term de minimis non curat lex means the "law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary, 4th ed. (St. Paul, Minnesota: 1951), p. 482. For an exhaustive account of the application of this significant term to the whole area of reapportionment, see generally John Kruger, "The Reapportionment Controversy--The Process of Dilution," 4 Memphis State University Law Review 565 (1974).

equality.[7] With the advent of the Burger Court,[8] there began a movement away from the Warren Court's "one man, one vote" doctrine.

Specific references and comments have been made to the Burger Court's erosion of the earlier doctrine. Some of those observing the trend of the Court not only note the new direction but are unhappy with it. John Kruger, in "The Reapportionment Controversy--The Process of Dilution," states, "The era of increasingly tightened mathematical standards was short-lived."[9] After reviewing the recent decisions handed down by the high Court, Kruger indicates alarm at the harmful "diluting" effect these decisions are having. He concludes with the following caveat: "Although we do not have to worry about regressing to the days of Baker v. Carr, it is submitted that implementation of the Court's workable but lax standards will result in the dilution of the effectiveness of one's vote."[10]

Charles A. Askin, in his article "The Burger Court and Reapportionment: From One Person, One Vote to One

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[7]See Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

[8]For a general discussion of the transition from the Warren Court to the Burger Court, see Stephen L. Wasby, Continuity and Change: From the Warren Court to the Burger Court (Pacific Palisades, California: Goodyear Publishing Co., 1976).

[9]John Kruger, "The Reapportionment Controversy," p. 573.

[10]Ibid., p. 577.

Corporation, Many Votes," notes: "The second decade following Baker, however, may witness an abrupt halt to this systematic extension of the Warren Court's one person, one vote doctrine."[11] Askin argues that the Court is "misusing" precedent. In pointing this out Askin believes "the Court's misreading of the case history while claiming to follow precedent raises serious questions regarding the intellectual integrity of the strict constructionist process itself."[12]

Robert F. Eimers, in considering the Court's loosening of an earlier standard in "Legislative Apportionment: The Contents of Pandora's Box and Beyond," suggests that "The Court has yet to state just how much deviation from the population standard it will allow, and has failed to articulate what legitimate state interests justify this departure."[13] He is generally concerned that the Burger Court's recent movement away from a more absolute standard will generate a multiplicity of questions which will not soon be answered.[14]

Richard Engstrom, in "The Supreme Court and

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[11]Charles A. Askin, "The Burger Court and Reapportionment: From One Person, One Vote to One Corporation, Many Votes," Comment, 62 Georgia Law Journal 1001 (1974).

[12]Ibid., p. 1018.

[13]Robert F. Eimers, "Legislative Apportionment: The Contents of Pandora's Box and Beyond," 1 Hastings Constitutional Law Quarterly at 290 (1974).

[14]Ibid., p. 308.

Equi-Populous Gerrymandering," a paper presented at the 1975 Annual Meeting of the American Political Science Association, observes with regard to recent Burger Court decisions: "The effect of the population equality rulings is to increase the flexibility of state and presumably local cartographers beyond that granted by the Warren Court. Effective standards through which discrimination applications of that flexibility can be invalidated have not been developed, however, and the 'gerrymanderer's paradise' characterization consequently continues to be a reasonable description of the Court's impact on representational districting."[15] After building a solid case against gerrymandering, even under the standard "one man, one vote," Engstrom concludes: "Invidious vote dilution due to malapportioned representational districts has been effectively prevented by the 'one man, one vote' doctrine. But the important 'fair and effective' representation problem of equi-populous gerrymandering remains. Neither the Warren Court nor the Burger Court has provided realistic adjudication standards through which discriminatory vote dilution within equi-populous districting arrangements can be invalidated."[16]

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[15]Richard L. Engstrom, "The Supreme Court and Equi-Populous Gerrymandering," a paper presented at the 1975 Annual Meeting of the American Political Science Association, San Francisco, California, September 2-5, 1975, p. 19.

[16]Ibid., p. 37.

Perhaps least fearful that the Burger Court has moved too fast and too far is Stephen Wasby, in Continuity and Change: From the Warren Court to the Burger Court. He nevertheless recognizes recent changes. Of the changes he notes: "On the subject of reapportionment, a major area in which the Warren Court stressed equality, the Burger Court's retreat was evident, as it approved state and local apportionment schemes with wider variances than those previously allowed. Indicating not merely differences in result but also substantial differences in approach and judicial ideology, the new Court showed its distaste for the Warren Court's active involvement in correcting state districting efforts."[17] However, when discussing more generally the differences between Warren and Burger Courts, Wasby points out: "the differences we see . . . instead of being consistently earthshaking are revisionist and incremental."[18]

The appearance of the Nixon-appointed Burger Court[19] has brought about significant changes in the area of the determination of district boundary lines and numbers of constituents represented since the first landmark reapportionment decisions back in the early 1960s. It should be

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[17]Stephen Wasby, Continuity and Change, p. 134.

[18]Ibid., p. 8.

[19]Stephen Wasby points out (p. 10) one federal judge said facetiously of the Nixon-appointed Burger Court, "I'll take mine with onions."

noted that the Burger Court with its Nixon-appointed justices[20] was not complete until the October 1972 Term.[21] A closer examination of some of the key decisions in the area of reapportionment since the advent of the Burger Court is of value at this point.

With the addition of the four Nixon appointees (Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist) along with Justice Stewart, a consistent dissenter throughout the reapportionment cases, and Justice White, an advocate of reapportionment until the de minimis decisions, the October 1972 Term noted the formation of a new 6-3 coalition. The general direction the new coalition would take soon evidenced itself in several cases. In the first case, Mahan v. Howell,[22] the Court for the first time

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[20]Burger was the first to take his seat in the October 1969 Term. He replaced Chief Justice Warren who first indicated his desire to retire in 1968 but did not step down until 1969 after the election of President Nixon. Harry Blackmun followed as the second Nixon appointee in early 1970. Blackmun replaced Abe Fortas who resigned in May 1969 over the ethics question of receiving money from financier Louis Wolfson. Finally coming on the Court very near each other in the fall of 1971 were Lewis Powell and William Rehnquist, filling the positions of Justices Black and Harlan who were retiring (both died shortly after retirement).

[21]For background on the appointment of justices to the Supreme Court generally and the Nixon appointees specifically, see Henry Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court (New York: Oxford Press, 1974); James Simon, In His Own Image: The Supreme Court in Richard Nixon's America (New York: David McKay, 1973); Louis Kolmier, This Honorable Court (New York: Charles Scribner's Sons, 1972).

[22]410 U.S. 315 (1973).

declared that the Constitution required less adherence to precise equality in state legislative reapportionment plans than in congressional schemes. At this point the Court proceeded to use Mahan as the bridge to White v. Regester[23] and Gaffney v. Cummings,[24] which held that de minimis deviations of up to 10 percent from absolute equality are permissible for "local" or state legislative apportionment plans. Later, in Salyer Land Co. v. Tulare Lake Basin Water Storage District,[25] the Court approved a weighted local voting scheme which favored large land corporations at the expense of area citizens. Before looking more closely at these, the most significant cases of deviation from the earlier standard of mathematical exactitude, it is useful to examine some of the preceding and foundational cases.

Robert Dixon, in referring to a period of time from approximately 1967 to 1971, indicates the Court handed down a series of cases which surprised even the most ardent supporters of the "one man, one vote" doctrine.[26]

Earlier in his book, Democratic Representation, Dixon stated: "In a series of state legislative and congressional districting decisions early in 1967, the Supreme Court was confronted with the tension between the logical

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[23]412 U.S. 755 (1973). [24]412 U.S. 735 (1973).

[25]410 U.S. 719 (1973).

[26]Robert Dixon, "The Warren Court Crusade for the Holy Grail of 'One-Man, One-Vote," The Supreme Court Review at 231-33 (1969).

necessity to be rigid on the equality standard, which derived from obscurity in Reynolds v. Sims concerning elements of fair representation other than raw district population, and the actual implementation of the "one man--one vote" principle which had yielded . . . disuniformity . . . ."[27] An examination of this line of cases follows.

In a 1967 case, Swann v. Adams,[28] which concerned the reapportionment of the state legislature of Florida, the Court was faced with a plan in which senate districts ranged from 87,595 to 114,053 in population per senator, or from 15.09 percent overrepresented to 10.56 percent underrepresented. These two percentages combined constitute a representational variance of 26.65 percent. In the house the population per representative ranged from 34,584 to 48,785, or from 18.28 percent overrepresented to 15.27 percent underrepresented. These two percentages combined constitute a representational variance of 33.55 percent. Upon making the predictable pronouncement that "mathematical exactness is not required in state apportionment plans,"[29] the Court struck down the plan on the grounds that while de minimis deviations are unavoidable, . . . variations of 30% among senate districts and 40% among house districts can hardly be deemed de minimis . . . ."[30] It is important to examine

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[27]Robert Dixon, Democratic Representation: Reapportionment in Law and Politics (New York: Oxford Press, 1968), p. 444.

[28]385 U.S. 440 (1967). [29]Id. at 444. [30]Id.

the Swann decision because it did not make mathematical equality the rule in state legislative reapportionment cases and because of its implication that there were two possible legal excuses or reasons for deviations from the equal population standard. In the first place, it pointed out, deviations could be justified by the implementation of an acceptable state policy such as maintaining the integrity of political subdivisions, providing for compact districts of contiguous territory, and recognizing natural or historical boundary lines.[31] Second, Swann recognized that the de minimis doctrine applied to state reapportionment cases.[32] However, when Swann is examined in connection with the landmark Kirkpatrick v. Preisler,[33] a rather different constitutional picture is evident. Preisler was a Missouri case which dealt with congressional districting. Here the Court had to deal with a situation where the most populous district was 3.13 percent above the mathematical ideal, and the least populous district was 2.84 percent below. This was the third attempt in three years to enact a constitutional redistricting plan under the Missouri reapportionment statute.[34] The Court did not accept Missouri's argument that there is a certain numerical or percentage variance small enough to be considered de minimis and to satisfy

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[31]Id. [32]Id. [33]394 U.S. 526 (1969).

[34]Missouri Annotated Statutes, Section 128.202-305 (1967), as amended Missouri Annotated Statutes, Section 128.204-306 (Supp. 1974).

without question the "as nearly as practical" standard. The Court felt that the "'as nearly as practical' standard requires that the State make a good faith effort to achieve absolute mathematical equality."[35] So far as the Court was concerned, the command of Article I, Section 2, permitted "only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[36]

The Court, in determining if the population deviations could be legally justified, developed a list of reasons which it considered to have no place in congressional redistricting plans. The Court declared that the desire to protect economic or social interests,[37] the desire for "legislative interplay,"[38] the desire for geographical compactness,[39] and the taking into account projected population shifts without thorough documentation[40] have no place in congressional redistricting plans. As a result Missouri's plan was determined to be unconstitutional.

In Wells v. Rockefeller,[41] a companion case, the New York legislature had enacted an unusual reapportionment plan.[42] Essentially, the state was divided into seven

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[35]394 U.S. at 530-31. [36]Id. at 531.

[37]Id. at 533. [38]Id. [39]Id. at 535-36.

[40]Id. at 535. [41]394 U.S. 542 (1969).

[42]New York State Law, Sections 110-11 (McKinney, 1968), as amended New York State Law, Sections 110-11 (McKinney Supp., 1973-74).

regions. These regions were subdivided into thirty-one congressional districts, and the remaining ten districts were composed of groupings of whole counties. Nevertheless, the congressional districts were equal only in each defined sub-state. The Court felt that this arrangement indicated a lack of good faith on the part of the legislators and therefore declared it unconstitutional. Simply stated, equality of population among districts in a sub-state does not justify inequality among all the districts in a state.[43]

While Swann and Kirkpatrick offered conflicting points of view as to the applicability of nonpopulation factors, a comparison of the two cases indicates that fundamentally the same test was used. A survey suggested that alternative plans provided the means for testing compliance with the equal population principle. The plaintiffs in both cases had either suggested or could point to an alternative plan not adopted by the legislature under which deviations could have been minimized.[44] The Court in Swann, when commenting on the importance of the various plans, stated:

> It seems quite obvious that the State could have come much closer to providing districts of equal population than it did. The appellants themselves placed before the court their own plan which revealed much smaller variations between the districts than did the plan approved by the District Court.[45]

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[43] 394 U.S. at 546.

[44] 385 U.S. at 445; 394 U.S. at 532.

[45] 385 U.S. at 445; accord, Dinis v. Volpe, 264 F.Supp. 425, 429 (D. Mass., 1967); aff'd per curiam,

The Court reaffirmed this doctrine in Kirkpatrick.[46] The Court held that a reapportionment plan is unconstitutional if population variances within it can be reduced. In reference to this case Robert Dixon has observed: "a new maxim of 'constitutional equity' is born: That which may be made more equal is not equal!"[47]

Dixon also indicated that the Court has frequently cited congressional and state legislative apportionment precedents interchangeably on all questions, including that of the population equality standard.[48]

One of the crowning cases the Court handed down in its long and difficult pursuit of mathematical precision came as recently as 1971 in Ely v. Klahr.[49] In this particular case an Arizona state apportionment statute[50] would have permitted a deviation between the high and low districts of 1.8 percent.[51] The Court held that the district court had properly concluded that this plan was invalid

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389 U.S. 570 (1968); Baker v. Clement, 247 F.Supp. 886, 896 (M.D. Tenn., 1965); Paulson v. Meier, 246 F.Supp. 36, 41, 44 (D. N. Dak., 1965).

[46]394 U.S. at 531-32.

[47]Robert Dixon, Democratic Representation, p. 447.

[48]Robert Dixon, "The Warren Court Crusade," p. 222.

[49]403 U.S. 108 (1971).

[50]Arizona Revised Statutes Annotated, Sections 16-1401-02 (1970), as amended Arizona Revised Statutes Annotated, Sections 16-1401-02 (Supp. 1973).

[51]403 U.S. at 111-12.

since the standards declared in Kirkpatrick and Wells would apply in the instant case as well. Indeed, in Ely the Court was continuing to maintain the principle of high mathematical exactitude.

Not long after tightening the reapportionment principles to achieve a more precise mathematical equality in Swann, Kirkpatrick, and Wells, the Court expanded the breadth of the doctrine to encompass local elections in Avery v. Midland County.[52] In this case in which a multimember system of electing county commissioners existed, the Court first held that voting districts may not vary substantially in population for election of local officials who exercise "general governmental powers" over the entire area they serve.[53] The Court later applied this doctrine to the election of junior college trustees in Hadley v. Junior College District.[54] In Hadley, Justice Black held that when state or local officials are popularly elected and perform a governmental function, the equal protection clause requires that the voting districts be as equal in population as practicable.[55] The purpose of the election is not important. Justice White again sided with the majority, which was comprised of Justices Black, Douglas, Brennan, and Marshall, while the dissenters were Chief Justice Burger and Justices Stewart and Harlan.

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[52]390 U.S. 474 (1968). [53]Id. at 475-76, 484-85.

[54]397 U.S. 50 (1970). [55]Id. at 56.

The era of increasingly tightened mathematical standards (1967-71) was quite brief. Beginning in 1973 the Court began to retreat from strict adherence to the earlier standard. In Mahan v. Howell[56] the Supreme Court for the first time declared a double standard for apportionment of federal congressional and state legislative districts. Reapportionment plans passed by the 1971 session of the Virginia General Assembly, for the state Senate and House of Delegates were attacked in three separate suits on various grounds, including the constitutional defects in population deviations.[57]

The plan for the state House of Delegates was challenged because the multi-member districts allegedly diluted voter representation and constituted racial gerrymandering. The house plan had a maximum deviation of 16.4 percent. A mathematically perfect plan would have apportioned one house delegate to 46,485 citizens throughout the state. Under the plan at issue, the sixteenth district received one delegate for each 50,964 citizens, while the twelfth district had only one delegate for 43,319. The sixteenth district thus exceeded the ideal plan by 9.6 percent, and the twelfth district was 6.8 percent short, totalling a

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[56] 410 U.S. 315 (1973).

[57] For a thorough background to this case, see David L. Martin, "'One Person, One Vote,' and California's Water Districts," 8 Natural Resources Law Review 9 (1975); see also Charles A. Askin, "The Burger Court and Reapportionment."

maximum deviation of 16.4 percent.[58] Interestingly, Justice Brennan's separate opinion in Mahan points out, however, that if "floating" districts were included in the computation, the maximum deviation figure could be as high as 23.6 percent.[59] However, with one significant exception (Fairfax County was the only boundary line exception, since it involved 10 out of the 100 House Delegate seats),[60] the house plan preserved political subdivision lines intact.

The United States District Court for the Eastern District of Virginia found that the house plan varied too much from absolute equality. The district court found the General Assembly's plan for the state Senate in violation of equal protection because of the Navy base problem in Norfolk and substituted its own multi-district provision.[61] The Supreme Court subsequently affirmed this part of the district court's order.[62] In addition the district court said that the state had failed to prove an affirmative necessity for maintaining the political subdivision boundaries.[63] The lower court cited two state legislative apportionment cases as authority for burdening the state with this justification.[64] The lower court substituted its own plan for the

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[58] Ibid., pp. 726-28. [59] Ibid. [60] Ibid., p. 728.

[61] Howell v. Mahan, 330 F.Supp. 1138, 1139 (E.D. Va., 1971), rev'd in part and aff'd in part, 410 U.S. 315 (1973).

[62] 410 U.S. 315 (1973).

[63] Howell v. Mahan, 330 F.Supp. at 1139-40, 1150.

[64] Id.

House of Delegates, which reduced the deviations to 10 percent but cut across many more subdivision boundaries than the legislature's plan.[65]

In a 5-3 decision, the high Court overruled the district court. The Mahan decision found three Nixon appointees (Justice Powell, fourth Nixon appointee, took no part in the Mahan case) joining Justices Stewart and White. Reasoning for the Court's decision was derived from what was regarded by the Court as alternate constitutional sources for judicial review of congressional and state legislative apportionment. Justice Rehnquist noted for the majority that under Reynolds state legislative apportionment is reviewable under the equal protection clause,[66] while the Wesberry case dictates that congressional districting is reviewable under Article I, Section 2.[67] The Court depended on the Reynolds language to the effect that under certain circumstances state legislative apportionment might be afforded wider latitude[68] and asserted that the distinctions between the two lines of cases have been adhered to faithfully since those decisions.[69]

Perhaps in most condensed form it may be said that

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[65] Id. [66] 410 U.S. at 331-33 (1973).

[67] 410 U.S. at 322; see also Wesberry v. Sanders, 376 U.S. 1 (1964).

[68] 410 U.S. at 321-22; see also Reynolds v. Sims, 377 U.S. 533, 580-81 (1964).

[69] 410 U.S. at 322.

the Mahan case for the first time specifically sanctioned separate standards for congressional and state legislative districting and affirmatively encouraged a relaxation by allowing states to meet their burden of proving the necessity of deviations from absolute equality by merely asserting state policies.

The next significant cases after Mahan were White v. Regester[70] and Gaffney v. Cummings.[71] These decisions held that state reapportionment plans containing minor deviations from mathematical equality are not prima facie in violation of the equal protection clause and thus do not require justification by the state.[72] These decisions marked the first acceptance of de minimis deviations and accelerated the Court's retreat to the double standard first signaled in Mahan.

The question in White v. Regester was whether the 1971 plan for the Texas House of Representatives, which apportioned 150 representatives among 79 single-member districts and 11 multi-member districts, was acceptable.[73] The Texas plan possessed a maximum deviation of 9.9 percent between the largest and smallest districts.[74] Referring to Kirkpatrick as precedent, a three-judge district court had

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[70]412 U.S. 755 (1973). [71]412 U.S. 735 (1973).

[72]White v. Regester, 412 U.S. 755, 763-64 (1973); Gaffney v. Cummings, 412 U.S. 735, 743 (1973).

[73]412 U.S. at 758. [74]Id. at 761.

overturned the plan because the state had failed to justify those deviations as necessary in order to effectuate a rational state policy.[75] A case with similar issues was Gaffney v. Cummings. A town in the state of Connecticut is the principal institution of local government, and the state constitution mandates that towns not be divided in creating state house districts except for districts comprised wholly from within the town.[76] The state apportionment board favored a state house plan calling for 151 single-member districts which cut across the boundaries of 47 of the state's 169 towns and permitted a maximum deviation of 7.83 percent.[77] In none of the four proposed plans were deviations from voting equality sufficiently justified by a proven state interest as required by Kirkpatrick, according to the ruling of the federal district court.[78]

The Court had never demanded absolute mathematical equality, but it had attempted to achieve as much

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[75] Graves v. Barnes, 343 F.Supp. 704, 714 (W.D. Texas, 1972), aff'd in part, rev'd in part, and remanded sub. nom.; White v. Regester, 412 U.S. 755 (1973).

[76] 412 U.S. at 737; see Connecticut Constitution, Article III, Section 4.

[77] 412 U.S. at 737-38.

[78] Cummings v. Meskill, 341 F.Supp. 139, 149-50 (D. Conn., 1972), rev'd sub. nom.; Gaffney v. Cummings, 412 U.S. 735 (1973). The plaintiffs had introduced three alternative plans which allowed fewer town boundary cuts but larger variances. 412 U.S. at 739.

mathematical precision "as nearly as is practicable."[79] The Court in Kirkpatrick and Wells rejected the proposition that a population deviation exists which is small enough to be regarded as de minimis.[80] Nevertheless, in Regester and Gaffney the Court recognized its previous adoption in Mahan of separate standards for reapportionment of state legislatures and congressional districts. Thus, it held that "minor deviations from mathematical equality in state legislative reapportionment do not constitute a prima facie case of discrimination under the fourteenth amendment and therefore do not require justification by the state."[81] By this holding the Court not only extended the Reynolds and Mahan language to allow deviations in state legislative reapportionment plans claiming to implement a rational state policy, but also sanctioned any deviation up to 10 percent regardless of any justification the state may give. Simply put, White and Gaffney were cases in which the deviations were so minor that, without more being shown, the plans would be valid.

In White the maximum population differential of 9.9

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[79] Hadley v. Junior College District, 397 U.S. 50 (1970).

[80] Wells v. Rockefeller, 394 U.S. 542, 546 (1969); Kirkpatrick v. Preisler, 394 U.S. 526, 530-32 (1969).

[81] White v. Regester, 412 U.S. 755, 763-64 (1973); Gaffney v. Cummings, 412 U.S. 735, 740-42 (1973). Regretfully, the Court did not state specifically what constituted "minor" deviations.

percent was considered to be prima facie valid.[82] Considering then, in connection with the fact that two years before in Abate v. Mundt[83] an 11.9 percent deviation from the ideal required justification by the state, it is reasonable to assume that a line has been drawn at approximately 10 percent. It seems, therefore, that deviations in excess of the amount of 10 percent are acceptable only if the state shows justification. Also, one must conclude, deviations of less than 10 percent would require no justification whatsoever. Thus, the parameters of the percentages where satisfactory state grounds would be adequate to justify the particular reapportionment plan are from 10 to 17 percent.[84]

Perhaps the case in which the high Court has gone the greatest distance in limiting its commitment to more egalitarian voting--that is, limiting the impact of Hadley, where the "as nearly as is practicable" principle was asserted--is the March 1973 case of Salyer Land Company v. Tulare Lake Basin Water Storage District.[85] In that case almost 85 percent of the 193,000 acres of rich farm land

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[82] 412 U.S. at 761 (1973).

[83] 403 U.S. 182, 184-85 (1971). As will be recalled from a discussion of Abate from Chapter I, the Court accepted as a rational state interest to justify the deviation from a strict population standard, the historical dual function performed by the county legislature.

[84] See John Kruger, "The Reapportionment Controversy," pp. 575-76, and Charles A. Askin, "The Burger Court and Reapportionment," p. 1014.

[85] 410 U.S. 719 (1973).

which comprised the Tulare Lake District was completely controlled by four corporations. The total population in this land area was 77 persons (18 of whom were children). Most of the citizens living in the area were employees and family members of the four corporations. Of the 77-person population living in this land area, only two residents were landowners, and only through ownership of a land corporation which farmed 16 percent of the district's land.[86] In Salyer the Court sustained the statutory scheme which enfranchised only landowners in the water storage district and apportioned their votes according to the assessed value of the lands.[87] This plan resulted in 37,825 votes for one corporation, enough to assure it control of a majority of the district's board of directors. The Court pointed out that Hadley had left open the option for a state to limit voting franchises in some circumstances to those primarily affected by a governmental body.[88] The Court further noted that the water storage district, because of its special limited purpose and disproportionate effect on landowners, was the type of exception envisioned by Hadley.[89] Indeed, the Burger Court's retreat in this California land company case signals the best current example of a closer turnaround from

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[86] Id. at 798.

[87] Id. at 724-25; see Calif. Water Code, Sections 4100-1.

[88] 410 U.S. 726-28. [89] Id. at 728.

the Warren Court's extension of a more precise mathematical standard of representation.

Although the Court has retreated from mathematical precision on a state and local level to the extent of permitting deviations in cases of less than 10 percent with no requirement of justification, to requiring acceptable state grounds of justification in reapportionment plans with deviations from 10 to 17 percent, it has to the present held irrevocably to mathematical exactitude on the federal level. In White v. Weiser,[90] a 1973 Texas case, the average deviation of all congressional districts from the ideal was .745 percent, i.e., +2.4 percent and -1.7 percent. The Court indicated that a deviation of this size was clearly unacceptable if the districts in question could be made more equal. In that the plaintiffs had presented a plan which provided for even smaller deviations, the legislature's plan was struck down. The Court stuck firmly to the policy laid down one decade before. It is noted, however, that the three concurring justices pointed out that the victory of mathematical precision might prove to be very short lived.[91] Deference to stare decisis[92] was the basis for the

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[90] 412 U.S. 783 (1973). [91] 412 U.S. at 798.

[92] A legal term meaning "let the decision stand." It is an important element of the common law whereby a decision applies in similar cases and is binding upon lower courts. Precedents thus established stand until overruled. Jack C. Plano and Milton Greenberg, The American Political Dictionary, 4th ed. (Hinsdale, Illinois: Dryden Press, 1976), p. 261.

concurrences. In a concurring opinion Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, pointed out that if the Court should decide to reconsider Kirkpatrick they would vote to overrule it.[93] He went on to indicate he would substitute in the place of the standard of mathematical exactitude the standard now applicable to state legislative reapportionment cases.[94] In light of the fact that Justices Stewart and White dissented in Kirkpatrick and are still on the bench, it is not unlikely that when the appropriate case emerges, the Kirkpatrick standard of absolute mathematical precision will be dropped.

If one recognizes, which one must, based upon the foregoing discussion, that deviations are increasingly being permitted at the local and state level, and that there is good basis in fact to believe the Court will in the future permit such deviations at the federal level, it is of value to examine the burden of proof for justification of deviations from precise mathematical equality in the chief congressional reapportionment decisions which have been advanced by the states but rejected by the Court.[95] Such an examination sheds light upon the attitude of the Court in reapportionment decisions in the past, but even more

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[93] 412 U.S. at 798. [94] Id.

[95] Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969); and White v. Weiser, 412 U.S. 783 (1973).

importantly suggests perhaps some of the most logical potential justifications for the future which will be predicated, in large measure, on what the Court has held regarding these matters in the past.

Patrick Quinlan, in an article entitled "Legislative Reapportionment: A Policy Emerges" in the 1973 Baylor Law Review, has usefully cataloged the eight purported justifications the states offered but which were subsequently rejected by the high Court:

> 1. "Variances are necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interested in Congress."[96] In this area any statement must be conditioned by the premise that the Court will look to the entire scheme before declaring any part thereof unconstitutional. The Court struck down this attempted justification by saying that citizens, not history or economic interests, cast votes; and that interest weighing is antithetical to the basic constitutional premise of equal representation for equal numbers of people.
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> 2. Legislative interplay or practical politics necessitate such variances. The court held that the rule is practicability and that "partisan politics cannot justify apportionment which does not otherwise pass constitutional muster."[97]
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> 3. "Variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."[98] The Court summarily dismissed that contention as "not legally acceptable." The Court again struck this attempted justification down in Weiser.[99]

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[96] Kirkpatrick v. Preisler, 394 U.S. 533.

[97] Id. at 533. [98] Id. at 533, 534.

[99] White v. Weiser, 412 U.S. at 4902.

4. "Deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering."[100] The Court struck this justification down for the same reason as attempted justification #2 (above).

5. "Disparities result from the legislature's attempt to take into account projected population shifts."[101] The Court intimated that this might possibly be a justification if the findings as to population can be predicted with a high degree of certainty and proved by thorough documentation as applied to the whole state. The court cautioned, however, that this was not to be used as an avenue for subterfuge.

6. "Deviations from equality were a consequence of the legislature's attempt to ensure that each congressional district would be geographically compact."[102] The Court struck down this justification on two grounds: first modern transportation and communication make this a hollow justification and a "state's preference for pleasingly shaped districts can hardly justify population variances."

7. New York tried to "justify its scheme of constructing equal districts only within each of seven sub-states as a means to keep regions with distinct interests intact."[103] The Court refused to accept this justification since it "would permit groups of districts with defined interest orientations to be over represented at the expense of districts with different interest orientations.[104]

8. "Variances represent good faith effort by the state to promote constituency--representative relations (a policy aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority of the members of the State's delegation have achieved in the United States House of Representatives)."[105] The Court held that it was unnecessary to rule on this contention since they had another plan before them which adhered more closely to

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[100] Kirkpatrick v. Preisler, 394 U.S. at 534.

[101] Id. at 535. [102] Id.

[103] Wells v. Rockefeller, 394 U.S. at 546. [104] Id.

[105] White v. Weiss, 71-1623, 41 L.W. at 4902, 4903 (June 18, 1973).

> population equality. Population shifts (#5) and "constituency-representative relations" (#8) seems to be the only possible justifications which the court will look to in considering whether the variances from equal population are justified.[106]

Quinlan points out that after the first denied state justification, the Court based denial upon the fact that "weighed interests"--historical, social, or economic--or whatever single interest was not in keeping with the fundamental proposition of equal representation for equal numbers of people in the Constitution. He suggests that the Court, for the time being, is more interested in the entire scheme of reapportionment rather than a more narrow single interest which seems to call for deviation.

In the second state justification which was denied, attention was brought to legislative interplay or more clearly "practical politics." The state hoped its proposed plan would be permitted some deviation because of "legislative interplay" and "practical politics." The Court spoke directly to the point that "partisan politics" could not be a basis of deviation and that indeed the plan must totally "pass constitutional muster." The Court was more interested in the functional practicability than practicality of the plan. Practicability was predicated on being acceptable under the Constitution as presently interpreted.

The third state justification for deviation was

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[106]Patrick J. Quinlan, "Legislative Reapportionment: A Policy Emerges," 25 Baylor Law Review 663 (1973).

founded on avoiding the fragmentation of political subdivisions. Point number three is somewhat similar to number one (justified because of certain interests). The Court again seemed to harken back to its basis for denial under the second justification, simply, that in this case such a justification would not be "legal," that is, would not pass constitutional muster. The Court with regard to this point did not choose to offer further explanation--it simply suggested illegality.

The fourth deviation sought was based upon the hope that the deviation would inhibit "partisan gerrymandering." The Court used the same basis of denial in this request as for the second attempted justification--it would not be "constitutional." No further elaboration was offered by the Court.

The fifth attempted justification sought deviation based upon population disparities which could be projected by population shifts. The Court inferred that if such a justification could be given based upon solid, reliable documentation, and not just for a narrow portion of the state but for the entire state as a whole, the Court might be willing in the future to consider such a justification.

The sixth population deviation hoped to be justified on the basis of attaining "geographically compact" congressional districts. The Court offered two reasons for its denial. One, modern technology has so advanced communications and transportation that this is really no longer an

era in which geographical compactness might be a serious justification. Two, districts with pleasing (or symmetrical) shapes cannot seriously be offered as a justification. The Court implied pleasing shapes for pleasing shapes' sake is simply on its face not enough reason to justify deviation.

The seventh deviation sought was to keep regions with like interests intact. This deviation is similar to interests mentioned in point one. The Court again denied the justification for the reason that groups of districts with specific interests might emerge and thereby overrepresent themselves at the expense of other districts that might not be as fortunate to share similar interests with neighboring districts.

The eighth deviation sought by a state was based upon the premise that variances should be construed as good faith efforts to improve "constituency-representative" relations. This would obviously have the practical effect of sustaining the relationships between the incumbent congressmen and their constituents as well as promoting the seniority system. The Court indicated that it would not rule on this state-proposed justification of deviation because it had another plan before it which more nearly approached population equality.

Of the eight state-proposed justifications for deviation, the Court seemed willing only in the case of

"population shifts," number five, and "constituency-representative relations," number eight, to consider at all if the variances from equal population might be justified. While it did not come close to approving the variances, it did indicate to careful Court watchers that if there is an area in which it might in the future logically loosen the standard of numerical exactitude, it could be expected to come in these areas.

In addition to the justifications advanced by the states but rejected by the Court in congressional reapportionment decisions, the attitude of the Court has been made clear in a series of cases in which justifications were offered in state legislative reapportionment situations. Having looked at the purported justifications at the federal level it is of value and indeed important for a thorough examination of deviations to note the justifications offered and in certain cases accepted at the state level. Quinlan has composed a list of justifications commonly proffered in state cases:

> 1. The basic argument is the bicameral state legislature is analogous to the Congress, i.e. broken into one house based on population and one house based on geographical location. Therefore only one house of the bicameral state legislature should be apportioned by population.
>
> 2. A second argument that has been raised as a justification by the states is that considerations of history and tradition dictate that apportionment not be disturbed by federal intervention.
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> 3. A third, and perhaps the most cited justification for population divergences in state reapportionment plans is the desire by the state to insure

some voice to political subdivisions, as political subdivisions.

4. A fourth justification that has been argued by the state is that there is a necessity to maintain the rural-urban balance in the legislature.

5. A fifth justification which has been raised by states seeking to support divergences in their reapportionment plans is the argument that the petitioners challenging such reapportionment plan have a nonjudicial remedy available.[107]

Quinlan points out that the argument that the bicameral state legislature is similar to the Federal Congress, when offered as a state justification for permitting a deviation from absolute mathematical precision, was rejected by the high Court in Reynolds v. Sims.[108] In the 1964 Reynolds case the Court would not accept the "federal plan" point of view. It stated that the writers of the Constitution did not necessarily intend to set up the federal legislative structure to serve as a "model" for the state legislative systems scheme of apportioning seats in their legislatures. The Court went on to reaffirm its rejection of the federal model in Roman v. Sincock[109] and Davis v. Mann.[110] Thus Reynolds, as indicated earlier, had the effect of requiring both upper and lower houses of state legislatures to be apportioned strictly according to population. This position was the rule until the more recent

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[107] 377 U.S. 574 (1964).

[108] WMCA v. Lomenzo, 377 U.S. 709, 12 L.Ed.2d 568, 84 S.Ct. 1418 (1964).

[109] Id. at 692. [110] Id. at 675.

decisions of Mahan, White, and Gaffney.

When states have sought to justify deviations in apportionment on the basis of "history and tradition," the Court has responded negatively to the contention. In Maryland Committee v. Tawes[111] the Court pointed out that "historical and traditional" considerations did not provide adequate justification for the substantial (24.7 percent) deviations from population-based representation in each of the houses of the Maryland state legislature. Quinlan has pointed out that if this justification were accepted today, it would depend upon the Supreme Court's interpretation of "substantial." The Court in Gaffney[112] considered 7.83 percent as "insignificant population variances." Today, given recent cases mentioned earlier, it seems logical that historical and traditional justifications would be acceptable in situations where there is less than 10 percent variation, and as well in cases such as Mahan v. Howell[113] where the Court pointed out that 16.4 percent variation is a "relatively minor variation."

In the most common justification offered by the states, that the state be permitted to reapportion to insure some influence in the political subdivisions as political subdivisions, the Court at first responded negatively in the

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[111]377 U.S. 656, 12 L.Ed.2d 595, 84 S.Ct. 1442 (1964).

[112]412 U.S. 735 (1973). [113]410 U.S. 315 (1973).

case of Alabama. However, in Reynolds the Court recognized this justification to be of more substance than the usual justification proffered. By 1973, however, in Mahan v. Howell[114] the Court accepted this justification and observed: "We hold the legislature's plan for reapportionment of the House of Delegates may reasonably be said to advance the rational state policy of respecting the boundaries of subdivisions."

In the matter of a state's proposed justification on the basis that there is a necessity to maintain the rural-urban balance in the legislature, the Court has been negative. In Davis v. Mann[115] this argument was rejected as "being without legal merit and without supporting facts within the case itself." Quinlan observes: "In Davis the population divergences before the Court reached 41.1%. Analyzing this attempted justification with the latest cases in mind, I feel that it could perhaps survive the rational state policy inquiry of Mahan v. Howell."[116] The Court in Mahan did not object to Virginia having one house of its two-house state legislature responsive to "voters of political subdivisions as such." Naturally, any urban-rural balance consideration would be carefully examined in situations where it would go above a 10-percent divergence.

The fifth justification cited by Quinlan--that is,

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[114] Id. [115] 377 U.S. 678 (1973).

[116] 410 U.S. 315 (1973).

in cases where divergences are sought because petitioners challenging such reapportionment plans have a nonjudicial remedy available--has been rejected by the high Court. The Court pointed out when refusing to accept this consideration that "courts sit to adjudicate controversies involving the denial of Constitutional rights."[117] At the same time the suggestion that such an apportionment is the result of popular mandate fails to withstand the approval of the Court. The Court has said in responding to this position in the case of Lucas, "a citizen's Constitutional right can hardly be infringed simply because a majority of the people choose that it be."[118]

While other varied justifications offered by the states could be enumerated, the ones considered above have been cited because of their common use in the past and because of the possible Court response and action upon them in the future.

The deviations from a more egalitarian era may be described, in summary, as having a basis for change in those cases of the latter 1960s following the landmark decisions of the earlier portion of the decade. With the formation of a new coalition derived from the addition of the four Nixon appointees, the Supreme Court began to extend voting equality in the electoral process. The Court began to require less adherence to precise equality in state legislative

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[117] Id. [118] Id.

reapportionment cases, starting first with Mahan v. Howell[119] in 1973. States appealed to the high Court to apportion federal congressional districts on a less egalitarian basis, citing a number of purported justifications. These justifications for variance were turned down. However, justifications advanced for variances at the state and local level were in certain cases accepted, for example, in the case of population shifts and constituency-representative relations. In addition, based upon recent decisions there is reason to believe the Court's adherence to mathematical precision at the federal congressional district level may prove to be short lived since the holdings in such cases were based largely upon stare decisis rather than firm commitments to judicial principle. The Court indicated that variances from mathematical exactitude would be applied in congressional district cases as well. It appears that further fundamental variances from the earlier precise standard may be observed in forthcoming cases.

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[119] 410 U.S. 315 (1973).

CHAPTER III

NOVEL VARIATIONS OF "ONE MAN, ONE VOTE"

Since the Supreme Court's forays into the political thicket of the 1960s, a number of loud complaints regarding representation have continued to be heard. Such problems cannot be overlooked when examining the question of legislative representation. Absolute voter equality was at first strictly demanded by the high Court. Even with strict adherence to the principle of mathematical exactitude, alleged inequities continued. Among the number of representation problems that continued to exist, stand noticeably black groups, consistently dominant groups, and the poor, each claiming to have been "diluted" and in effect denied its full representative thrust. But even more noticeable and patently preventing the achievement of fair and effective representation for all citizens, stands the problem of gerrymandering.

This chapter examines the inequities of gerrymandering which exist in spite of the Supreme Court's pursuit of a more egalitarian system of representation. It investigates the basic complaint that the Court, in extending its quest for population equality, has at the same time increased the practice of gerrymandering. Moreover, it

considers the related problems and difficulties that exist with regard to two groups which contend they have been ignored and in effect "diluted"--blacks and political interests. Working definitions are developed and significant cases examined to bring into sharper focus some of these more novel variations of "one man, one vote."

Governor Elbridge Gerry of Massachusetts in 1812 allowed a "salamander-like" electoral district to be thrust upon Essex County, Massachusetts. In actuality the legislature divided the county of Essex into two state senatorial districts, and from that time to the present "gerrymandering" has been a part of the American political system.[1] Plano and Greenberg, in The American Political Dictionary, define gerrymandering as "the drawing of legislative district boundary lines with a view to obtaining partisan or factional advantage."[2] Robert Dixon has defined gerrymandering as "discriminatory districting which operates unfairly to inflate the political strength of one group and

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[1]Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (New York: Oxford Press, 1968), p. 459. Some students of government delight in describing odd-shaped districts. One of the best of these descriptions is "The camel biting the tail of the buffalo which is stepping on the tail of the dachshund" and then "jigs and jags like a salamander scurrying over hot rocks." This example is cited in G. Tyler and D. Wells, "The New Gerrymander Threat," AFL-CIO AM Federationist, February 1971.

[2]Jack C. Plano and Milton Greenberg, The American Political Dictionary, 4th ed. (Hinsdale, Illinois: Dryden Press, 1976), p. 170.

deflate that of another."[3] Robert Engstrom has said of gerrymandering, "the essence of the practice is the creation of an electoral advantage for a favored group by diluting the voting effectiveness of a competitive group. The goal of the gerrymanderer is to create a scheme that will cause the targeted group to waste a substantial proportion of its votes by dispersing them in support of losing candidates and/or by concentrating them so that they provide excessive support for winning candidates."[4] Engstrom points out that the practice of gerrymandering is often associated with the delineation of representational district boundaries, which do not have to be "contorted" to dilute effectively a particular group's voting strength. For example, the votes of a group can also be effectively diluted by submerging them within at-large or large multi-member districts. This type of gerrymander is referred to as "institutional gerrymandering."[5] Such a gerrymander is especially offensive when a minority group is not able to formulate successful

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[3]Robert G. Dixon, Jr., "The Court, the People, and 'One Man, One Vote,'" in Reapportionment in the 1970's, ed. Nelson W. Polsby (Berkeley: University of California Press, 1971). For a good historical account of gerrymandering and its practice even before its etymological development, see E. Griffith, The Rise and Development of the Gerrymander (n.p.: 1907).

[4]Richard L. Engstrom, "The Supreme Court and Equi-Populous Gerrymandering," a paper presented at the 1975 Annual Meeting of the American Political Science Association, San Francisco, California, September 2-5, 1975, p. 2.

[5]See Dixon, "The Court, The People, and 'One Man, One Vote.'"

electoral conditions with other groups.[6]

Even in light of the achievement of numerical representational equality of the 1960s, criticisms persist. At the present, even recognized proponents of "one man, one vote" have come to express disenchantment with the Warren Court's development of that doctrine.[7]

Alexander Bickel has observed, "Malapportionment, its foes had persuaded one another, was the source of most of our domestic ills. In it were the roots of the urban crisis and of the obsolescence of federalism. It was the essential reason why wealth accumulates, and men decay. There are, it has turned out, other roots, less easily reached; other reasons, less easily understood."[8] Bickel goes on to say, "the Court has made gerrymandering easier by requiring that the established boundaries of subdivisions

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[6]See generally John Kruger, "The Reapportionment Controversy--The Process of Dilution," 4 Memphis State University Law Review 565 (1974).

[7]For perhaps the largest collection of statements critical of "one man, one vote," see Robert G. Dixon, "The Warren Court Crusade for the Holy Grail of 'One-Man, One-Vote,'" The Supreme Court Review (1969), pp. 231-33. Dixon quotes the critical comments of David Wells, William J. D. Boyd, William M. Beaney, Malcolm E. Jewell, Gordon E. Baker, and Robert B. McKay. While this list is not inclusive it does tap litigants, legal authorities, political scientists, journalists, and scholars who in Dixon's vernacular are "the surprised friends of 'one-man, one-vote.'" See also Ward Elliot, "Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment," 37 The University of Chicago Law Review 474 (1970).

[8]Alexander Bickel, "The Supreme Court and Reapportionment," in Reapportionment in the 1970's, p. 7.

of government, such as counties, be disregarded in the process of districting. As to the same result unintentionally achieved--plain districting--the Court has also said nothing, and there is little it could say. To abolish districting would be not only to let the majority rule, but to let it rule quite alone without opposition, by entirely excluding the minority from representation."[9] He offers in conclusion, with regard to the policy of "one man, one vote," that "Nothing of importance was improved, much that was indifferent or acceptable was made worse, and a great deal that could be better was made more difficult."[10]

Another critic is William J. D. Boyd, director of the National Municipal League. The league is an organization which enthusiastically supported the "one-man, one-vote" movement and made available an important information service. Boyd has observed, "Unfortunately, the Court seems to be saying that no social, economic, or political data of any type may be used as criteria for districting and that city and county boundaries are pretty much irrelevant. It should be carte blanche for the gerrymanderers until the day the Court rules."[11]

Malcolm E. Jewell has noted that the census figures used in apportionment are neither accurate enough nor recent enough "to justify this kind of passion for mathematical

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[9]Ibid., p. 70. [10]Ibid., p. 74.

[11]Note 7, ibid., p. 232.

perfection."[12] Jewell suggests that gerrymandering will be simpler if political subdivision boundaries become wholly irrelevant under an absolute equality rule. He is concerned that presently "existing political subdivisions do have some sense of community and community interests."[13] He goes on to offer the following hypothesis: "It can also be argued that legislators are less likely to be visible and identifiable to their constituents if legislative district boundaries are completely independent of other existing city and county boundaries."[14]

In the same vein Robert N. Clinton states: "Indeed the political manipulation involved in the gerrymander is really only the reverse side of the apportionment problem posed by the 'one person, one vote' cases. Political manipulation and discrimination can be effectuated either by tinkering with the absolute size of districts or by adjusting the district boundary lines."[15] Clinton believes "There is significant support for the view that by eliminating the former alternative, the Supreme Court's 'one person, one vote' cases have drastically increased reliance on the gerrymander by vested legislative interests seeking to remain in power by manipulating the electoral process. While inadvertently exacerbating the gerrymander problem,

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[12]Ibid. [13]Ibid. [14]Ibid.

[15]Robert N. Clinton, "Further Explanations in the Political Thicket: The Gerrymander and the Constitution," 59 Iowa Law Review at 4 (1973).

the courts have yet to formulate any clear and comprehensible standards with which to analyze it."[16]

The gerrymander problem arises in part from our geographic base for political representation. If more representatives were elected at large by means of proportional representation, the need to divide the political bailiwicks would be minimized as well as the opportunity for the manipulation of boundary lines. However, since multiple-member districts are often used under proportional representation, districting disagreements and gerrymandering are still possibilities. For the most part, however, we do not operate under a proportional representation system in the United States, nor are we required to do so by the equal protection clause.[17] Instead, our election process is primarily "district based," requiring the drawing of district boundary lines. Thus, when a political unit must be subdivided into districts for representation purposes, the manipulation of the electoral process by the dominant group, which performs the districting function, becomes possible. If minority interests can be geographically isolated, their political power can be effectively diffused or diluted by one or possibly both of two tactics.[18] First, the minority

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[16] Ibid.

[17] See Whitcomb v. Chavis, 403 U.S. at 156-60 (1971).

[18] Andrew Hacker, Congressional Districting: The Issue of Equal Representation (Washington, D.C.: Brookings Institution, 1964), pp. 54-63.

group voters might be concentrated in one district. If such a district existed, the "minority" group's candidates could easily receive over 90 percent of the votes.[19] Consider, however, if every vote in excess of that necessary to elect a candidate (i.e., 50 percent plus one) is really an "excess" vote, it would be more useful to the minority group if cast elsewhere. Since this phenomenon may be "naturally" obtained by the de facto concentrations in certain geographic areas of large numbers of blacks, Democrats, Republicans, or other groups, it can also be contrived and used as a deliberate political weapon. Second, minority group concentrations may be divided and diffused throughout several districts, so as to constitute a substantial minority in any given district. While their combined numbers may have permitted such minority group voters to elect a certain number of representatives on a proportional basis, this type of fractionalization, due to the winner-take-all nature of the electoral system, effectively dilutes the minority's ability to elect any representatives. Each minority vote cast in a district in which the minority voters, no matter how large their numbers, can never gain a majority is, in a sense, a "wasted" vote.[20]

Without question, as long as blacks and whites, Republicans and Democrats, rich and poor, live sufficiently close enough together to be placed in the same electoral

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[19]Ibid., p. 55. [20]Ibid., pp. 55-57.

districts, there will most certainly be "wasted" votes.[21] The difficulty the gerrymander presents for the courts is not the one of hypothetical "wasted" or "excess" votes in any district. Instead it is the difficulty of determining what degree of political submergence amounts to an unacceptable, systematic electoral dilution. It is impossible for the courts to eliminate all "wasted" and "excess" votes, and indeed they should not attempt to do so.[22] However, they can eliminate the abuses by the dominant political group of the districting power and assure fairness in the process of representation.[23]

Efforts of the high Court to resolve the many constitutional problems brought about by the gerrymander reach back even before the "one-man, one-vote" rulings. In 1960, in Gomillion v. Lightfoot,[24] the Supreme Court held that the attempted detachment of the Negro community from within the city boundaries of Tuskegee, Alabama, was in violation of the Fifteenth Amendment's guarantee of the franchise. An appeal of the dismissal of a complaint challenging the validity of a state law, Act 140,[25] sought to place all but

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[21]Dixon, Democratic Representation, pp. 461-63.

[22]Whitcomb v. Chavis, 403 U.S. at 153-55 (1971).

[23]See Gordon W. Hatheway, Jr., "Political Gerrymandering: The Law and Politics of Partisan Districting," 36 George Washington Law Review 144 (1967).

[24]364 U.S. 339 (1960).

[25]Alabama Acts 1957, Number 140, at 185.

four or five of Tuskegee's four hundred registered blacks outside the city boundaries. The Tuskegee Negro community at this time was seven-eighths of the city's total population. Tuskegee's voter registration amounted to about one thousand, 40 percent of whom were black voters.[26] Justice Frankfurter, speaking for the Court, noted:

> The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, inter alia, the right to vote in municipal elections.[27]

The opinion indicated that if the petitioners' allegations about Act 140 were true, the Act would violate the Fifteenth Amendment guarantee against the denial of the franchise on the basis of race. Justice Frankfurter concluded for the Court:

> The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.[28]

According to Jo Desha Lucas, with regard to Gomillion, Frankfurter's emphasis on the Fifteenth Amendment seems on its face to be incorrectly placed.[29] By its terms the Fifteenth Amendment deals with cases in which the right to

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[26]Robert G. Stern, "Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence," 41 University of Chicago Law Review 408 (1974).

[27]364 U.S. at 341. [28]Id. at 346.

[29]Jo Desha Lucas, "Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot," The Supreme Court Review 210 (1961).

vote is "denied or abridged" on the basis of race. Indeed, Act 140 did not deprive black voters of their franchise entirely since they could still vote in county and state elections. Thus, only the location of the exercise of the franchise was at issue. On this basis Justice Whittaker felt compelled to write a separate concurring opinion. Whittaker stressed that the right to vote was not denied or abridged by Act 140. Rather, he relied on the equal protection clause of the Fourteenth Amendment[30] and regarded the case as simply another attempt to segregate the races illegally. Even though several observers have, along with Justice Whittaker, objected to the Fifteenth Amendment approach to the Court's majority because it did not fit the facts,[31] Frankfurter's opinion indeed might be read as broadening the protection of the Fifteenth Amendment by expanding the concept of a denial or abridgement.[32] In Gomillion, Frankfurter's opinion is vulnerable to the interpretation that a decision by the state as to where the vote is to be exercised may be invalid under the Fifteenth Amendment when based on racial factors. Accompanying such an interpretation of Gomillion are profound implications for changes of racial gerrymandering, since the gerrymander

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[30]364 U.S. at 349.

[31]Robert G. Dixon, Jr., discusses this in Democratic Representation, p. 117, and Professor Lucas in "Dragon in the Thicket," pp. 210-14.

[32]See Stern, "Political Gerrymandering," p. 409.

device operates fundamentally as a decision on the location of the exercise of the franchise. Gomillion's importance to the problem of racial gerrymandering does not, interestingly, rest entirely upon the theory that the Court chose to invalidate Act 140.

The chief importance of Gomillion in connection with the racial gerrymander lies not in where denial of the right to vote occurs but instead in the justiciability of the issue itself, an item almost completely ignored by the opinion. Since Frankfurter's opinion neatly sidesteps the earlier "political question" doctrine cases,[33] it actually never holds that every claim of racial discrimination in districting is justiciable. Rather, Frankfurter carefully distinguished the cases, holding apportionment to be a political question by suggesting that they involved discrimination under the coverage of the equal protection clause, although the case in point involved the denial of the right to vote.[34] In fact, this distinction explains Frankfurter's uncommon selection of the Fifteenth Amendment as the basis of the decision in Gomillion. Naturally, after Baker the courts were not concerned by the application of the political question doctrine in the broad field of apportionment. Therefore, in spite of Justice Frankfurter's

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[33]For a complete discussion of the political question doctrine, see Colegrove v. Green, 328 U.S. 549 (1946), and Baker v. Carr, 369 U.S. 186 (1962).

[34]364 U.S. at 346.

attention to the Fifteenth Amendment in Gomillion, the courts henceforth assumed that any claim of racial discrimination in the apportionment process was justiciable even though founded on the equal protection clause instead of the denial of voting rights.[35]

The next Supreme Court case dealing with a charge of racial gerrymandering to be considered is Wright v. Rockefeller[36] in 1964. At the time the Wright case was decided, it did not draw much attention since it was greatly overshadowed by two other cases decided in the same term, Wesberry v. Sanders[37] and Reynolds v. Sims.[38]

In the matter of Wright the Court assumed the justiciability of the issue under the Fourteenth Amendment and moved to resolve the substantive issues in the case. The facts included a claim that in New York, Manhattan's four congressional districts were arranged in such a way as to segregate black and Puerto Rican voters largely into one district in violation of the Fifteenth Amendment and the equal protection and due process clauses of the Fourteenth Amendment. In spite of the dissents of Justices Goldberg

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[35]See Sims v. Baggett, 247 F.Supp. 96, 104-5 (M.D. Ala., 1965). This case for the first time held a racial gerrymander of electoral districts unconstitutional on Fourteenth Amendment grounds. Here a three-judge panel struck down a new apportionment plan of the Alabama House on the grounds that it combined counties into multi-member districts to avoid the election of a Negro member.

[36]376 U.S. 52 (1964). [37]376 U.S. 1 (1964).

[38]377 U.S. 533 (1964).

and Douglas (which should be noted), the Court affirmed the split of the lower court's three-judge panel dismissing the case.[39] The rationale the Court gave for its decision is not clearly explained or easy to understand.

The plaintiffs in the case were an unusual group of parties, which in part seems to explain the not completely expected positions taken by some of the justices on the Court, especially dissenting Justice Douglas. The plaintiffs, mostly black and Puerto Rican voters from Manhattan, brought suit to invalidate the congressional districting on the basis of deliberate racial gerrymandering. Along with several of his Democratic party supporters, Adam Clayton Powell intervened. The charge was made by Powell and followers that the plaintiffs did not represent the class to which the intervenors also belonged and defended the present districting scheme on the grounds that it permitted the affected racial and ethnic groups to elect to Congress their own representatives.[40] The Manhattan congressional districts were racially comprised in the following way:[41]

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[39]Wright v. Rockefeller, 211 F.Supp. 460 (S.D. New York, 1962).

[40]See the racial composition of the Manhattan congressional districts, Wright v. Rockefeller, 211 F.Supp. 460 (S.D. New York, 1962).

[41]376 U.S. at 60.

District	White Percentage of District	Negro and Puerto Rican Percentage of District
Seventeenth	94.9	5.1
Eighteenth	13.7	86.3
Nineteenth	71.5	28.5
Twentieth	72	27.5

The suggestion of blacks supporting political segregation resulted in some provocative observations from members of the high Court.

Even though there was overwhelming proof that black and Puerto Rican voters were segregated into the Eighteenth District and out of the Seventeenth District by an eleven-sided, step-shaped boundary along the racial frontier,[42] the Court majority held that the case of the plaintiffs had not been proved:

> We accept the findings of the majority of the District Court that appellants failed to prove that the New York Legislature was either motivated by the racial considerations or in fact drew the districts on racial lines. Compare Gomillion v. Lightfoot, 364 U.S. 399. It may be true, as Judge Feinberg thought, that there was evidence which could have supported inferences that racial considerations might have moved the state legislature, but, even if so, we agree that there also was evidence to support his finding that the contrary inference was "equally, or more, persuasive."[43]

Thus, the majority in Wright held, without stating it, that racial gerrymandering was a justiciable issue even though the challenge was based in part on the equal protection clause.[44] The majority of the Court implicitly accepted plaintiffs' argument that a purposeful segregation

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[42]376 U.S. at 56-57. [43]376 U.S. 52 (1964).

[44]Compare, for example, to Katzenbach v. Morgan, 384 U.S. 641 (1966).

of racial and ethnic groups in political districting was a violation of the equal protection clause as well as the Fifteenth Amendment. The Court accomplished this by affirming the district court's dismissal predicated on the plaintiffs' failure of proof of improper legislative intent instead of on justiciability grounds. Curiously, no question was raised as to the justiciability of political discrimination against Puerto Rican voters in spite of the apparent nonapplicability of the Fifteenth Amendment to this class of citizens.[45]

Both of the dissenting Justices, Douglas and Goldberg, looked upon the case in traditional segregation terms. They focused on the racial separation of black and Puerto Rican voters in the Eighteenth District. Their basis for dissent was that the Eighteenth and Seventeenth Districts' statistical and demographic makeup, combined with the irregular shape of the boundary line between them, established a prima facie case of unconstitutional districting. Justice Douglas, dissenting, noted:

> I had assumed that since Brown v. Board of Education, 347 U.S. 483, no State may segregate people by race in the public areas. The design of voting districts involves one important public area--as important as schools, parks, and courtrooms. We should uproot all vestiges of Plessey v. Ferguson, 163 U.S. 537, from the public area.[46]

Justice Goldberg, in dissenting, noted as well:

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[45]376 U.S. at 62. [46]376 U.S. at 69.

> I understand the Court's decision since Brown v. Board of Education, to hold that harm to the Nation as a whole and to whites and Negroes alike inheres in segregation. The Fourteenth Amendment commands equality, and racial segregation by law is inequality. Judge Moore, therefore, did not apply the proper constitutional standard.[47]

In 1964 no member of the Court indicated an interest in addressing the question of dilution of black or Puerto Rican votes which might be involved in their "integration" into hostile white majorities in the neighboring Nineteenth and Twentieth Districts.

One of the most interesting aspects of Wright was the very dramatic reaction on the part of Justice Douglas to Adam Clayton Powell's defense of the segregated voting pattern in the case. Justice Douglas's disgust with Powell's claims probably encouraged him to make too sweeping statements which were later put to use in ways which were no doubt unexpected by Justice Douglas. Congressman Powell justified the districting pattern on the grounds that it allowed minority interests to elect their own representatives. Justice Douglas not so charitably described the argument as "separate but better off."[48] In his angry objection to Powell's suggestion, Justice Douglas asserted:

> The fact that Negro political leaders find advantage in this nearly solid Negro and Puerto Rican district is irrelevant to our problem. Rotten boroughs were long a curse of democratic processes. Racial boroughs are also at war with democratic standards.[49]

Douglas went on to provide what is regarded as a classic

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[47]Id. at 62. [48]Id. [49]Id.

quotation in the gerrymander field, after first charting a history of racial and ethnic "electoral register" systems throughout the world:

> Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition--"of the people, by the people, for the people." Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic and so on. . . . The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a devisive force in a community emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.[50]

Clearly, Douglas viewed Powell's argument, which he characterized as "separate but better off," as but another racist effort at segregation, though with a twist somewhat different from others.

Congressman Powell's defense of racially segregated electoral districts spawned in the written opinion of Justice Douglas's comments, which were not wisely concluded or were at best too broad and sweeping in condemning any reference to racial residential patterns of drawing district lines. Indeed his comments in Wright in 1964 contrast dramatically with the view he held six years later in 1971

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[50] Id. at 66.

in his dissent in Whitcomb v. Chavis.[51] However, the lower courts often depended upon Justice Douglas's comments in Wright to prevent substantive relief from being granted litigants. Justice Douglas, however, ignored the fact that the state might have a legitimate concern in drawing district lines with regard to racial demography to assure that traditionally underrepresented or disenfranchised minorities have a fair chance to attain representation.[52] Such a remedial affirmative action is quite a different matter from segregating most black voters into one predominantly non-white district as was ostensibly done in the Eighteenth District in New York. Indeed, the segregation of the Manhattan congressional districts resulted in a large number of what might be called "wasted" black and Puerto Rican votes in the Eighteenth District. If these votes could have been cast in other districts in Manhattan, they would have been cast more effectively.[53]

The high Court, therefore, in a summary view of Wright, addressed the charge that there was an unfair concentration of minority group voting strength. It rejected that charge because the plaintiffs failed to demonstrate improper legislative intent.[54]

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[51] 403 U.S. 124, 171-81 (1971). Here Justice Douglas recognizes "race" as a basis for determining where district boundary lines should be drawn. See Justice Douglas's quote on p. ||| infra.

[52] 376 U.S. 52 (1964). [53] Id. [54] Id. at 62.

In the years following Wright, several cases from the South challenging the racial makeup of political districts were considered. In 1965, in Mann v. Davis,[55] black voters who did not like the combining of Richmond, Virginia, with outlying county areas in a multi-member district, challenged this districting plan. They contended that it denied them of their chance to elect a black delegate to the General Assembly of Virginia, which they were entitled because of their numbers.[56] The district court found that there was no deliberate racial exclusion in this case based upon the fact that counties had never been subdivided into single-member districts in Virginia. The court relied heavily on the Douglas dissent and concluded that the Constitution did not demand an alignment of political districts to assure the electoral success of any particular race.

Another 1965 case, Sims v. Bagget,[57] dealt with the question of a racial gerrymander of electoral votes in the state of Alabama. A three-judge panel struck down a new apportionment of the lower house of the Alabama legislature on the basis that it combined counties into multi-member districts to prevent the election of a Negro.[58] It was decided by the court, due to the extensive history of racial discrimination in Alabama and the more recent efforts under

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[55] 382 U.S. 42 (1965). [56] Id.

[57] 247 F.Supp. 96 (M.D. Ala., 1965). [58] Id. at 109.

the Voting Rights Act of 1965,[59] to give the black the right to vote. Indeed the only acceptable explanation for the grouping of the counties affected by the plan was the purpose of preventing the election of a black. Thus the charge leveled in Sims was not that of the traditional segregation claim as leveled in Wright. Instead, it involved the charge of attempted dilution of nonwhite voting power due to purposeful or deliberate "integration," or perhaps better described as "fusion," with areas of white voting concentration. Clearly, emphasis in Sims was not on the more traditional point of racial segregation and the equal protection clause, but instead on the protection of the right of the black person's vote against the dilution implicit in the fusing or mixing of black and white voters--in this case in the very heart of the South.

The next case decided in the following year, 1966, was Bannister v. Davis.[60] The presiding judge, speaking for a unanimous three-judge panel, enunciated the germane law on gerrymandering in establishing the redistricting guidelines for the Louisiana legislature:

> Even if a plan meets the requirement of the equal population principle, it may be invalid if it goes too far in diluting voting strength. Multi-member, multi-parish districts tend in this direction. Gerrymandering of any kind, therefore, will be closely scrutinized. Racial gerrymandering which violates the Equal Protection Clause, will not be tolerated.[61]

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[59] 42 U.S. Code 1973 (1970).

[60] 263 F.Supp. 202 (E.D. La., 1966). [61] Id. at 209.

The attitude taken by the lower courts in the North and South were not the same. The courts in the North were not as receptive to charges of racial gerrymandering. Northern courts continued to reject such charges unless the plaintiffs could provide the rather heavy burden of proof required in Wright. This would be possible by showing deliberate racial discrimination with ample and persuasive evidence. Normally, the sophistication of northern legislatures prevented the plaintiffs from providing adequate proof of racial motivation in the drawing of district boundary lines. Thus, such suits were rarely successful in the northern states.

At the same time the lower federal courts were dealing with the meaning of the Wright case, the question of the role of the multi-member district in the Court's reapportionment decisions began to put pressure on the Court to address again the gerrymander issue.[62] Ultimately the

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[62]See for example, Whitcomb v. Chavis, 403 U.S. 124 (1971); Graves v. Barnes, 343 F.Supp. 704 (W.D. Tex., 1972); Archer v. Smith, 409 U.S. 808 (1972); Georgia v. United States, 92 S.Ct. 1702 (1973). Briefly, multi-member districts are considered to be electoral units from which more than one representative is elected. Within such a district the population must be proportional to the number of representatives elected. For example, if the "one-man, one-vote" standard requires that a single-member district contain approximately 10,000 residents, a five-member district may be constructed containing approximately 50,000 residents. When an entire governmental unit, such as a county or a city, functions as an electoral district (single- or multi-member) it is regarded as an at-large district. For a definition as well as thorough discussion of multi-member districts, see Dixon, Democratic Representation, pp. 503-27.

high Court resolved in 1965 and 1966 in Fortson v. Dorsey[63] and Burns v. Richardson[64] that multi-member districts were not automatically or inherently unconstitutional under the Fourteenth Amendment.[65] At the same time the Court was forced to consider one aspect of the gerrymander problem--the common submergence of racial, economic, or political minorities in multi-member districts which results in either underrepresentation or lack of any representation.[66] Justice Brennan, speaking for the Court in the Burns opinion, noted:

> Where the requirements of Reynolds v. Sims are met apportionment schemes including the multi-member districts will constitute an invidious discrimination only if it can be shown that "designedly or otherwise, a multi-member constituency apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[67]

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[63]379 U.S. 433 (1965). [64]384 U.S. 73 (1966).

[65]For general consideration of the use and results of multi-member districts, see Malcolm E. Jewell, "Commentary" on Robert G. Dixon, "The Court, The People, and 'One Man, One Vote,'" in Reapportionment in the 1970's; Maurice Klain, "A New Look at the Constituencies: The Need for a Recount and a Reappraisal," 49 American Political Science Review 1105 (1955); Ruth C. Silva, "Compared Values of the Single and Multi-Member Legislative District," 17 Western Political Quarterly 504 (1969); and Howard D. Hamilton, "Legislative Constituencies: Single Member Districts, Multi-Member Districts, and Floterial Districts," 20 Western Political Quarterly 321 (1967).

[66]For an article providing exhaustive documentation that at-large elections significantly impair the ability of minority group members to win election to a legislative body, see Albert K. Karning, "Black Representation on City Councils: The Impact of District Elections and Socio-Economic Factors," 12 Urban Affairs Quarterly 223 (1976).

[67]384 U.S. 88. Emphasis added.

In Fortson v. Dorsey the Court observed:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.[68]

Thus Burns and Fortson, in brief, provided that while multi-member districts did not per se violate the "one-person, one-vote" test, they were considered to be unconstitutional where they operated to submerge or cancel out the effectiveness of the voting strength of various minority groups.[69] The Court, unfortunately, did not elaborate on the theoretical rationale for this test, nor did it explain how, if at all, it should be applied to single-member districts. It is important, however, to note that indeed the Burns and Fortson opinions embraced the starting point of a standard that could be applied in

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[68] 379 U.S. 433, 439 (1965).

[69] In 1967 the Supreme Court decided per curiam and without oral argument a case dealing with a Texas legislative plan. The decision was made solely on the basis of arithmetic equality, but the Court said of its multi-member districting questions, "Our cases do not foreclose attempts to show that in the particular circumstances of a given case multi-member districts are invidiously discriminatory." Justice Douglas in a concurring opinion stated what today may be the best description of the Court's view of the constitutionality of multi-member districts: "I reserve decision on one aspect of the problem concerning multi-member districts. . . . Under the present regime each voter in the district has one vote for each office to be filled. This allows the majority to defeat the minority on all fronts. . . . I am not sure in my own mind how this problem should be resolved." Kilgarlin v. Hill, 386 U.S. 120, 122 (1967). See also n. 140, p. 31, supra.

gerrymander cases.[70] The door, it may be said, was left slightly "ajar."

Regretfully, after the Burns and Fortson cases were decided the Court did not directly deal with the gerrymander issue for another five years. Occasionally during this five-year silence the Court did consider cases in which a gerrymander comprised one issue, but usually decided them in an abbreviated manner or without very much comment on the gerrymander issue itself.

The next significant development with regard to the gerrymander came about five years later when the Supreme Court agreed to consider Whitcomb v. Chavis.[71] Whitcomb is important to the gerrymander question because it was the first case in which the Court directly dealt with and elaborated upon the dilution theory considered in the Fortson-Burns line of cases. As well it provided the Court's first opportunity to consider a scope of protection against the gerrymander under the Fourteenth Amendment, which went beyond concepts of racial discrimination.

The facts of the Whitcomb case provide an interesting backdrop for the consideration of the gerrymander issue. Primarily black and poor voters living in the Indianapolis Township Ghetto area challenged the multi-member legislative district from which Marion County,

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[70] Engstrom, "The Supreme Court and Equi-Populous Gerrymandering," pp. 11-12.

[71] 403 U.S. 124 (1971).

Indiana (which included Indianapolis), elected its representative to the state assembly. In that the affected area in Marion County was predominantly black, the chief emphasis of both the plaintiffs and the three-judge panel was on the fact that the class was composed of poor citizens and voters. It was found by the district court that poor voters in the Center Township Ghetto in Marion County represented an identifiable interest group whose votes were systematically diluted by the operation of the multi-member district to be unconstitutional under the equal protection clause.[72] The unanimous opinion of the district court three-judge panel most clearly demonstrates that the focus of the court was not only on black voters as such, but on the poor as an identifiable political interest group with distinct legislative goals. It should be noted that in the course of defining the census tracts comprising the Center Township Ghetto, the court would not accept the inclusion of one tract. While this ghetto tract was black, it was essentially middle class in orientation and therefore different socioeconomically from the others.[73]

As a basis for reaching this conclusion, the district court focused almost entirely upon Fortson and Burns. The district court held that the standard review for claims of this type under the equal protection clause was whether voting strength of identifiable groups of citizens was

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[72] 305 F.Supp. at 1364 (S.D. Ind., 1969). [73] Id.

diluted or cancelled out by the apportionment scheme in question. The court determined that such dilution was in violation of the Fourteenth Amendment.

The district court opinion dealt with the issue of whether the poor residents of the Center Township Ghetto were an identifiable interest group. It proceeded to do so by making comparisons of demographic data from the ghetto on such items as crowded dwellings, home ownership, age and condition of housing, unemployment, education, delinquency, income and welfare payments, with similar data from other areas of the county. Upon noting gross differences in these figures, the district court, within the purview of the dicta found in Fortson and Burns, determined that the plaintiffs had policy concerns on these issues sufficiently different from voters in adjoining districts to represent an identifiable political element.

The district court was able to find dilution of political power and voting strength when it observed that representatives from Marion County did not adequately represent the interests of ghetto residents. Important points which it found persuasive in the matter was the strong control political parties exerted in the primaries (this tended to minimize the opportunity of ghetto residents to gain a position on the ballot) and the testimony of a plaintiff, Chavis, a black legislator from Marion County. Chavis indicated that, due to such strong party control in the legislature, he was hesitant to express the interests of

the residents of the Center Township Ghetto.[74]

The court went on to note that the positions taken by all the legislators from the Marion County district tended to coalesce, resulting in an attitude on the issues that was almost always the same. The ghetto suffered from underrepresentation, the court determined, when it analyzed the results of five prior elections (1960-1968) which it was fortunate to have. It noted that Washington Township, possessing 14.64 percent of the population of Marion County, was the residence of 52.27 percent of the senators and 41.79 percent of the representatives elected from Marion County. But on the other hand, the Center Township Ghetto had 17.81 percent of the population (22 percent larger than the population of Washington Township) and only 4.75 percent of the senators and 5.97 percent of the representatives.[75]

When confronted with the statistics the court concluded that residents of the Center Township Ghetto were not sufficiently represented as a result of a multi-member district which had the effect of diluting their votes and at the same time reducing their political strength and influence. The district court held the plan invalid under the equal protection clause.

The opinion handed down by the district court in the Whitcomb case had the practical effect of requiring the entire state to be redistricted. This decision represented

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[74]Id. at 1386. [75]Id. at 1383-85.

the high point for the view that any discernible interest group in the community with common legislative goals was protected by the equal protection clause against discrimination in the drawing of district boundary lines. Using the requirements and conditions adopted by the three-judge panel, proof of common policy goals and of the dilutions of political strength by fragmentation appeared to be sufficient to state a prima facie case of discrimination. In that the background and facts of the Whitcomb case were exhaustively and effectively documented, the case went to the Supreme Court with a record equal to any that plaintiffs will generally be able to establish in a gerrymander case.[76] Thus the Supreme Court's failure to respond to the plaintiffs' arguments in Whitcomb is especially noteworthy.

The Supreme Court reversed the three-judge panel decision of the district court by a six to three vote.[77] Justice White, writing for the majority of the Court, unfortunately left the impression that the Court did not completely comprehend the importance of the case for the general issue of the gerrymander. Rather, the Whitcomb case was treated by the Supreme Court as only another example of a challenge to multi-member districts.[78] Therefore, to the extent that the Supreme Court's opinion focuses upon the multi-member district issue, the opinion takes a narrow view

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[76] Archer v. Smith, 409 U.S. 808 (1972).

[77] 403 U.S. 124 (1971). [78] Id. at 142-43

and does not address the central importance of the Whitcomb case to the question of the law and its attitude toward electoral discrimination.

It is unfortunate that Justice White in the writing of his opinion does not come directly to grips with most of the theoretical problems posed in the matter of electoral discrimination in the form of the gerrymandered district. Indeed, there are clear indications in the opinion that the high Court was not prepared to recognize such challenges. In Section V of the opinion is the clearest example of the Court's reluctance to extend recognition to such challenges. From his reading of the lower court's decision in Whitcomb, Justice White made clear that the district court's opinion was confined to the protection of racial minorities. In an interesting portion of that opinion he observed:

> The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. . . . At the very least, affirmance of the District Court would spawn endless litigation concerning

> the multi-member district systems now widely employed in this county.[79]

Clearly, the high Court was concerned about an "endless litigation" or "plethora" of federal court cases resulting if it should confirm the lower district court's holding. Thus the Court held in the interest of judicial economy. The members no doubt remembered the avalanche of cases in the federal courts which came about after the emergence of the "one-man, one-vote" doctrine. A discernible interest group in the community with common legislative goals was not to be protected by the equal protection clause against discrimination in the drawing of electoral district lines.

In concluding the majority opinion Justice White ended on a somewhat surprising note:

> On the record before us plaintiffs' position comes to this: that although they had equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantely Democratic and the party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections. But typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, and the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member and multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in the so-called "safe" districts where the same party wins year after year.[80]

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[79] Id. at 156-57. Emphasis added. [80] Id. at 153.

The conclusion, by bringing to the fore the winner-take-all question, ignores the fact that the discrimination takes place not in the last place but rather in the initial drawing of the district boundary lines. Indeed, the winner-take-all feature of the system adds to the discrimination against a particular group. However, the discrimination exists due to the use of the electoral line-drawing function for the advantage of one particular political group. For example, the winner-take-all principle works in a dramatically different way where the minority interest represents, for example, only 15 percent of the voters in a particular electoral district than where the minority interest represents 49 percent of a district which has been knowingly included with an opposite 51-percent interest to dilute its political impact.

In a concurring opinion, Justice Harlan heavily criticized the majority for failing to be completely candid in the matter and for proposing a completely different theoretical approach to the apportionment question. Justice Harlan found fault with his colleagues for their findings in three cases--not only Whitcomb, but two others, Gordon v. Lance[81] and Abate v. Mundt,[82] decided the same day.

His complaint was not for the retreat he insisted they had made, but for the covert withdrawal from the high Court's earlier commitment to the "one-man, one vote"

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[81]403 U.S. 1 (1971). [82]403 U.S. 165.

position it had earlier asserted under the equal protection clause. In his remarks with regard to the majority opinion in the Whitcomb decision, Harlan observed:

> Other past decisions have suggested that multi-member constituencies would be unconstitutional if they could be shown "under the circumstances of a particular case . . . to minimize or cancel out the voting of racial or political elements of the voting population." Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Burns v. Richardson, 384 U.S. 73, 88 (1966). Today the Court holds that a three-judge District Court, which struck down an apportionment scheme for just this reason, "misconceived the Equal Protection Clause."[83]

In a separate opinion, Harlan went on to bring his thinking into sharper focus. He stated that the majority of his colleagues had ignored or rejected the total reapportionment theory which had been the basis of the long line of gerrymander cases starting with Gomillion. With regard to how they viwed "one man, one vote," he noted that they saw it as "reflections of deep personal commitments by some members of the Court to the principles of pure majoritarian democracy."[84]

Harlan went on to make the point that such a philosophy "ignores or overcomes the fact that the scheme of the Constitution is not one of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others, as both the body of the Constitution and the Fourteenth Amendment itself show on their face."[85]

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[83]403 U.S. 165. [84]Id. at 166. [85]Id. at 166-67.

Justice Harlan then revealed that he would have preferred open recognition that a mistake had been made in the reapportionment cases and that the most sensible thing would be to return to the political questions doctrine previously discussed by Justice Frankfurter:

> This case is nothing short of a complete vindication of Mr. Justice Frankfurter's warning nine years ago "of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants) into which this Court today catapults the lower courts of the country." . . . With all respect, it also bears witness to the morass into which the Court has gotten itself by departing from sound constitutional principle in the electoral field. . . . I hope the day will come when the Court will frankly recognize the error of its ways in ever having undertaken to restructure state electoral processes.[86]

Other justices highly displeased with the majority opinion were Douglas, Brennan, and Marshal. Justice Douglas penned an angry dissent dealing directly with the primary theoretical questions posed by the gerrymander issue. Referring to Reynolds v. Sims,[87] Douglas pointed out that the gerrymander question was but another aspect of the representational theory brought into sharp focus by this landmark case. Of it he noted:

> The question of the gerrymander is the other half of Reynolds v. Sims, 377 U.S. 533. Fair representation of voters in a legislative assembly--one man, one vote--would seem to require (1) substantial equality of population within each district and (2) the avoidance of district lines that weigh the power of one race more heavily than another.[88]

Stating the question very clearly and in such a way

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[87]377 U.S. 533 (1964). [88]403 U.S. 176 (1971).

that it could not be misunderstood, Justice Douglas said, "The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it."[89]

Not content to stop with such a clear declaration of the gerrymander question alone, Justice Douglas went on to deal specifically with the theory of the gerrymander cases. He observed that the law had developed to the point that groups other than racial minorities were protected from electoral discrimination and that it had been defended and justified under the appearance of the gerrymander. Justice Douglas therefore maintained that a showing of racial motivation was thus unnecessary to prove a violation of the equal protection clause.[90]

According to Justice Douglas, electoral discrimination by the use of the gerrymander was made impossible by the equal protection principle stated in Hunter v. Erickson,[91] a case decided three years earlier in 1969. Quite interestingly, the opinion in the Hunter case had been written for the high Court by Justice White. It had provided: "The State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another comparable in size."[92]

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[89] Id. at 177. [90] Id.

[91] 393 U.S. 385 (1969). [92] Id. at 393.

Hunter thus had the practical effect of invalidating an amendment to the Akron, Ohio, city charter. The charter required a majority vote of the electorate at a referendum for the passage of any open housing legislation. Therefore, on the basis of Hunter, Justice Douglas found that it was a violation of the equal protection clause to disadvantage any specific group in effectuating its legislative interests.[93] Upon finding the Fortson-Burns line of cases to be only an application of the fundamental principles made clear in Hunter, Justice Douglas then applied the same analysis to the record in Whitcomb and concluded that a violation of the equal protection clause had been firmly resolved:

> In both Fortson and Burns we demanded that the invidious effects of multi-member districts appear from evidence in the record. Here that demand is satisfied by (1) the showing of an identifiable voting group living in Center Township, (2) the severe discrepancies of residency of elected members of the general assembly between the Center and Washington Township, . . . (3) the finding of pervasive influence of the county organizations of the political parties, and (4) the finding that legislators from the county maintained "common, undifferentiated" positions on political issues.[94]

Therefore, it can be seen in Whitcomb v. Chavis[95] that the high Court again acknowledged the view that some protection continues to exist against the gerrymander. Nevertheless, the Court at the same time maintained its careful tradition of failing to grant relief in the immediate case before it because of the "record" of that

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[93] 403 U.S. at 177-78. [94] Id. at 179.

[95] 403 U.S. 124 (1971).

particular case. In addition to failing to find relief appropriate in a case in which the operational and functional effect of the gerrymander in question was exhaustively documented, the decision of the Court in Whitcomb did not lend itself to the future success of challenges against the gerrymander. Certainly, this was precisely what the Court hoped to do--prevent "endless litigation" in the future.

As Whitcomb strongly hints, proving a discriminatory effect is not adequate to meet the required burden of proof. It must also be shown that there is intent to discriminate or disadvantage some group on the part of the body performing the districting function.[96] Many of the lower federal courts, as a result of Whitcomb and other Court decisions, have interpreted cases before them in like manner.[97] In several cases the plaintiffs have not been able to secure relief because they have not been able to meet the weighty burden of proof seemingly expected of them. One district court has noted in language that no doubt

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[96] Whitcomb v. Chavis, 403 U.S. 124, 149. In addition to this case, for a more exhaustive review and analysis of the burden of proof accepted and rejected by the high Court in congressional and reapportionment decisions as well as in state legislative reapportionment decisions, see pp. supra.

[97] See Dunn v. Oklahoma, 343 F.Supp. 320, 328 (W.D. Oklahoma, 1972); Howard v. Adams County Board of Supervisors, 453 F.2d 455, 458 (5th Cir.), cert. denied, 407 U.S. 925 (1972); Kelly v. Bumpers, 340 F.Supp. 568, 572 (E.D. Arkansas, 1972), appeal filed 41 U.S.L.W. 3120 (U.S. July 31, 1972).

typifies the attitude of the lower courts: "We feel compelled to conclude from Whitcomb that effect . . . is not sufficient alone to invalidate a districting scheme under the Fourteenth Amendment. And intent--if by intent one means only an established, specific purpose--is usually very difficult to demonstrate; racial motives are rarely stated openly nowadays."[98]

The district courts subsequent to Whitcomb find themselves in a state of inconsistency when dealing with the gerrymander issue. They are especially inconsistent while relying upon the guidance offered them on the matter from the Supreme Court.

Unquestionably more guidance is needed from the high Court. In its simplest form, the thorny question comes down to whether the federal courts can take racial and other socioeconomic demographic factors into account in redistricting a gerrymandered apportionment scheme. It would seem the Supreme Court must either choose to articulate a clear standard of review and a method of analysis under the equal protection clause for assessing the gerrymander or decide to retreat from the districting field. The Court earlier acted through its "one-man, one-vote" doctrine to prevent invidious vote dilution due to malapportioned

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[98]Graves v. Barnes, 343 F.Supp. 704, 735 (W.D. Texas), stay denied, 405 U.S. 1201 (Powell, Circuit Justice), aff'd in part sub nom.; Archer v. Smith, 409 U.S. 808 (1972).

representational districts. Even so, the important "fair and effective" representation problem of gerrymandering is still with us.

CHAPTER IV

IMPORTANT PERCEPTIONS OF REAPPORTIONMENT

Reactions to a series of Supreme Court decisions handed down in the early 1960s involving the high Court for the first time in the judicial question of apportionment and representation were immediate and in some instances profound. The more recent Court decisions which frame the issues of the increasing deviations and movement away from the earlier important apportionment cases were equally as profound. While the more recent decisions and direction of the Court have not been as extensively and exhaustively analyzed as the early 1960s' spate of cases, the energies of political and legal analysts have nevertheless helped bring the political and constitutional issues into sharper focus.

This chapter reviews and analyzes the literature within the discipline of political science as well as within allied fields which has characterized the varied perceptions of national and state apportionment since those early deviations from the "one-man, one-vote" principle. While their number is small, special attention is directed to published books dealing directly or indirectly with apportionment. Journal articles touching the issues of deviation from the

earlier more egalitarian era of "one man, one vote" are noted and analyzed where appropriate. Special articles, papers, lectures, and independent publications are pointed out or otherwise cataloged in the bibliography.

Few books have been written that are directly applicable to the question of "one-man, one-vote" apportionment or the most recent deviations from the earlier more egalitarian standard. Those published in the early 1960s or more recently may be limited to less than ten publications. The most significant and uncommonly exhaustive of these works is Democratic Representation: Reapportionment in Law and Politics by Robert G. Dixon, Jr., first published in 1968 and reprinted in 1972.[1] This volume is without equal in defining, enumerating, analyzing, and otherwise effectively chronicling the critical cases, issues, and strategies of counsel in the matter of reapportionment.[2]

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[1]Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (New York: Oxford Press, 1968; reprinted, 1972).

[2]Dixon points out in an article entitled "The Court, The People, and 'One Man, One Vote,'" in Reapportionment in the 1970's, ed. Nelson Polsby (Berkeley: University of California Press, 1971), which was published subsequent to his earlier work: "Logically the one man, one vote upheaval has made it improper to use the term reapportionment regarding state legislative seats, because the tight population equality now required makes it legally impossible to 'apportion' state legislative seats to existing units such as counties or cities. With no fixed districts, the whole process is simply redistricting. In deference to custom, the old terms have been continued in this essay; occasionally the phrase apportionment/districting is used as an all-inclusive term" (p. 7).

Ralph Eisenberg, in reviewing the work in the American Political Science Review, has observed: "It is difficult to think of what Professor Dixon has omitted from this impressive volume, for it covers exhaustively just about every significant issue raised by the Revolution. For example, he discusses the basis for judicial intervention, the problems of establishing judicial standards, and the difficulties of courts applying equal representation standards, both substantively and procedurally, to legislative bodies."[3]

In writing Democratic Representation Dixon draws upon a large measure of research materials that include not only the standard reapportionment works and the contributions of political science to the several aspects of reapportionment, but the wealth of legal materials that have accumulated in a relatively short period of time. Dixon has used law review articles, opinions of federal and state courts at all levels, as well as briefs submitted to various courts by all parties--plaintiffs, defendants, and amici curiae. Additionally he has utilized his own research talents as a political scientist and law professor.[4]

If it is possible to extract from this volume of such wide scope a general argument, it would be that Dixon

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[3]Ralph Eisenberg, "Book Reviews and Notes," 63 American Political Science Review 567 (1969).

[4]See Dixon, Democratic Representation, Appendixes A, B, and C, pp. 589-633.

supports the view that population must be the preeminent standard for representation. At the same time he feels strongly that key questions of representation remain unresolved.[5] He is displeased with the hit-and-miss pattern of compliance with judicial one-man, one-vote standards. He points out that a multiplicity of simple standards of mathematical equality actually do not confront the real issues of representation.[6]

Apportionment involves, so far as Dixon is concerned, political decisions, even if there are definite guidelines for equally populated districts. He emphasizes that functional inequality in representation may continue to exist, even with an attendant one-man, one-vote standard, due to the possible impact of varying districting schemes upon particular political situations.[7]

Dixon discusses the measurement of representatives of gerrymandering, single- and multi-member districting patterns, the geographic concentration of political party strength, and the use of local political boundary lines in the process of districting. He points out that reapportionment attempts must take into consideration political

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[5]See ibid., "Introduction," pp. 3-22, and Chapter XIX, "Remaining Thorns in the Political Thicket--I, II, III," pp. 436-543.

[6]See ibid., Chapter VII, "The Reapportionment Revolution Unfolds," pp. 162-71.

[7]See ibid., Chapter XXI, "Conclusion--Representation Realities," pp. 584-87.

realities and operate within state constitutional and statutory bounds which maximize political compromise. By taking the position that compromise should be sought in drawing legislative district boundary lines, Dixon points out a common view that neutral reapportionment is impossible to accomplish.[8] Although he recognizes the political nature of reapportionment, Dixon does not offer solutions to resolve it. Rather, the primary accomplishment of Democratic Representation is the raising of many appropriate questions pointing out serious problems of the judicial treatment of the reapportionment cases. Criticism is leveled against the conduct of the arguments, unsatisfactorily prepared briefs, unanswered questions of the complainants, the logic of opinions, the process for remedies fashioned by the courts, and most significantly the articulation of simplistic arithmetical standards for equality. Though swift compliance has occurred, its clear value has been offset by the problems of varied judicial and legislative responses to mandates to reapportion.

Approximately four years after the publication of Democratic Representation, Dixon, having sought the best device for resolvling the seemingly insoluble problem of neutral reapportionment, proffers optimistically that a new

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[8]See ibid., Chapter XIX, "Remaining Thorns in the Thicket--III--Fruitless Refinements of Population Equality Measures," pp. 535-43. Also note pp. 17, 267-71, 437, 443, 449, 582-83.

political institution--a bipartisan reapportionment commission with tie breaker[9]--might be the best vehicle for resolving the problem.

Dixon suggests that the partisan members of the bipartisan commission could be comprised of the majority and minority party leaders in each house of the legislature or individuals appointed by the state central committee of each party. To avoid self-interest, an optional provision could be added to bar from election within a designated period any person who has served on the bipartisan commission. He suggests a number of possibilities for selecting the tie-breaker. The tie-breaker could be appointed by the entire bench of the state's highest court, by the chief justice of the state, or by the governor.[10] In any case, the advantage of the appointment of the tie-breaker to the state's highest court is that it would be less partisan than a gubernatorial appointment and at the same time would soften the political blame that might be attributed to the state's chief justice if he were to appoint singularly.[11]

Unfortunately, the commission device does not come to grips with the problem of consideration of third-party or factional interests within a party, if it can be considered a problem, in the light of our commitment to a two-party

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[9]Dixon, "The Court, The People, and 'One Man, One Vote,'" pp. 35-39.

[10]Ibid., p. 38. [11]Ibid.

system. However, neither does our present process of districting by state legislatures deal with the matter. The tie-breaker commission, Dixon points out, is a worthy advance over the straight partisan apportionment process presently used. As described by Dixon, the bipartisan commission for the apportioning or districting of legislative districts solves the following problems:

> 1. It permits a focus on the realities of political representation in all proposed plans, thus avoiding a process of shadowboxing with pseudo-standards such as contiguity and compactness;
> 2. the commission can adjust to any given rule of equal-population stringency, although, as with any districting agency, its task will be harder if there is no agreed minimum of acceptable deviation;
> 3. the redistricters will know or will have access to the relevant political and social data bearing on representation needs and the degree to which alternative redistricting plans would satisfy them;
> 4. the unavoidable, overweening element of partisanship, which is simply a sign of a politically alert populace, will be formally recognized and will be ameliorated institutionally within the redistricting agency itself;
> 5. invidious gerrymandering detrimental to either party will be checked at the outset rather than being left to uncertain correction in the judicial process which is not well adapted to this kind of litigation;
> 6. there could be some gain for ethnic minorities, for, although it might not be advisable to attempt to conduct all commission business in open session, the commission's existence would bring the process into the open and provide a responsible focal point for making known the interests of particular groups concerning representation;
> 7. a plan devised by a bipartisan commission, although still subject to judicial review, could be undergirded with a strong presumption of representational fairness, unless particularized "unrepresentativeness" could be shown.[12]

Dixon believes that the problem lies in how to

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[12]Ibid., p. 36.

institutionalize a process for avoiding one-sided partisanship at the outset of redistricting, while preserving political realism. His suggestion for a bipartisan commission with a tie-breaker undergirded by a presumption of constitutionality promises a device for avoiding unfairness in the form of gerrymandering.[13] The commission has an advantage over straight partisan apportionment where several interests such as major and minor party and subgroup interests may indeed be forfeited.

For the last several years the burden of proof in apportionment litigation has been decisive. Plaintiffs have enjoyed an almost sure presumption of unconstitutionality when they have sustained the simple burden of demonstrating that a reapportionment plan more equal than contained in the state's plan was possible. In that only very tiny population deviations were being dealt with in recent years, it does not seem wise to require the state to "justify each variance, no matter how small."[14] This demanding judicial standard flies in the face of the legislative process

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[13]States that have amended their constitutions authorizing bipartisan commissions with tie-breakers to perform the function of state legislative apportionment are New Jersey (New Jersey Constitution, Article XI, Paragraph 5 [1966]) and Pennsylvania (Pennsylvania Constitution, Article II, Paragraphs 16-17 [1968]). As well, in December 1970 Illinois ratified a new constitution which retained reapportionment power in the legislature but provided for use of a bipartisan commission with tie-breaker in the case of a deadlock by the legislature.

[14]Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969).

itself. When a legislature attempts to legislate in circumstances where there are competing values, it must seek to accommodate both rather than push a single value to its logical conclusion (i.e., justify every variance no matter how small). A bipartisan commission with tie-breaker would be in a position to seek to incorporate competing values without carrying any value to a partisan extreme.

In some instances bipartisan districting has occurred informally where control of the two houses of the state legislature and the governorship, with its veto power, has been divided between the two parties. Such an accidental circumstance of divided government did permit some bipartisan procedures in some states in the period after 1964, when state legislative districts and congressional districts were dramatically altered on a far-reaching basis.[15] Regretfully, this process cannot be counted on since such informal bipartisanship has no provision for a tie-breaker. Dixon, a distinguished authority on reapportionment, remains optimistic about his proposal.

Nelson Polsby, anticipating the availability of the 1970 census figures, tapped a number of noted scholars of politics, law, and social sciences to express what problems they foresaw emerging from the political question of "how

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[15]See Dixon, Democratic Representation, pp. 363-84. Dixon notes that at all costs the "bemused idea that nonpartisan apportionments are possible should be avoided" (p. 380).

the boundaries are drawn which determine who represents whom in congress, state legislatures, and other governing bodies"[16] in the 1970s. Polsby used a symposium format to stimulate interchange and to present the views of leading figures in the study of reapportionment. His volume included reactions from other scholars as well as answers to responses. The seven essays and responses to them touched upon three main political institutions--the Supreme Court, state legislatures, and Congress. Prominent among the contributors examining the various themes were Robert Dixon and Alexander Bickel.[17]

In his essay, Dixon points out a vital concern when he states, "We expect far more from the election system than mere filling of legislative seats. . . . A further goal . . . is that there be room in the system for all significant interests to acquire spokesmen preserving the right of all to be heard, if not in control."[18] He goes on to note, "Wielding one man, one vote, like a meat-ax, the Court has not been content only to lop off extreme population malapportionment. It has come close to subordinating all aspects of political representation to one overriding

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[16]Polsby, Reapportionment in the 1970's, p. 1.

[17]See Dixon, "The Court, the People, and 'One Man, One Vote,'" p. 7; and Alexander M. Bickel, "The Supreme Court and Reapportionment," in Reapportionment in the 1970's, p. 57.

[18]Dixon, "The Court, the People, and 'One Man, One Vote,'" pp. 10-11.

element--absolute equality of population in all legislative districts.[19] It is Dixon's view that the Court should have followed a substantive due process argument in the apportionment cases. This would have permitted much more room for legislative judgment and at the same time would have disallowed the grossest forms of malapportionment.

Bickel points out another worthwhile point and criticism when he considers: "From the beginning, the Warren Court's apportionment decisions have consistently asked the wrong questions about American political institutions."[20] It is his feeling that "The sensible question to ask about any institution of government . . . [would be] whether it tends to include or exclude various groups from influence, and whether, if it assigns disproportionate influence to some groups, they are the ones which are relatively shortchanged elsewhere . . . ."[21] Bickel is clearly not satisfied with the rule handed down by the Court but, unlike Dixon, he offers no direct recommendation.[22]

Thomas A. Flinn, in reviewing Reapportionment in the

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[19]Ibid., p. 11.

[20]Bickel, "The Supreme Court and Reapportionment," p. 60.

[21]Ibid.

[22]Ibid., p. 74. Finally he concludes: "The general verdict on the consequences of the rule at all levels of government is this: Nothing of importance was improved, much that was indifferent or acceptable was made worse, and a great deal that could be better was made more difficult."

1970's in the American Political Science Review and having affirmed the points made by Dixon and Bickel above, said of the work: "Unlike so many collections, this one is a remarkably successful attempt to cover an important issue from various perspectives. Despite its title, however, this book will not tell the reader what is going to happen to apportionment in the 'seventies. Crystal balls seem to be a bit cloudy."[23] Thereupon the reviewer offers his own prediction: "My own best guess is that President Nixon will continue to reconstruct the Court and that the new Court may be open to the making of distinctions, if not reversals. If that is so, then the questions are how will the legislatures be chosen and how able and determined will they be to change what was forced on them in the 'sixties."[24]

The recurring question in the literature considering legislative representation and apportionment is inevitably the most troublesome of all--the gerrymander. Chapter III of this dissertation dealt with the issue and at the same time focused upon two increasingly disputed facets of the general gerrymander problem--racial and political gerrymandering. The published material today sooner or later touches upon this topic much like the literature in the period after Baker v. Carr dealt with numerical equality.

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[23]Thomas A. Flinn, "Book Reviews and Notes," 67 American Political Science Review 1380 (1973).

[24]Ibid.

Rather than becoming less important, the entire gerrymander issue seems to loom even larger in significance.

Gordon E. Baker, in a consideration of gerrymandering, wonders if it is a privileged sanctuary or if it should be the next judicial target.[25] Baker fears that the earlier traditional criteria of approximate population equality, compactness, and contiguity were not wrong, but incomplete and misleading. He recognizes the importance of "equal population" as a necessary element of democratic representation,[26] but is apprehensive that the demand of precision set down in Wells and Kirkpatrick in 1969 does not yield more representative institutions, especially when the earlier minimal restraints on gerrymandering are set aside. Compactness, it seems on first examination, is an obvious check against boundary manipulation.[27] However, in the face of practical realities, compactness can handily disguise a genuine gerrymander. At the same time, districts that appear misshaped and suspicious may only be reflecting the common boundaries of natural political communities.

Baker expresses concern that in the age of computers, with their enormous capacity for storing and

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[25]Gordon E. Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target," in Reapportionment in the 1970's, pp. 121-42.

[26]Ibid., p. 139.

[27]See Ernest Reock, Jr., "A Note: Measuring Compactness as a Requirement of Legislative Apportionment," 5 Midwest Journal of Political Science 71 (1970).

processing information,[28] such a wealth of data, rather than eliminating the gerrymander, could make even more sophisticated ones possible. Additionally, if local boundaries and communities of interest are not considered, the chances for gerrymandering are maximized more than ever before.[29]

Baker then advocates: "What is needed is a return to the spirit of Reynolds v. Sims and its concern with the goal of fair and effective representation of all citizens. This approach recognizes the importance of political subdivisions and community interests so long as population is . . . the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.[30]

He suggests that the Supreme Court should formulate some guidelines for accepting the challenge of gerrymandering. Baker pointed out that multi-member districts are a form of gerrymander, and should be proclaimed unconstitutional unless specially justified by the state.[31] Such a principle would extend even further an earlier decision handed down by the high Court in Swann v. Adams,[32] that the burden of proof is on the state to justify any significant

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[28]Baker, "Gerrymandering," p. 139. Numerous variables critical to the formation of new districts include population, population growth patterns, registered voters, governmental subdivisions, partisan strength, and party loyalty.

[29]Ibid., p. 135. [30]Ibid., p. 140.

[31]Ibid., p. 141. [32]385 U.S. 440 (1967).

population disparities.

As well, Baker is concerned about boundary manipulation and its use for gerrymandering. Especially in the case of single-member district boundary-line drawing, there is a significant possibility of gerrymandered districts whose populations are almost entirely equal. Baker points out: "Though it might make a somewhat unsatisfactory constitutional case based on the Fourteenth Amendment's equal protection clause, it undoubtedly could be done."[33] He asks the question, "Might it not then be preferable for this one aspect of apportionment controversies to invoke the amendment's due process clause? Gerrymandered boundaries seem peculiarly suited here, since they are partially the result of questionable procedures. Courts could even indicate procedural guidelines, such as requiring a redistricting act to have a substantial degree of bipartisan support in the legislature."[34]

In summary, Baker is concerned that gerrymandering is not only permitted but encouraged with the development of the strictly egalitarian cases under the law.

Robert S. Stern, in a consideration of the problem of gerrymandering of congressional districts,[35] suggests

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[33]Baker, "Gerrymandering," p. 142.

[34]Ibid.

[35]Robert S. Stern, "Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence," 41 The University of Chicago Law Review 398.

that a mathematically defined standard of compactness is the best means to provide an effective and at the same time understandable criterion to guide apportionment decisions and judicial review of those decisions. From the outset he points out that even under a broad judicial examination of redistricting, practical problems of proof and the need for suitable deference to legislative judgments make the courts an ineffective forum for preventing the damages resulting from many types of gerrymandering.[36] However, with regard to the question of a compactness standard as an antidote for judicial impotence, most state and federal laws that have set up some kind of compactness criterion have not succeeded in developing an objective, mathematical standard by which compactness can be evaluated.[37] But even worse, the success of some compactness laws has been done further damage by the use of limiting phrases such as "as compact as

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(1974). Stern points out that he does not deal with state legislative apportionment since it involves different considerations and may require a different solution to gerrymandering. He cites the example that state legislative districts are more numerous and substantially smaller in area than congressional districts and therefore increases the importance of geographic factors and political subdivision lines. He also indicates that because there are more state representatives per population unit, proportional representation might be more effective in giving representation to small interest groups. Thus the argument for trying to represent local interests in state legislative districts is stronger because national issues are less likely to dominate state elections. Also, unlike congressional redistricting, state legislative district lines are drawn by those who will run from those districts, thereby increasing the motivations to gerrymander.

[36]Ibid., pp. 405-11. [37]Ibid., p. 412.

practicable"[38] and "as compact as may be."[39] In situations where there are such limiting statements but no clear statutory definitions, the courts have viewed "compactness" as nothing more than generic fairness requirements.

Stern cites the example of Illinois as a state that had various constitutional compactness provisions dating back to 1870. However, no definition for compactness was ever specified in the Illinois Constitution, and the court found that "compact" meant "closely united."[40] Obviously, this type of vague standard would only prohibit the most extreme gerrymandering situations. The case of Illinois serves as a useful illustration that to minimize gerrymandering effectively, a more explicit standard is needed.

"A district has achieved maximum compactness," Stern indicates, "when the greatest distance between two points in the district cannot be reduced without decreasing the total area of the district. Circular districts are therefore the most compact. Circular districts, however, would exclude some persons altogether, so a relative compactness standard is necessary."[41] The suggestion is made that "The relative

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[38]See Hawaii Constitution, Article III, Paragraph 4, Clause 13. See also Rhode Island Constitution as amended Article XIII, Paragraph 1 and Article XIX, Paragraph 1.

[39]See Colorado Constitution, Article V, Paragraph 47. See also Missouri Constitution, Article III, Paragraph 2, Clause 7, and Paragraph 8.

[40]Stern, "Political Gerrymandering," p. 413, citing 155 Illinois 315, 451 N.E. at 307 (1895).

[41]Ibid.

compactness of two districts can be measured by dividing the perimeter of each district by the perimeter of a circle by the area of the smallest possible circumscribing circle. Under either measurement, the closer the result, or 'compactness index,' is to one, the more compact the district."[42]

Stern is desirous of reconciling the concept of "compactness" and at the same time the "one-man, one-vote" principle in order to allow for differences between population densities and the contours of the boundaries of the several states. He believes that the appropriate solution to the two seemingly competitive approaches (purely egalitarian and odd-shaped districts) is to require all congressional district maps to be drawn so as to minimize population variances among the districts and to maximize the compactness of the districts.[43] Stern then points out that "the state's lowest possible compactness index would be the average of the indices of each district in a districting plan drawn exclusively to minimize population variances and maximize compactness."[44] Stern concludes that a compactness standard is better than any other objective standard for drawing district lines, and is indeed preferable to gerrymandering.

In an effort not greatly dissimilar from that of Stern, Robert N. Clinton, in surveying "the rather

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[42]Ibid., p. 414. [43]Ibid. [44]Ibid.

inauspicious results of the judiciary's forays into the political thicket to confront the gerrymander," suggests what he describes as "a roadmap through this troublesome area."[45] Rather than a "statutory compactness standard as an antidote" to the gerrymander problem suggested by Stern, Clinton offers a "roadmap" based upon the cases arising from lower federal court and Supreme Court decisions. "Herein should be found," Clinton indicates, "the articulation of a clear, concise standard and mode of analysis similar to that employed in the malapportionment field."[46] He is confident "the most fruitful way to approach the gerrymander problem is to isolate the various issues involved and develop a coherent matrix of analysis for each, based on available equal protection (or fifteenth amendment) theory."[47]

The best place at which to begin an analysis of the issue of substantive protection from the gerrymander, Clinton notes, would be the point at which Justice Douglas began to develop his dissenting opinion in Whitcomb v. Chavis.[48] Justice Douglas's analysis there assumes that members of any discernible group having coherent and identifiable legislative goals ought to have an "equal opportunity" to influence the policy-making process by electing

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[45]Robert N. Clinton, "Further Explorations in the Political Thicket: The Gerrymander and the Constitution," 59 The University of Iowa Law Review 1 (1973); see p. 2.

[46]Ibid., p. 35. [47]Ibid.

[48]403 U.S. 124 (1971); see pp. 111-13 infra.

legislators of their own preference. The fundamental features of this analysis are found in two Supreme Court decisions, Hunter v. Erickson[49] and Reitman v. Mullkey.[50] Though two years apart it was in these two cases, Clinton observes, that the Court struck down on equal protection grounds an amendment to the Akron, Ohio, city charter and an amendment to the California Constitution, each of which was designed to impede the passage of open housing legislation by establishing stringent procedures which were not generally applied for the enactment of other legislation. Justice White's opinion in Hunter best describes the analysis used. It was pointed out that the Akron city charter amendment distinguished between those groups seeking the law's protection against racial, religious, and ethnic discrimination in the real estate field, and other majority groups seeking to effectuate their policy goals. Justice White, in writing the opinion for the Court, held that a state cannot make it more difficult for one particular group to enact legislation for its benefit over that of another.[51] Briefly, the Court held that the creation by the state of a special obstacle to an interest group's efforts to effectuate its legislative goals is a violation of the equal protection clause.

Clinton points out, as Justice Douglas noted in the

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[49]393 U.S. 385 (1969). [50]387 U.S. 369 (1967).

[51]393 U.S. at 391-93.

Whitcomb v. Chavis dissent, that the dicta contained in the Fortson-Burns line of cases are in fact examples of the implementation of the Hunter analysis in the field of apportionment.[52] Clinton goes on to show, "The same reasoning which prevents a state's disadvantaging a particular group in seeking effectuation of its legislative goals also prevents it from setting up an apportionment scheme which would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[53]

In a summary statement recommending the Hunter analysis to obviate the gerrymander, Clinton states: "Such an analysis is best built on the view of the equal protection clause set forth in Hunter v. Erickson. The test ought to be whether the apportionment scheme, considered as a whole, operates systematically to dilute, minimize or cancel out the electoral voice of any cognizable interest group which has an identifiable and coherent set of policy goals. If it does it should be held to violate the equal protection clause. As discussed above, this test neither goes beyond existing equal protection theory nor does it pose any threat of endless litigation. Indeed, the present uncertainty in this area and the untenable and shifting positions the Court

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[52]Clinton, "Further Explorations," p. 36; see p. 113 infra for a consideration of Whitcomb v. Chavis and pp. 100-2 infra for a consideration of Fortson v. Dorsey and Burns v. Richardson.

[53]Ibid.

has announced pose a greater threat of continuing the endless and directionless litigation in which the federal judiciary is presently immersed."[54]

Coming from a completely different perspective, Richard L. Morrill, a professor of geography interested in avoiding the gerrymander and achieving political balance, appraises the "generally accepted criteria for reapportionment" which he describes as "(1) equal population, (2) compactness, or lack of irregularity or sinuosity, and (3) use of counties and cities as building blocks."[55] He also cites as "suggested" criteria "(4) natural geographic boundaries, (5) integrity of cultural groupings, and (6) political balance (no systematic bias)."[56] As a geographer, Morrill suggests that (4) and (5) would better be expressed as a mandate for a seventh criterion--"meaningful regions."[57] The conclusions the geographer reaches are based upon a one-month effort to reapportion the legislative and congressional districts of the state of Washington.[58]

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[54]Ibid., p. 47.

[55]Richard L. Morrill, "Lampadephoria or Criteria for Redistricting," 48 The University of Washington Law Review 847 (1973); see p. 847.

[56]Ibid. He points out, perhaps tongue-in-cheek: "Legislators may add some less lofty political criteria: (8) minimization of the loss of incumbents, (9) minimum change in districts, and (10) achievement of partisan advantages."

[57]Ibid., p. 848.

[58]The legislature of the state of Washington had the

With regard to an equal population criterion, which is constitutionally required and has been held to a one-percent maximum deviation in the state of Washington,[59] Morrill observes this is too stringent a criterion for four reasons: "(1) the census itself is not generally considered to be accurate within one percent; (2) as much as 15 percent of the population moves every year; (3) the population eligible to vote varies by up to 20 percent from the total population; and (4) within a few months of the census, long before a redistricting plan is even accepted the population of many of the census units changes by more than one percent."[60]

For a good equal protection criterion, Morrill recommends "that a 3 percent (or even a 5 percent) deviation is more realistic and in accordance with the requirement of equal representation. Forming districts of precisely equal population requires accuracy and stability of census data

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constitutional mandate to redistrict the state. Washington Constitution, Article II, Paragraph 3. A Seattle attorney, George Prince, filed suit in the Western District Court requesting that the court appoint a master if the legislature had not acted by February 25, 1972. The court accepted the request, and when the legislature failed to meet the deadline, it selected Morrill from a list of possible masters. On the basis of this redistricting experience and its subsequent analysis and reflection, he arrived at his conclusions.

[59]Prince v. Kramer, Civil No. 9668 (W.D. Wash., Feb. 25, 1972). The one-percent maximum deviation allowed in the 1972 Washington redistricting order permitted a variation of only 684 people between districts.

[60]Morrill, "Criteria on Redistricting," p. 850.

that simply does not exist."[61]

When considering a compactness criterion, Morrill indicates: "while it may be necessary to prohibit grossly irregular districts, I would strongly argue against a simple and mechanical application of a compactness criterion . . . some irregularity of shape may be justified because of the irregularity of topography and population distribution, or in order to maintain community of interest to ensure representation of ethnic or racial minorities."[62] He goes further to note: "compactness alone does not preclude gerrymandering because uniformly compact districts could be systematically arranged to waste one party's votes by concentrating them in a few districts."[63]

In connection with a meaningful region criterion which strives to avoid dividing counties or cities and which is unpopular with those who desire ideal, compact, distance-minimizing districts, Morrill indicates: "inasmuch as the population of larger counties or cities rarely is divisible into an even number of districts, and since many city boundaries and populations are changing rapidly, strict adherence to the criterion is impractical. On balance, the criterion is reasonable if expressed as a preference rather than a rigid requirement."[64]

As a geographer, Morrill might be expected to be

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[61]Ibid. [62]Ibid., p. 851.

[63]Ibid., pp. 851-52. [64]Ibid., p. 852.

happy with a natural geographic barriers criterion requiring district boundaries to follow, when appropriate, mountain ranges or major bodies of water. Of it he observed: "Such a criterion, however, should not be rigidly applied. A river may be a unifying force within its basin rather than a barrier, and bridges across water bodies may be evidence of strong community of interest."[65]

Regarding a criterion of maintaining the integrity of cultural groups, Morrill points out that while "we might hope for a more effective melting pot, many minority groups --blacks, Chicanos, Puerto Ricans and to a lesser extent some ethnic groups--perceive spatial concentration and group solidarity to be an effective means of gaining political leverage. Deliberate dilution of such block voting on grounds of cultural integration would create a risk of severe frustration and unrest."[66] For example, "in implementing this criterion by creating a district that is 55 percent black, one is in a crude sense disenfranchising the 45 percent who are white. Nevertheless it is important to remember that the larger portion of most minority populations are sufficiently dispersed so as not to constitute a voting majority in their districts, however the districts may be drawn."[67]

Of the political balance criterion, Morrill observes that "The history of gerrymandering suggests that a

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[65]Ibid. [66]Ibid., p. 853. [67]Ibid.

criterion of political balance is plausible. Simple tests of imbalance are available, such as comparing a party's portion of the total vote with that party's proportion of elected representatives."[68] He then cites the example of the state of Washington utilizing this criterion.

In summary, Morrill recommends "(1) a slight relaxation of the equal population criterion to perhaps 3 percent (at least for legislative districts); (2) retention of compactness, integrity of counties and cities, and natural geographic barrier criteria to be applied without excessive rigidity; (3) a meaningful region criterion, again avoiding inflexible application; and as a lesser priority, (4) a minimization of unnecessary changes in present district form. A political balance criterion is reasonable in evaluating a plan, but is impractical in preparing a plan."[69]

Concluding, Morrill deals briefly with the question of who should carry out reapportionment. He insists that it is "absurd" and "unfair" to expect a legislative body to redistrict itself easily or objectively. He recommends that this responsibility be placed by the legislature in the hands of a commission, reserving itself the power to accept or reject the plan or suggest modifications.[70]

In one of the most clear and penetrating studies dealing with the problem of the present-day gerrymander,

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[68]Ibid., p. 854. [69]Ibid., p. 856.

[70]Ibid., pp. 855-56.

Richard L. Engstrom stated: "Burger Court evaluations of efforts to redistrict in compliance with the 1970 census have produced serious modifications in the 'one man, one vote' doctrine. While the Kirkpatrick and Wells rulings have not been overturned, their precedential value has now been restricted to the evaluation of congressional districting designs."[71] Thus today an absolute mathematical standard is used only in the case of congressional districts and even then "The future of the 'absolute equality' standard for congressional districts remains in doubt, however, as the concurring opinion of Mr. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, expressed reservations with that standard and a desire to have the Court reconsider it."[72]

Engstrom is concerned that "Considerable freedom has been granted in the construction of state legislative districts. A majority consisting of the Nixon appointees and Justice Stewart and White has not only extricated districting authorities from the initial responsibility of justifying 'minor' deviations from equality within legislative plans, but appears to have significantly relaxed the burden

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[71]Richard L. Engstrom, "The Supreme Court and Equi-Populous Gerrymandering," a paper presented at the 1975 Annual Meeting of the American Political Science Association, San Francisco, California, September 2-5, 1975, pp. 13-14.

[72]Ibid., p. 18, citing White v. Weiser, 412 U.S. 783, 790 (1973), at 798 (Powell, J., dissenting).

these authorities face in establishing justifications for larger deviations as well."[73]

Engstrom points out that the Burger Court favors a "fair and effective representation" that "does not depend solely on mathematical equality among district populations."[74] However, "its decision to relax the burden of justification previously required of districting authorities is a highly questionable pathway toward the attainment of that goal if not combined with the development of effective standards through which discriminatory designs can be invalidated. The effect of the population equality rulings is to increase the flexibility of state and presumably local cartographers beyond that granted by the Warren Court."[75]

It is Engstrom's position that "Effective standards through which discriminatory applications of that flexibility can be invalidated have not been developed, however, and 'gerrymanderer's paradise' characterization [used earlier by Dixon] consequently continues to be a reasonable description of the Court's impact on representational districting."[76]

By citing numerous examples, Engstrom reinforces his argument that the Burger Court has skirted the gerrymander

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[73]Ibid., p. 14.

[74]Ibid., p. 18, citing Gaffney v. Cummings, 412 U.S. 735, 748-49 (1973).

[75]Ibid. [76]Ibid., pp. 18-19.

issue when it might have directly confronted it. An important case cited by Engstrom is Ely v. Klahr,[77] a 1971 Arizona redistricting case in which the high Court did not directly confront the issue of gerrymandering but did trigger a concurring opinion by Justice Douglas, joined by Justice Black, which revealed a keen desire to deal with the problem. Prior to the time 1970 census statistics were available to the Arizona legislature, a districting plan was adopted based on precinct population estimates which had been based upon voter registration data acquired in 1968. A computer was programmed to avoid incumbent versus incumbent challenges and also to avoid the creation of safe one-party districts. Ostensibly, this criteria was designed and applied in a bipartisan manner. Earlier in 1966 and 1968 the Arizona legislature had been elected from districts determined by a federal district court after its own redistricting efforts had been declared unconstitutional. Two years later the district court objected to the plan, pointing out that the population estimates were not adequate for districting and disapproved both the incumbency and partisan strength criteria.[78] Even so, the Court permitted the Arizona legislature's plan to be used for the 1970 elections only, since it more nearly approximated population equality

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[77] 403 U.S. 108 (1971).

[78] Klahr v. Williams, 313 F.Supp. 152 (D. Arizona, 1970).

than the earlier judicially adopted plan which was now out-dated.

Engstrom points out that the Supreme Court deferred to the lower courts assessment of the situation and as a result affirmed the decision. The majority of the Court did not address the political criteria used in the creation of the 1970 plan but for repeating in a footnote the Warren Court's position that the protection of incumbents' reelection chances "does not in and of itself establish invidiousness."[79] Noteworthy, however, is that Justices Douglas and Black did find invidious consequences for minority racial and ethnic groups resulting from incumbent protection in this matter and in a concurring opinion appeared to challenge the Arizona legislature to develop another plan. Engstrom indicates, "Douglas described the incumbency and partisan strength criteria as apportioning to an incumbent 'his own fiefdom,' and consequently operating to continue underrepresentation of minority groups . . . . The use of registration figures for estimating population was also found to have a discriminatory effect on 'the poor, the blacks, the Chicanos, and the Indians' resulting from their lower rates of registration."[80]

With regard to what Engstrom refers to as the

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[79]Engstrom, "Equi-Populous Gerrymandering," p. 20, citing 403 U.S. at 112-13, n. 5.

[80]Ibid., p. 21, citing 403 U.S. at 118 (Douglas, J., dissenting).

"challenge" found in Douglas's conclusion, it appears "that the situation would likely be repeated in the next round of redistricting and his concern that not only the district court have sufficient time to completely review the matter but significantly that the Supreme Court have adequate time as well."[81]

In addition Engstrom refers to the 1972 Louisiana Taylor v. McKeithen case[82] in which the problem of discriminatory consequences resulting from incumbent protection was more directly before the Court. This case involved the delineation of four state senatorial districts within New Orleans, Louisiana. The United States Attorney General, acting under Section 5 of the Voting Rights Act,[83] objected to the state legislature's effort at redistricting and consequently their plan was replaced by the plans of a special master adopted by a federal district court.[84] The subsequent plans constructed by the master were not drawn with the political futures of the incumbent legislators in mind,[85] and thus created several situations in which

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[81]Ibid. [82]407 U.S. 191 (1972).

[83]Engstrom, "Equi-Populous Gerrymandering," p. 22, citing a letter from David L. Norman, Assistant Attorney General of the United States, to Jack P. F. Gremillion, Attorney General of the State of Louisiana, August 20, 1971.

[84]Ibid., citing Bussie v. Governor of Louisiana, 333 F.Supp. 452 (E.D. La., 1971).

[85]Ibid. Engstrom indicates the special master did not take into consideration "the location of the residences

incumbents were pitted against incumbents for reelection. Such a situation occurred in two dominantly white, single-member districts. Two adjoining districts, "without incumbents, were created with black registered voter majorities of 51 percent and 58 percent."[86] The senators were not pleased with the master's proposals and during the hearings on the plans attempted to alter them by asking the court to substitute for the four districts in the master's plan a different delineation covering the same geographical area that provided each a district of his own. The justification of the senators' plan was that it followed more closely the traditional practice of having legislative districts correspond to ward boundaries within the city. However, it had the effect of seriously rearranging the racial populations inside the districts. Engstrom points out: "The districts within the senators' plan had black registered voter proportions of 37.6 percent, 25.7 percent, 44.3 percent, and 24.0 percent."[87] Thus "the district courts rejected the senators' request, characterizing their plan as having as its primary purpose 'the protection of incumbent office holders,'"[88] and concluded that it would

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of either incumbents in office or of announced or prospective candidates." Opinion of Judge West, Civil Action 71-234, August 24, 1971, cited in 407 U.S. at 191.

[86]Ibid., observing that the proportion of black registered voters within the senators' two districts was 18 percent and 20 percent.

[87]Ibid., p. 23. [88]Ibid., citing 333 F.Supp. at 458.

"operate to diversify the negro voting population throughout the four districts and thus significantly dilute their votes."[89] However, in the master's plans the districts were depicted as providing blacks with "a fair chance in two out of the four districts."[90]

The dissatisfied senators maintained their goal of seeking relief in the Fifth Circuit Court of Appeals and met with success. Without giving an opinion the Fifth Circuit panel substituted the master's four districts with those of the senators. Finding the record "insufficiently informative," the Supreme Court did not make a decision on the issue and returned the case to the Fifth Circuit Court of Appeals. The Supreme Court asked the Fifth Circuit to supply the reasoning behind the substitution.[91] The issue of benign or compensatory gerrymandering--the construction of districts composed of a racial minority group--as was the situation in this case, was considered in the per curiam remand. Engstrom points out the high Court's statement:

> An examination of the record in this case suggests that the Court of Appeals may have believed that benign districting by federal judges is itself unconstitutional gerrymandering even where (a) it is employed to overcome

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[89]Ibid., citing 333 F.Supp. at 457. [90]Ibid.

[91]Ibid., citing 407 U.S. at 194. The opinion of the Fifth Circuit was ultimately supplied on August 21, 1974. It essentially maintained that the senators' plan would provide blacks better representation because they would not be segregated out of two "safe" white districts, the senators from which would not need to be responsive to black interests." Taylor v. McKeithen, 499 F.2d 893 (5th Cir., 1974).

> the residual effects of past dilution of Negro voting strength and (b) the only alternative is to leave intact the traditional "safe" white districts. If that were in fact the reasoning of the lower court, the petition [for certiorari] would present an important federal question of the extent to which the broad equitable powers of a federal court . . . are limited by the color-blind concept of Gomillion v. Lightfoot and Wright v. Rockefeller.[92]

Additionally, Engstrom cites a 1973 Connecticut case, Gaffney v. Cummings,[93] as an example of what he considers a "compensatory" gerrymander for partisan purposes. In question in Gaffney was a redistricting plan created by a bipartisan apportionment board for the Connecticut House of Representatives. The plan itself, however, did not have bipartisan support. A federal district court noted that several of the districts had "highly irregular and bizarre outlines"[94] and thus invalidated the plan on "one-man, one-vote" grounds. The Supreme Court, in response to the appellees' contention that the plan was a "gigantic political gerrymander, stated: "We are quite unconvinced that the reapportionment plan . . . violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts."[95] Engstrom is dissatisfied with the

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[92] Ibid., citing 407 U.S. at 193-94.

[93] 412 U.S. 735 (1973).

[94] Cummings v. Meskill, 341 F.Supp. 139, 147 (D. Conn., 1972).

[95] 412 U.S. at 752.

high Court's "cursory treatment given the allegation" and points out that "the Court's opinion did not address the admittedly difficult problem of viewing the 'fairness' of a set of districts within the context of the residential location of partisan supporters."[96] Totally avoided is "the question of whether, in this situation, Democratic supporters voting for their local representatives may have been treated unfairly so that a 'fair' statewide partisan outcome would result."[97]

Engstrom concludes, noting that "Invidious vote dilution due to malapportioned representational districts has been effectively prevented by the 'one man, one vote' doctrine. But the important 'fair and effective' representation problem of equipopulous gerrymandering remains."[98] It is his feeling that neither the Warren Court nor most recently the Burger Court has provided realistic standards of judgment that would make possible the invalidation of discriminatory vote dilution within equi-populous districting. He contends that "Given the recent relaxation of the districting authorities' burden of justifying population inequalities, a more balanced approach to the representational issue seems even more necessary."[99] He is not, however, without optimism when he states: "The Court has acknowledged that 'Politics and political considerations

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[96]Engstrom, "Equi-Populous Gerrymandering," p. 25.

[97]Ibid., p. 26. [98]Ibid., p. 37. [99]Ibid.

are inseparable from districting and apportionment.' From this recognition it would be 'only a small and appropriate step to what many recognize as a realistic and effective adjudication standard.'"[100] Engstrom's proposal would be to require "plaintiffs alleging discriminatory vote dilution to establish a reasonable presumption of gerrymandering, with the burden of explanation and justification then placed upon those responsible for the representational design."[101]

Indeed, Engstrom's recommendation for the shifting of the burden of proof in the first instance from the agency drawing the district boundary lines to the plaintiff alleging discrimination is sound. Under these conditions it would be incumbent upon the plaintiff to develop a sufficient and reasonable presumption of gerrymandering, in which case it would at that moment, and only at that time, be necessary for the party responsible for the drawing of the boundary lines to assume the burden of explaining and justifying the decision as to where and why the boundary lines have gone. Not only would this recommendation realistically shift the burden of proof but would act as a natural force to slow the innumerable cases arising under the present judicial guidelines.

One of the earliest scholarly treatments of "political gerrymandering" was in 1967 by Gordon W.

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[100] Ibid., p. 38, citing Gaffney v. Cummings, 412 U.S. 735, 753 (1973).

[101] Ibid.

Hatheway, Jr.[102] Hatheway indicates that attempts to control the gerrymander are not actionable in federal courts though states have instituted regulatory provisions in their constitutions.[103] After tracing the unsuccessful attempts at getting a measure of control at the federal level by congressional legislation in the form of compactness and contiguity requirements,[104] he indicates there are four gerrymander controls already built into our political system:

> First, the two party system itself may check the gerrymander if there is a split in party control within the state's bicameral legislature or between the legislature and the state house. Second, population mobility may reduce its effectiveness. Third, in states that are sparsely populated, or are without either large metropolitan centers or racial or other minorities, it is extremely difficult to gerrymander district lines without making the act so blatant as to be impracticable, the gerrymander may become ineffective or even turn against its creator. Finally, the appeal of a popular incumbent often overshadows party affiliation and works to minimize the effectiveness of a gerrymander.[105]

Hatheway believes the burden of proof is the "final barrier" in the political gerrymandering question. He points out: "what perhaps best explains judicial reluctance

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[102]Gordon W. Hatheway, Jr., "Political Gerrymandering: The Law and Politics of Partisan Districting," Editorial Notes, 36 George Washington Law Review 144 (1967).

[103]Ibid., p. 146, nn. 13-22. Hatheway indicates these take the form of requirements respecting compactness, contiguity, equal district population, county boundary integrity, other political subdivision boundary integrity, multi-member district prohibitions, executive checks on legislative intransigence or abuse of power, citizen apportionment suits, removal of the apportionment function from the legislature, and the initiative.

[104]Ibid., pp. 147-49. [105]Ibid., p. 149.

to consider political gerrymandering are the underlying practical problems posed by the burden of proof issue. Once gerrymandering is held justiciable, the burden of proof issue will become critical. This is already true in the related racial gerrymandering field."[106] He goes on: "Requiring proof of intent seems inappropriate. First, the burden would be nearly impossible to carry unless a result oriented test, not clearly dispositive of intent, could be used, or revealing letters or statements of the apportioners or legislative leaders were both available and admissible . . . . Secondly, intent is somewhat irrelevant since only the result is significant."[107]

It is Hatheway's contention that "The most reasonable burden of proof . . . should require no more than a demonstration of 'functional districting' . . . sufficient to raise a permissible inference of gerrymandering. The defendant should then be required to explain and justify the apportionment. If the defendant is unable to do this, a new apportionment should be ordered, enforceable by the threat of judicial reapportionment."[108]

Thus Hatheway joins Gordon Baker, Robert Stern, and Richard Engstrom in a criticism of the burden of proof in apportionment cases before the Court. Another concerned

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[106] Ibid., p. 159. The cases to which Hatheway refers are Wright v. Rockefeller, 376 U.S. 52, 60-61 (1964), and Sincock v. Gately, 262 F.Supp. 739 (D. Del., 1967).

[107] Ibid., pp. 160-61. [108] Ibid., p. 162.

with the gerrymander and the inequities that result in this case as related to "one man, one vote" is James M. Edwards.[109] It is Edwards's hypothesis that gerrymandering of district lines, much like malapportionment of population, constitutes an invidious discrimination which violates the equal protection clause of the Fourteenth Amendment. It is possible to prove such an invidious discrimination, in the absence of justification by the state, by showing that district lines do not constitute a good faith effort, consistent with the equal population dictum, if they do not comply with antigerrymandering standards elaborated by the courts on a case-by-case basis. Simply put, a districting statute that fails to meet minimum antigerrymandering standards[110] should be held unconstitutional per se on a case-by-case basis, just as districting statutes that fail to meet minimum standards of population equality have been held invalid per se. Edwards concludes his essay by observing: "The elaboration and application of objective standards to control gerrymandering is no less a proper role for the judiciary than has been the elaboration and application of of standards to control malapportionment of election districts. Nor should gerrymandering be tolerated on the

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[109] James M. Edwards, "The Gerrymander and 'One Man, One Vote,'" 46 New York University Law Review 879 (1971).

[110] According to Edwards, among the factors that should become the basis of antigerrymandering standards are contiguity and adherence to political subdivisions. Ibid., p. 889.

ground that it effects a rough form of 'proportional' representation, for the resulting representation will normally reflect only the proportionate legislative power of a state's dominant political and racial groups."[111]

A final study of gerrymandering is that of Stephen E. Gottlieb.[112] He makes the point that "The major difficulty with judicial control of gerrymandering has been the inability of the courts to frame a satisfactory definition of gerrymandering."[113] Gottlieb suggests that gerrymandering is the selective use of two policies--heterogeneous and homogeneous districting. Each should be evaluated in the light of "motive, purpose and effect." He recommends that the legislature retain legislative discretion but with the Court sustaining a protective role. Ultimately the courts should identify the gerrymander that utilizes a combination of techniques. Gottlieb offers the applicable standard of compact, contiguous, and equal districts as the most appropriate.[114] Based upon the criticisms and comments directly and indirectly leveled above by Robert Dixon, Gordon Baker, Robert Stern, Robert Clinton, Richard Morrill, Richard Engstrom, Gordon Hatheway, James Edwards, and Stephen Gottlieb, it is apparent that the problem of the gerrymander is

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[111]Ibid., p. 899.

[112]Stephen E. Gottlieb, "Identifying Gerrymanders," 15 Saint Louis University Law Journal 540 (1971).

[113]Ibid., p. 541. [114]Ibid., p. 563.

one that must inevitably be dealt with by the Supreme Court. Without the high Court's intervention and enunciation of a standardized guideline for districting, the assumed achievements of "one man, one vote" will but be ephemeral.

Issues related to "one man, one vote" that are touched upon from time to time by students and scholars alike but not directly linked to gerrymandering, however, are considered part of the literature and include apportionment according to race, special districts, representation and apportionment, state legislative apportionment, congressional apportionment, and state and congressional apportionment.

Offering a solution to the problem of racial reapportionment is Richard Young.[115] Young contends that compensatory racial districting presents a dilemma. It is his point that without an inquiry into effect, the Supreme Court can never be assured that a racially motivated districting plan that is alleged to prefer some racial minority is in fact not benign. There are two solutions to the dilemma though both have disadvantages. The Court could either adopt a per se test as a substitute for measuring the political effects of apportionment plans[116] or declare

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[115]Richard Young, "Compensatory Racial Reapportionment," 25 Stanford Law Review 84 (1972).

[116]Ibid., pp. 90-92. Young indicates benign racial classifications can be divided into two categories: those that are "color conscious" yet treat the races unequally by providing compensatory treatment for some racial group. The

unconstitutional the intentional use of race in districting regardless of whether the legislature characterizes its plan as benign.

It is Young's suggestion that even though there are some disadvantages, a per se test is the better means of resolving the dilemmas of compensatory districting.[117] In the end it is likely that the choice between a per se test and the porhibition of all racially conscious apportionment will rely upon judicial perceptions of the sincerity and racial enlightenment of state legislators.

In 1973 Isiah Leggett presented a concern from the black community[118] on the heels of Mahan v. Howell,[119]

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clearest example of compensatory treatment is presented by the employment cases. Here, one job applicant would be preferred to another solely on the basis of skin color. To be constitutional, a compensatory scheme must meet the following requirements: The minority to be aided must in fact have been affected adversely by discrimination, the plan must decrease rather than increase this disadvantage, and other equally disadvantaged groups must be given equally preferential treatment.

[117]Ibid., pp. 103, 106. The suggested per se test utilizes a range of permissible minority concentrations for districts containing a significant number of minority persons. Assuming that the racial motivation of a plan has been established, any plan which divides a substantial geographically contiguous and compact grouping of persons of the same minority race into districts in which they comprise less than 30 percent or more than 70 percent of the registered voters within that district, shall be per se unconstitutional. The range between 30 and 70 percent minority registration or a similar objective figure is left open to legislative discretion since the Court has in the past exhibited inability to resolve the controversy.

[118]Isiah Leggett, "Reapportionment: The Delicate Balance," 18 Howard Law Journal 184 (1973).

[119]410 U.S. 315 (1973).

White v. Weiser,[120] and Gaffney v. Cummings.[121] He noted "twin obstacles" to meaningful black voting strength: multi-member districting and extreme deviations from the one-man, one-vote principle permitted by the courts at the state level.[122] Blacks and other minorities are described as being most vulnerable to political manipulation through malapportionment. Concern is voiced for the vast number of blacks that live in districts where they constitute only a minority of the population but may end up being left politically impotent if the state legislatures take advantage of the permissible loopholes reflected in the Court's decisions involving multi-member districts and the large deviations from the one-man, one-vote principle permitted at the state level. It is Leggett's contention that the acceptability of multi-member districting as a means toward equitable reapportionment only makes a mockery of the one-man, one-vote principle. The Supreme Court has compounded the deterioration of this principle by placing a higher value on maintaining intact county political boundaries whose real function remains undisturbed, instead of according equal weight to every man's vote. However, in doing this the Court has overrepresented the role of local government in carrying out the various state responsibilities. Therefore, the role of the individual state legislator and his

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[120] 412 U.S. 783 (1973). [121] 412 U.S. 735 (1973).

[122] Id. at 195.

relationship to the local government is overemphasized. Leggett concludes by noting that it is more fair to have "each vote, regardless of location throughout the state, valued equally so that the vote of any citizen is approximately the equivalent in weight to that of any other citizen in the state."[123]

Also considering the minority voter is Stephen L. Hubbard who maintains that "potential dilution" of minority voting strength is not within the area of constitutional review.[124] Hubbard cites a case in which the plaintiffs, black voters in two Dallas County precincts, filed a class action suit challenging a 1973 redistricting plan.[125] The plan had provided a shift of approximately one-fourth of the black population from precinct four to precinct three. It was contended by the plaintiffs that the 1973 plan would result in an unconstitutional dilution of their voting strength since by 1985 an 80-percent projected growth rate of the black population would have occurred in district four. The allegation was made that shifting blacks from the "growth" district would prevent them from obtaining a majority in any precinct at least until 1985, the date of

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[123]Id. at 199.

[124]Stephen L. Hubbard, "Constitutional Law--Reapportionment--Potential Dilution of Minority Voting Strength Not within Area of Constitutional Review," 7 St. Mary's Law Journal 447 (1975).

[125]Gilbert v. Sterrett, 509 F.2d 1382 (5th Cir., 1975).

the next mandatory reapportionment. The contested plan was found by the federal district court to be constitutionally sound. It held that ordering reapportionment on the basis of projected population statistics would be speculative and beyond the mandate issued by the Supreme Court.[126]

The plaintiffs appealed to the Fifth Circuit Court of Appeals, but the lower court's decision was affirmed. It was held that the plan did not unconstitutionally dilute the minority group's voting strength, for a minority group is not entitled to apportionment schemes that maximize their political advantages.

In explaining his position Hubbard indicates: "The emphasis placed on population equality in Gilbert can be interpreted in one of two ways: either the court is requiring population inequalities and unequal opportunities to participate, before finding impermissible dilution, or the court is simply refusing to expand their standards of review to encompass potential dilution."[127] Hubbard feels that the first interpretation is not likely. Rather, "The second interpretation is more probable, since the court's emphasis in Gilbert is on population equality and the absence of present dilution to justify the cursory treatment of

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[126]Id. The constitutional mandate whether the plan operates to minimize or cancel out voting strength of racial or political elements was first promulgated in Burns v. Richardson, 384 U.S. 73, 89 (1966).

[127]Id. at 451.

potential dilution."[128] The final resolution of the potential dilution argument will depend largely upon the treatment of this issue by the Supreme Court.[129]

One of the most recent considerations of the racial issue with regard to reapportionment is by Christine M. McEvoy.[130] McEvoy points out that in United Jewish Organizations v. Wilson[131] the Court of Appeals for the Second Circuit considered whether the Fourteenth[132] and Fifteenth[133] Amendment rights of white voters had been abridged as a result of a reapportionment plan that drew certain New York state senate and assembly districts with reference to racial criteria. Earlier, in 1972, the state of New York

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[128] Id.

[129] Hubbard indicates that the likely case will be Beer v. United States, 374 F.Supp. 363 (D. D.C., 1974), appeal docketed, 43 U.S.L.W. 3007 (U.S. July 9, 1974) (No. 73-1869).

[130] Christine M. McEvoy, "Constitutional Law--Reapportionment--Compensatory Racial Reapportionment but No Right to Community Unity--United Jewish Organizations v. Wilson, 510 F.2d 512 (2d Cir., 1975)," 9 Suffolk University Law Review 1496 (1975).

[131] 510 F.2d 512 (2d Cir., 1975), petition for rehearing denied, No. 74-2037 (2d Cir., Feb. 27, 1975).

[132] The United States Constitution, Amendment XIV, provides in part that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[133] The United States Constitution, Amendment XV, provides in part that "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude."

had redistricted the state senate and assembly districts in Kings, Bronx, and New York Counties due to population changes. New York was required to seek approval of the plans from the United States Attorney General under Section 5 of the Voting Rights Act,[134] which it did on January 31, 1974. On April 1, 1974, the Attorney General found that most of the 1972 plan was "unobjectionable" but that certain portions of the plan covering Kings and New York Counties were unacceptable as they might have "the effect of abridging the right to vote on account of race or color."[135] In spite of the fact that the state was not in accord with the Attorney General's position regarding the latter two

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[134]42 U.S. Code 5, Paragraph 1973(c) (1970). The reason for this requirement was that New York had violated Sections 4 and 5 of the Voting Rights Act, 42 U.S. Code, Paragraphs 1973(b), 1973(c) (1970), in 1968 by maintaining a literacy test as a prerequisite to voting. 35 Fed.Reg. 12354 (1970). This resulted in less than 50 percent of the voting-age residents voting in the presidential election. 36 Fed.Reg. 5809 (1971).

[135]510 F.2d at 517 and n. 5. The Attorney General has established certain guidelines to follow when considering a submission under Section 5 of the Act. 28 C.F.R. Section 51.1 et seq. (1973). Section 51.19, which is relevant here, provides in part: "The burden of proof of the submitting authority is the same . . . as it would be in submitting changes to the District Court for the District of Columbia . . . . If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority." In this instance the Attorney General based his objection on the overconcentration of minorities into certain districts and diffusion of the remaining minorities populating the adjoining areas into a number of other areas. 510 F.2d at 517.

counties, it did not exercise its right to appeal his finding.

Once again New York redistricted the objectionable areas in order to effectuate compliance with the Voting Rights Act. To obtain the Attorney General's approval, the legislature consciously placed 65 percent nonwhite voters in a certain number of districts.[136] One of the affected areas in Kings County was the senate and assembly district in which the entire Hasidic Jewish community was located. The Hasidic community is a tightly knit, 40-block enclave of thirty thousand ultraorthodox Jews, living in the Williamsburgh section of Brooklyn. They are deeply religious and dress in black clothing. The first of their number settled there in the 1940s as refugees from Nazi concentration camps.[137] Under the 1972 plan the Hasidic community fell entirely within one senate district and one assembly district (having a 61.5-percent nonwhite population). However,

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[136]The Joint Committee on Reapportionment informally discussed with the Justice Department considerations for drawing the 1974 plans. Richard S. Scolaro, the executive director of the committee, testified that in order to receive approval there should be "substantial nonwhite majorities" in three senate and two assembly districts. He also testified that he "got the feeling" that if these districts were 65-percent nonwhite, they would be approved. 510 F.2d at 517. The rationale was employed that a 65-percent figure would make a district "safe" because of lower voter registration and turn-out. Anything less would not ensure majority control.

[137]Philip Hager, "Supreme Court Upholds Use of Racial Quotas for Legislative Reapportionment," Los Angeles Times, March 2, 1977, part 1, page 12.

under the 1974 revised plan the Hasidic community was split almost in half between two senate districts (having a 65.0- and an 88.1-percent nonwhite population, respectively). The Attorney General subsequently approved this plan on July 1, 1974. The approval was based solely on his findings that the 1974 plan did not have the purpose or effect of minimizing the voting strength of blacks and Puerto Ricans.[138]

Suit was brought by the Hasidic Jewish community in the United States District Court for the Eastern District of New York, requesting general relief as well as declaratory and injunctive relief against the implementation of the 1974 plan.[139] In addition, the plaintiffs sought a judgment that the Attorney General's rejection of the 1972 plan was unconstitutional, and further injunctive relief in favor of the implementation of the 1972 plan, or alternatively the 1966 plan established by the New York Court of Appeal's Judicial Commission.[140] The complaint was dismissed by the district court, which held that the plaintiffs' constitutional claim was "untenable" because they had suffered "no cognizable

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[138]See Department of Justice, Civil Rights Division, Memorandum of Decision, July 1, 1974, at 2, 17-19, 21, included in appendix to Brief for Appellee Saxbe, United Jewish Organizations v. Wilson, 510 F.2d 512 (2d Cir., 1975).

[139]Id. at 518. In In re Orans, 17 N.Y.2d 107, 110; 216 N.E.2d 311, 312; 269 N.Y.S.2d 97, 98 (1966).

[140]510 F.2d at 514.

injury."[141] The district court held that there was no constitutional right to community unity. Moreover, it held that since the Attorney General had approved the plan, the claim could not be based on the Voting Rights Act. As well the court held that racial classifications were constitutionally permissible, since they were used to "correct a wrong."[142] The plaintiffs appealed from this dismissal.

Prior to examining the merits of the case, the Court of Appeals for the Second Circuit decided two very important questions. The Second Circuit first determined that Section 5 of the Voting Rights Act does not bar a suit seeking injunctive relief based on constitutional grounds.[143] Even so, the Wilson court ruled that the district court had no jurisdiction over the Attorney General in this suit. The plaintiffs, under the Voting Rights Act, could only seek judicial review of the Attorney General's determination that the 1972 plan was objectionable by intervening in a suit brought by a state or political subdivision in the District Court for the District of Columbia.[144] Such a suit was never filed.

The second preliminary question the court decided was that the plaintiffs had standing as white voters to

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[141]Id. [142]Id. at 519-20. [143]Id. at 520.

[144]The Brief for Appellants at 4-7 indicates that the appellants (i.e., plaintiffs) were not asserting standing as white voters, but only as Hasidim. The Second Circuit apparently conferred standing as whites upon the plaintiffs by its own initiative.

maintain this suit but not as members of the Hasidic community.[145] The reasoning of the court was that although whites constitute a majority in the country, they may be in a minority in a given political subdivision. As a result, standing was conferred to assert claims of a denial of equal protection and the right to vote. The court did not grant standing as Hasidim, however, finding that no right to community unity existed.[146] The reasoning of the court was that reapportionment would otherwise become an "impossible task" as a result of the great number of identifiable communities which might potentially populate a given area.[147]

So far as the merits of the case, the appellants requested that the court acknowledge that the issue in this case was whether it was constitutionally permissible for the state to gerrymander district lines according to preselected racial percentages in order to purportedly offset past racial discrimination.[148] However, the majority declined to reach this question. The court relied chiefly on the fact that the plaintiffs had not met their burden of proving that the effect of the districting was to invidiously cancel out or minimize the voting strength of white voters. It was noted by the court that even if the districts elected nonwhite representatives, "there would be

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[145] 510 F.2d at 520-21. [146] Id. at 521.

[147] Id. at 522-23. [148] Id.

no disproportionately nonwhite representation in either house."[149] This finding was based upon the fact that there existed a 35.1-percent nonwhite population in Kings County, and nonwhites constituted a majority in 30 percent of the senate districts (3 of 10 senate districts) and 31.4 percent of the assembly districts (7 of 22 assembly districts). Consequently, the nonwhite majority control of the districts was proportionately less than the nonwhite population in the county. Also, the court found that even if there had been disproportionate representation, the plaintiffs had not sustained their burden of proving invidious discrimination under the test established in White v. Regester[150] and Whitcomb v. Chavis.[151] Proof is required in this test that the appellants did not have equal access to the political processes leading to nomination and election. No evidence was found by the Wilson court to satisfy this test, in that historically whites had not been the victims of racial or political discrimination in these districts, in Kings County, or in the state of New York.[152]

Ultimately, the issue in Wilson was reduced to whether using racial considerations in districting was unconstitutional per se, since the appellants did not succeed in meeting the burden of proving invidious discrimination.[153] When districting (even when based on racial

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[149]412 U.S. 755 (1973). [150]403 U.S. 124 (1971).

[151]510 F.2d at 523. [152]Id. [153]Id. at 525.

considerations) receives the approval of the Attorney General under the Voting Rights Act and his directive is not challenged, the court held that districting may not be challenged in the absence of a clear showing of prejudice.[154] Relying on Allen v. Board of Elections,[155] the Second Circuit held that the Voting Rights Act was designed to cure dilution of minority group votes and underrepresentation of race.[156] The reasoning of the Second Circuit Court was that because the purpose of the act was concerned with race, corrective action under it necessarily required the use of racial factors.[157] Consequently, to that extent the factor of race did not render the legislation doubtful.

McEvoy concluded by summarizing her view: "The Wilson decision illustrates that the constitutionality of compensatory racial reapportionment may not be decided in the near future. More importantly, it demonstrates the courts' reluctance to interfere with the legislative districting process as well as their intention to exercise judicial restraint absent a clear violation of constitutionally protected rights."[158]

The Court of Appeals for the Second Circuit affirmed

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[154]393 U.S. 544 (1969).

[155]510 F.2d at 569. [156]Id. at 525.

[157]McEvoy, "Compensatory Racial Reapportionment," p. 1511.

[158]United Jewish Organizations of Williamsburgh, Inc., et al. v. Hugh L. Carey et al., 97 S.Ct. 996 (1977).

and the appellants petitioned the Supreme Court to issue a writ of certiorari, which was granted.[159] There the case was heard and the holding affirmed.

On March 1, 1977, the Court held 7 to 1 that New York, in the disputed 1974 redistricting, did not violate the constitutional rights of the redistricting's challengers, the appellants. Therefore, by deciding that this particular race-conscious plan was not unconstitutional, the Court was saying by necessity, as several statements of the justices indicated, that race-conscious redistricting in general was a constitutional technique, at least in Voting Rights Act cases.[160]

Speaking for the majority with regard to the Voting Rights Act and race-conscious redistricting, Justice White observed: "It is apparent from the face of the Act, from its legislative history, and from our cases that the Act was itself broadly remedial in the sense that it was designed by Congress to banish the blight of racial discrimination in voting."[161] Justice Brennan concurring with Justice White noted that it is a "settled principle that not every remedial use of race is forbidden."[162] He pointed out: "a reapportionment cannot violate the Fourteenth or Fifteenth

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[159] Id.

[160] Id. at 1005, citing South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[161] Id. at 1013. [162] Id. at 1008.

Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts."[163] Thereupon he cited a number of cases in which the high Court authorized and even required race-conscious remedies in a variety of corrective settings.[164]

The seven justices who agreed in the result of the decision--Justices White, Brennan, Stewart, Powell, Blackmun, Stevens, and Rehnquist--were, however, badly split on the reasoning behind it.[165] Thus it leaves in question, to some degree, its precedential value.[166] Simply, the justices differed among themselves on their reasoning, and thus there was no one statement of the Court's holding that was joined by a majority of justices. In any case, the ruling

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[163]Id., e.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971); United States v. Montgomery Board of Education, 395 U.S. 225 (1969); and Franks v. Bowman Transportation Company, 424 U.S. 747 (1976).

[164]Justice White's opinion gave two independent grounds for ruling that the state of New York did not violate the Constitution with its 1974 plan. Justices Stevens, Brennan, and Blackmun agreed regarding the first ground; Justices Stevens and Rehnquist agreed regarding the second. And finally, Justice Stewart wrote a separate opinion, which was joined by Justice Powell, who concurred in the final judgment for still another reason.

[165]Most agreed that the use of racial criteria by the state of New York in its 1974 plan in attempting to comply with section five of the act and to secure the approval of the Attorney General did not violate the Fourteenth or Fifteenth Amendment. However, their reasonings for arriving at that common decision were quite varied.

[166]Lesley Oelsner, "U.S. High Court Backs Use of Racial Quotas for Voting Districts," The New York Times, March 2, 1977, Vol. CXXVI, No. 43,502, p. 16.

was the lowest common denominator of the several statements written or joined by the seven justices.

Deputy Solicitor General Lawrence G. Wallace, who participated in arguing on the winning side in the case, suggested after the decision was handed down that it should not be interpreted as indicating how the high Court might rule in other cases pending before it about affirmative action, such as the constitutionality question of special minorities admissions programs at universities.[167] The Deputy Solicitor General did not indicate that the present case was important, in that if the Court had ruled the other way it would have "undermined" a "good deal" of the Voting Rights Act.[168]

The Director of the NAACP Legal Defense and Education Fund, Jack Greenberg, who was also on the winning side of the case, referred to the decision as a civil rights "advance" as well as "a major and encouraging pronouncement on affirmative action with important implications in the areas of employment and education."[169]

A perhaps less positive view of the decision's long-reaching precedential value came from Nathan Lewin, chief attorney for the Hasidic Jews. His feeling was that the case could be interpreted either quite narrowly or broadly. Since it involved a set of facts not likely to occur often, it could be viewed as "limited." With regard to the quotas,

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[167]Ibid. [168]Ibid., p. 16. [169]Ibid., pp. 1, 16.

he said it also "gives more of an imprimatur constitutionally."[170]

The sole dissenter in the case was Chief Justice Burger who attributed his dissent to two considerations. He first questioned if the state legislative action was constitutionally permissible absent any special considerations raised by the Federal Voting Rights Act. Chief Justice Burger cited a 1960 case, Gomillion v. Lightfoot,[171] as the first case to strike down a state's attempt at racial gerrymandering.[172] He noted: "If Gomillion teaches anything, I had thought that it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution."[173] Chief Justice Burger was concerned that "In drawing up the 1974 reapportionment scheme, the New York legislature did not consider racial composition as merely one of several political characteristics; on the contrary, race appears to have been the one and only criterion applied."[174] He went on to point out that "One New York official testified that he got the feeling [from a Justice Department spokesman] . . . 65 percent would be

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[170] Ibid., p. 16. [171] 364 U.S. 339 (1960).

[172] 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

[173] United Jewish Organizations of Williamsburgh, Inc., et al. v. Hugh L. Carey, et al., 97 S.Ct. 1018 (1977).

[174] Id.

probably an approved figure . . . . This official also testified that apportionment solutions which would have kept the Hasidic community within a single district, but would have resulted in a 63.4% nonwhite concentration, were rejected for fear that, falling short of 'exactly 65 percent,' they 'would not be acceptable' to the Justice Department."[175] Thus the words "racial quota," which are emotionally loaded and should always be used with caution, were in fact applied in the present case. Chief Justice Burger concluded: "undisputed testimony shows that the 65% figure was viewed by the legislative reapportionment committee as so firm a criterion that even a fractional deviation was deemed impermissible. I cannot see how this can be characterized otherwise than a strict quota approach and I must therefore view today's holding as casting doubt on the clear-cut principles established in Gomillion."[176]

The second question raised by Chief Justice Burger was whether the action of the state of New York becomes constitutionally permissible because it was taken to comply with the remedial provisions of the Federal Voting Rights Act. Citing two cases, South Carolina v. Katzenbach[177] and Allen v. State Board of Elections,[178] the Chief Justice recognized that the high Court had indeed upheld the Voting Rights Act--in Katzenbach as a "permissibly decisive"

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[175] Id. [176] Id. [177] 383 U.S. 301 (1966).

[178] 393 U.S. 544 (1969).

response to "the extraordinary strategem of perpetrating voting discrimination in the face of adverse federal decrees," and in Allen as a potential for "dilution" of minority voting power which could "nullify the ability to elect the candidate of one's choice."[179]

In a 1976 case, Beer v. United States,[180] the high Court held that it was the distinct obligation of the state to redistrict so as to avoid "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[181] Clearly, under certain circumstances such as those enumerated in Katzenbach, Allen, and Beer, redistricting along racial lines is constitutional--indeed, even imperative--under the Voting Rights Act. However, the Chief Justice indicated in the present case, "the state legislature mechanically adhered to a plan to maintain--without tolerance for even a 1.6% deviation--a 'nonwhite' population of 65% within several of the new districts."[182] The record, according to the Chief Justice, does not indicate that the use of this rigid figure was in any way related--much less necessary--to fulfill the state's obligation under the act. He concluded:

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[179] South Carolina v. Katzenbach, 383 U.S. 334 (1966); Allen v. State Board of Education, 393 U.S. 544 (1969).

[180] 425 U.S. 130 (1976). [181] Id. at 130 and 141.

[182] Jewish Organizations v. Carey, 97 S.Ct. 1019 (1977).

"If this kind of racial redistricting is to be upheld, however it should, at the very least, be done on the basis of record facts, not suppositions . . . . The record is devoid of any evidence that the 65% figure was a reasoned response to the problem of past discrimination."[183] Finally, "Manipulating the racial composition of electoral districts to assure one minority or another its 'deserved' representation will not promote the goal of a racially neutral legislature. On the contrary, such racial gerrymandering puts the imprimatur of the State on the concept that race is a proper consideration in the electoral process."[184]

In that it is difficult to tell what precedential value the Supreme Court will assign the Williamsburg case in the future, it is important to state concisely what in fact it does establish for the present. Simply, the decision determines that a state drawing up a reapportionment plan may sometimes use racial quotas designed to assure that blacks and other nonwhites have majorities in certain legislative districts. The Court has said that this type of race-conscious redistricting is constitutional, at least in

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[183] Id. He notes that the sole reason that New York, Bronx, and Kings Counties were brought under the sweep of the Voting Rights Act was that ballots in those counties had been prepared only in English and not in Spanish. In light of the large Puerto Rican population in those counties, this was held to be a "discriminatory test or device."

[184] Id. at 1020.

some circumstances, when the state does it in an effort to comply with the 1965 Federal Voting Rights Act.

Technically, the justices' holding was simply that New York, in the disputed 1974 redistricting, did not violate the constitutional rights of the challengers of the redistricting. Specifically, however, by establishing that this particular race-conscious plan was not unconstitutional, the Court was saying, as various statements of the justices indicated, that race-conscious redistricting in general was a constitutional technique, at least in the Voting Rights Act cases. On the other hand, the ruling leaves unclear just what other factual circumstances, beside those shown in the Williamsburg case, would permit the use of a race-conscious plan.

Indeed, the White opinion leaves open the ostensible possibility that race-conscious redistricting could be challenged successfully if it could be shown that the effect was to give minority group members greater voting strength at the expense of whites than the Voting Rights Act provided for.

This possibility assures that future high Court decisions will be observed with more than casual interest. The March 1977 Williamsburg decision is the latest in a slowly developing series of cases, as well as articles, essays, papers, and in a limited number of instances books, that constitute the literature dealing with the demise of "one man, one vote." Due to its very recent adjudication,

Williamsburg has not yet been discussed or analyzed beyond the text of the jurists' opinions. It therefore stands as the most contemporary contribution to the yet unresolved question of apportionment.

CHAPTER V

ONE MAN, ONE VOTE: PAST, PRESENT, AND FUTURE

Paul A. Freund of the Harvard Law School observes that the central issue in the reapportionment cases is "whether the right involved is an individual voter's personal claim to a fractional participation in his legislative district equal to that of a voter in another legislative district, or is a claim of the aggregate voters of a district to fair representation in the legislative assembly."[1] The adoption of the first way of looking at the problem, that is, allegiance to absolute egalitarian principle, as has been seen, resulted in frequent oversimplification of the problem of representation. In addition, the adoption of a posture of rigidity in the standards of judging the validity of apportionment plans utilizing the oversimplified "one-man, one-vote" formula for those bodies that are not representative in the legislative sense, has not provided a satisfactory solution to the dilemma.

Today, some rather fundamental questions have been raised in connection with the reapportionment doctrine of

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[1]Paul A. Freund in the foreword to Robert G. Dixon, Jr., Democratic Representation: Reapportionment in Law and Politics (New York: Oxford Press, 1968; reprinted, 1972), p. v.

"one man, one vote" and remain unanswered. Such questions are (1) What is the legal status of gerrymandering? (2) To what extent should race, political identity, or economic level be considered? (3) How does apportionment apply to local government? (4) What are the limits on multi-member districts?

This final chapter reviews and analyzes the apportionment trends in the 1970s based upon the cases, articles, scholarly papers, points of view expressed in separate books, and so forth, that were earlier identified as significant, especially in the areas where questions have been raised and not yet answered. Also, in an attempt to understand what has taken place in the area of apportionment and why, this chapter provides general observations and recommendations where appropriate.

The 1946 decision of Colgrove v. Green[2] reflected the historic policy of the Supreme Court and the refusal of lower federal courts to exercise jurisdiction in cases attacking malapportionment of congressional districts, legislatures, or other governing bodies of the states and their political subdivisions.[3] The Colgrove decision had

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[2]328 U.S. 549 (1946). See also Wood v. Broom, 287 U.S. 1 (1932).

[3]The Supreme Court's Colgrove decision held that the Constitution precluded judicial intervention in the "political thicket" of congressional districting. The case was one of first impression, raising the interface between Article I, Section 2, and the equal protection clause of the Fourteenth Amendment. Justice Frankfurter, in announcing

the precedential impact of instructing the federal judiciary to avoid the controversial "political thicket" spoken of by Justice Frankfurter because it was "of a peculiarly political nature and therefore not meant for judicial determination."[4] The Court was plainly establishing its thinking that the judiciary had no business getting involved in a matter that was clearly not within its purview. Sixteen years later, however, over the robust dissents of Justices Frankfurter and Harlan,[5] the high Court in Baker v. Carr[6] distinguished the apportionment question from the "political question" precedents and declared that the plaintiffs challenging the representational basis for the Tennessee legislature had asserted a right "within the reach of judicial protection under the Fourteenth Amendment."[7] Thus in Baker the United States Supreme Court overruled Colgrove and held

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the judgment of the Court, based his decision on Article I, Section 4, which grants Congress the power to establish regulations affecting the "Times, Places and Manner" of electing state representatives. It was the feeling of Justice Frankfurter that this delegation of power to Congress precluded judicial interference. Id. at 380-81.

[4]328 U.S. 549 at 552 (1946). Following Colgrove until the Baker decision, the Supreme Court issued per curiam dismissals of reapportionment decisions. See, for example, Cook v. Fortson, 329 U.S. 675 (1946); Turman v. Duckworth, 329 U.S. 675 (1946); Colgrove v. Barrett, 330 U.S. 804 (1946); Remmey v. Smith, 342 U.S. 916 (1952); Cox v. Peters, 342 U.S. 936 (1952); and Kidd v. McCanless, 352 U.S. 920 (1956).

[5]Justice Frankfurter dissenting at 369 U.S. at 266 and Justice Harlan dissenting at 369 U.S. at 330.

[6]369 U.S. 186 (1962). [7]369 U.S. at 237.

that the district court had jurisdiction over the subject matter of state reapportionment, that the qualified Tennessee voters had standing to sue, and that the plaintiffs had stated a cause of action for which relief could be granted. Simply, the question of reapportionment was determined to be a justiciable issue. This was indeed a dramatic about-face from the Colgrove decision of sixteen years earlier.

Shortly after the lead of Baker, the United States District Court for the Northern District of Georgia, sitting as a three-judge court, held that the Georgia county unit system violated the equal protection clause of the Fourteenth Amendment.[8] Upon appeal, the United States Supreme Court vacated the judgment below and remanded the case,[9] whereupon it ruled in Gray v. Sanders that "there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State."[10] In Gray v. Sanders[11] Justice Douglas first articulated the policy which was to govern all future reapportionment cases: "one person, one vote."[12] First the Court had entered the "political

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[8]Gray v. Sanders, 203 F.Supp. 158 (1962).

[9]Gray v. Sanders, 372 U.S. 368, 9 L.Ed.2d 821, 83 S.Ct. 801 (1963).

[10]Id. at 380. [11]372 U.S. 368 (1963).

[12]Id. at 381. In writing the majority opinion, Justice Douglas declared that the only exceptions to the

thicket"; now it had established a dramatic new electoral principle that each person's vote must count equally.

Moving even further, one year later in Wesberry v. Sanders[13] the Georgia congressional reapportionment plan was declared invalid under Article I, Section 2. The Court set down the test which is still the standard today for congressional reapportionment plans:

> We hold that, construed in its historical context, the command of Article I, Section 2, that representatives be chosen by the People of the several states means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.[14]

The decision of the Supreme Court was based upon a consideration of the historical background of the House of Representatives. "It would defeat the principle solemnly embodied in the great compromise--equal representation in the House for equal numbers of people--for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a congressman than others."[15] Undoubtedly, this established a powerful mandate which has been upheld and strictly applied in the most recent Supreme

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doctrine are the allotment of two senators for each state in the Federal Congress and the election of the president by the electoral college provided for in the Twelfth Amendment. In all other electoral proceedings, the right to vote mandates equality of voting.

[13] 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964).

[14] Id. at 8. [15] Id. at 18.

Court cases involving reapportionment.[16]

The Court handed down another landmark decision in 1964--Reynolds v. Sims.[17] In Reynolds the Court held in an 8 to 1 decision that the equal protection clause requires the apportionment of the seats in both houses of the bicameral state legislature on a population basis. This had the effect of rejecting the "federal analogy" that, like Congress, a state legislature could have one house based on a factor other than population. It held that political subdivisions in states are not sovereign entities (on which equal representation of states in the Senate is predicated). Since both houses of a legislature must agree to enact legislation, representation on factors other than population dilutes the votes of citizens living in heavily populated areas. In the Reynolds case and later decisions the Supreme Court has not insisted on absolute equality of representation, permitting "substantial" equality of representation. Nevertheless, the "one-man, one-vote" principle remains firm

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[16]See Kirkpatrick v. Preisler, 394 U.S. 526 (1969), which provided that each variance in regard to population in a congressional district must be justified and that no arbitrary cutoff point exists at which a deviation can be said to be de minimis. Wells v. Rockefeller, 394 U.S. 542 (1969), decided the same day as Kirkpatrick, provided that congressional districts must be divided as equally as possible, using the whole state as the starting point. Most recently, in White v. Weiser, 412 U.S. 783 (1973), the Court voided the congressional apportionment plan because the districts were not mathematically as equal as reasonably possible in regard to population.

[17]377 U.S. 533 (1964).

as the basic principle governing the American system of representative government.

The Court next moved, in 1968, to tighten the reapportionment principle, reaffirming Reynolds to achieve a more precise mathematical equality at the local level. In Avery v. Midland County[18] the Supreme Court in effect completed the implementation of the "one-man, one-vote" principle locally. The decision announced that there could be no deivation from the population standard set forth in Reynolds in the apportionment of local units of government (the Texas Midland County Commissioners) that possess any semblance of a legislative function. The decision declared that equal voting power in all popular elections is a fundamental right enjoyed by every American.

Following in chronological progression in 1969 were two other decisions handed down by the high Court maintaining an absolute mathematical standard. Those two cases, decided on the same day--Kirkpatrick v. Preisler[19] and Wells v. Rockefeller[20]--dealt with congressional districting plans in Missouri and New York. In these cases the Court held that a reapportionment plan is unconstitutional if population variances within it can be reduced.

Another case which further underscores the extension of the absolute egalitarian principle at the local level was

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[18]390 U.S. 474 (1968). [19]394 U.S. 526 (1969).

[20]394 U.S. 542 (1969).

Hadley v. Junior College.[21] In this case the Court held that the popular election of persons to perform public functions requires proportional districting under the authority of Reynolds. The Hadley decision climaxed a series of apportionment cases that had begun with Baker. Each of the cases beginning with Baker v. Carr and moving through Gray v. Sanders, Wesberry v. Sanders, Reynolds v. Sims, Avery v. Midland County, Kirkpatrick v. Preisler, Wells v. Rockefeller, and Hadley v. Junior College all moved in the direction of strict adherence to an absolute mathematical standard of apportionment. From the 1962 Baker v. Carr decision to the 1970 Hadley v. Junior College case, the Supreme Court gradually and definitely altered the fundamental basis for American legislative apportionment. The guiding standard was "one man, one vote."

A turning point in an otherwise orderly progression of decisions uncompromisingly adhering to an absolute mathematical standard as the guiding principle for apportionment came in Mahan v. Howell[22] in 1973. In this case the Supreme Court held for the first time a double standard for the apportionment of federal congressional and state legislative districts. The Court held that the Constitution requires less adherence to precise equality in state legislative reapportionment plans than in congressional schemes, and

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[21]397 U.S. 50 (1970). [22]410 U.S. 315 (1973).

permits a maximum population deviation of 16.4 percent[23] in the apportionment plan for the lower house of the Virginia state legislature known as the House of Delegates. Mahan signaled a clear loosening of the more strict egalitarian standard.

Quickly following the watershed case of Mahan in 1973 and continuing along the lines of a more permissive mathematical standard were White v. Regester[24] and Gaffney v. Cummings,[25] which held that state apportionment plans containing minor deviations from mathematical equality are not prima facie in violation of the equal protection clause and therefore do not require justification by the state.[26] Regester and Gaffney signaled the first acceptance of de minimis deviations and accelerated the Court's movement to the double standard first acknowledged in Mahan.

The decision in which the Supreme Court has gone the farthest in limiting its commitment to "one man, one vote" is Salyer Land Company v. Tulare Lake Basin Storage District.[27] At question was whether the predominant landowner of a water storage district, a corporation, or the employees of the corporation living within the storage district should

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[23]Id. at 336. [24]412 U.S. 755 (1973).

[25]412 U.S. 735 (1973).

[26]White v. Regester, 412 U.S. 755, 763-64 (1973); Gaffney v. Cummings, 412 U.S. 735, 743 (1973).

[27]410 U.S. 719 (1973).

be enfranchised to assert control of the district's board of directors. In Salyer the Court sustained the statutory scheme which enfranchised only landowners in the water storage district and apportioned their votes according to the assessed value of the lands.[28] This, too, moved the Court farther from its "one-man, one-vote" standard.

A final case shifting the Court in a new direction following Salyer was White v. Weiser.[29] The high Court indicated that Texas congressional districts which contained an average deviation of .745 percent, i.e., +2.4 percent and -1.7 percent, were unacceptable if deviations of this size could be made more equal, thus seemingly reaffirming its policy laid down one decade earlier. However, the three concurring justices holding the majority view indicated that this ostensible victory of mathematical precision for even congressional apportionment might be short lived,[30] since their decision was reached primarily on the basis of stare decisis. Should the Court decide to reconsider Kirkpatrick, which served as the precedent for White, the three indicated they would vote to overrule it[31] and thus not require absolute equality in United States congressional districts.

The new spate of cases introduced by Mahan v. Howell,[32] permitting higher percentages of deviation between districts, permitting decreasing emphasis upon mathematical

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[28] Id. at 798. [29] 412 U.S. 783 (1973).

[30] Id. at 798. [31] Id. [32] 410 U.S. 315 (1973).

equality, and permitting distinguishing between congressional and state legislative districts, contain the potential for increased Court flexibility and involvement in the apportionment process.

A natural question arising a decade and a half after the first landmark apportionment decision in 1962 is, What political accomplishments has it brought? Ward Elliott has observed, "In 1962 it was conventional wisdom among the cognoscenti, Gordon Baker, Anthony Lewis, Andrew Hacker, Robert McKay, John F. Kennedy, the Twentieth Century Fund and the American Political Science Association, that Malapportionment[33] was to blame for the worst problems of government at every level. It was supposed to have reduced city dwellers to second-class citizens, and to have stifled urgently needed reforms like home rule, slum clearance, metropolitan transit, annexation, labor and welfare legislation, civil rights laws, equal tax laws, and equal expenditures on schools and roads 'because of the ignorance and indifference of rural legislators.'"[34]

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[33]Elliott interestingly points out that perhaps the most significant victory of the proponents of reapportionment was the public acceptance of the term "'malapportionment,' . . . even by the opponents of reapportionment. The term is easily used, but somewhat loaded, since it describes the inequality of districts. This can be good or bad depending on its political context . . . as 'bad apportionment.'"

[34]Ward Elliott, "Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment," 37 The University of Chicago Law Review 474

It was popularly believed that in addition to giving special powers to rural intransigents, malapportionment served to weaken federalism by splitting party control of legislatures and governorships, to stop government action, and to spawn "public cynicism, disillusionment, and apathy."[35] Supposedly, reapportionment was going to destroy the rural roadblock, unleash the bottled-up legislation, strengthen local and state representation, and produce a "new breed" of legislation. However, Elliott concludes otherwise: "Yet Prometheus unchained seems remarkably unchanged, either in the matter of banishing public cynicism, disillusionment, and apathy or of producing an urban tyranny, as Strom Thurmond had feared."[36] The changes that did take place seem more nearly directly linked to political upheavals like the Democratic landslide of 1964 or the Republican gains of 1966-68 than to reapportionment.[37]

(1970). Elliott's article is the most thorough and systematic assessment of the impact and accomplishments brought about by what he calls "The Reapportionment Revolution."

[35]See generally Gordon Baker, Rural Versus Urban Political Power (New York: Random House, 1955), pp. 27-39; One Man--One Vote (New York: Twentieth Century Fund, 1962) (For more about the "strange little leaflet," see Dixon, Democratic Representation, p. 286); Anthony Lewis, "Legislative Apportionment and the Federal Courts," 71 Harvard Law Review 1057 (1958); and John F. Kennedy, "The Shame of the States," New York Times Magazine, May 18, 1958, p. 12.

[36]Elliott, "Prometheus Unbound," p. 475.

[37]See generally Philip C. Dolce and George H. Skau, eds., Power and the Presidency (New York: Charles Scribner's Sons, 1976); and Norman J. Ornstein, ed., Congress in Change: Evolution and Reform (New York: Praeger Publishers,

In studies by Andrew Hacker in Congressional Districting: The Issue of Equal Representation and in the Congressional Quarterly, it was shown that there was no connection between unequal districts and the reluctance of Congress to pass liberal, administration-backed legislation.[38] Indeed, according to Hacker's weighting of sample roll calls, reapportionment could be expected to produce greater resistance to such measures!

Hacker then questions if indeed his study indicates that the conservatives in Congress are in fact underrepresented. He notes: "For in six out of the eight weighted votes those opposing the Administration proposals had fewer votes on the actual roll calls than they did when votes were adjusted to take account of district populations and election results. If this is so, then it would appear that liberals have little to gain by reforms in the direction of equitable districting or even the curtailing of gerrymandering."[39] On the other hand, he considers the limitations of his study by pointing out his use of weighted votes which relied on existing congressmen and prevailing constituencies.

1975); in addition, more specific statistical assessments of the impact of reapportionment have been made by the Congressional Quarterly and Andrew Hacker.

[38]Andrew Hacker, Congressional Districting: The Issue of Equal Representation, rev. ed. (Washington, D.C.: Brookings Institution, 1964), p. 97; 20 Congressional Quarterly Weekly Report, February 2, 1962, pp. 153-54.

[39]Ibid., pp. 98-99.

He observes: "If those favorable to more ambitious undertakings by the federal government believe that their cause will be aided by the equalizing of districts, then that hope must rely on the assumption that new districts will produce a new breed of congressmen."[40] Hacker feels that there is undoubtedly some validity to this expectation but that "it would also be a mistake to overestimate the liberal propensities of American voters, especially when they cast their ballots for Congress. It is well known that many Americans apply different standards to presidential and congressional aspirants--frequently supporting a liberal chief executive and simultaneously voting for a conservative representative."[41]

Perhaps the most noted casualty of reapportionment in Congress was House Rules Committee Chairman Howard W. Smith, a conservative who lost to his moderate opponent, George C. Rawlings, Jr., by 645 votes in the 1966 Virginia primary after his district's boundary lines had been redrawn. The upshot of this change was to introduce a new congressman in one district, and that was only with the help of a general trend toward new faces in Virginia politics. His election was itself more connected with the revolt against the Byrd machine than with reapportionment. In terms of substantive change in the governing of the Rules Committee, there was little, since Smith was succeeded by

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[40]Ibid., p. 99. [41]Ibid.

a similar conservative southerner, William M. Colmer of Mississippi.[42]

After reapportionment, however, dramatic changes did take place in several states in regional control of legislatures as well as in some individual changes in policy in which reapportionment may have been a secondary factor. Even so, "no overall trend of policy attributable to reapportionment can yet be perceived."[43] Based upon Congressional Quarterly's August 1966 survey of reapportionment, it seems reasonable to conclude and worthy of note that control shifted from one region to another in the legislatures of five states.[44] In Florida the fast-growing southern half of the state broke the traditional domination of the legislature by the northern half of the state after a bitter eighteen-year struggle. In Alabama power was transferred from the southern agricultural section to the northern industrial region. In Maryland the balance of power seemed to shift from the east shore, southern and western Maryland to the suburbs of Baltimore and Washington, and to Baltimore itself. In California power clearly

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[42]For a detailed account of Smith's intransigence and defeat, see Tom Wicker, JFK and LBJ: The Influence of Personality upon Politics (Baltimore: Penguin Books, 1969).

[43]Elliott, "Prometheus Unbound," p. 476.

[44]Congressional Quarterly Background Report, Representation and Reapportionment (Washington, D.C.: Congressional Quarterly, 1966), pp. 45-50, 62-93, hereafter cited as Congressional Quarterly.

shifted from the north to the south. And, finally, in Nevada the previously dominant rural interests were shifted to Reno and Las Vegas.[45]

In addition, in five western states with regionally apportioned senates--Arizona, Montana, New Mexico, Utah, and Missouri--reapportionment brought an extreme increase of urban power in one house. For example, cities in Vermont, Chicago, and the central Piedmont cities of North Carolina (Charlotte, Greensboro, Winston-Salem, and Raleigh) also gained significant power in their respective state senates. Nevertheless, in spite of the great anticipation of what reapportionment might do, Elliott points out: "Even in Tennessee, whose 'crazy quilt' of unequal districts had inspired the Court to intervene in Baker v. Carr, the inequalities had been so haphazard that reapportionment does not seem to have brought about any major alterations in regional influence within the state."[46]

While significant changes in the balance of power occurred in several states following the original reapportionment decisions, it is not possible to survey the new legislators and their policies and assert with any degree of certitude that they were more responsive to reapportionment than, say, any number of other influencing factors.

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[45]Ibid., generally, pp. 38-50; specifically, Florida, p. 71; Alabama, pp. 65-66; Maryland, p. 75; California, p. 67; and Nevada, p. 77.

[46]Elliott, "Prometheus Unbound," p. 476.

Looking back to the elections immediately following the reapportionment decisions, one cannot insist, for example, that the election of George Romney in Michigan, Philip Hoff in Vermont, Ronald Reagan in California, Claude Kirk in Florida, Lester Maddox in Georgia, or Lurleen Wallace in Alabama is indicative of a great reapportionment breakthrough.

Referring to issues and elections of the mid through late 1960s, Elliott observed: "Reapportionists and others watching the cities for the expected Revitalization since reapportionment saw little sign of it; instead every passing year seemed to show the cities and states less capable of dealing with their own problems; with the yoke of Malapportionment thrown off, the cities' political efflorescence expressed itself in riots and garbage strikes, and the New Federalism seemed to consist of appeals to the federal government for troops and money, if anything more than the old."[47]

Indeed, the elections that followed in 1968 and 1969 at the national, state, and local levels continued the trend away from the civil rights euphoria of 1965 and many other progressive causes, with the most dramatic rebuffs of the liberals taking place in the cities themselves. In 1968 all three presidential candidates vowed to bring back a Supreme Court of strict constructionists. In 1966 the Republicans

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[47]Ibid., p. 478.

had made dramatic gains in Congress and were able to hold on to them two years later, as well as to add to those gains in the states. Liberals met defeat in mayoral races at the hands of conservatives such as Sam Yorty of Los Angeles and Richard Daley of Chicago. Moreover, four liberal mayors--Joseph Barr of Pittsburgh, Jerome Cavanaugh of Detroit, Richard C. Lee of New Haven, and Arthur Naftalin of Minneapolis--chose not even to run but, instead, withdrew from electoral politics by their own choice. Liberals Robert Wagner and John Lindsay of New York City capitulated to less well-known conservative opponents from within their own parties in the primaries. In Minneapolis moderate candidates from both parties were defeated by an ex-policeman, Charles Stenvig, who ran on a law and order platform.[48] Surely the cataclysmic events that were expected to follow reapportionment did not take place in the manner anticipated by many.

Not long after the Reynolds v. Sims[49] decision in 1964, quantitative studies began to appear in the professional literature. Many of the studies compared indicators of malapportionment in the various states with indicators of the various evils--suppression of party competition, split

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[48]For a thorough analysis of the American electorate during this period, see Richard M. Scammon and Ben J. Wattenberg, The Real Majority: An Extraordinary Examination of the American Electorate (New York: Coward, McCann & Geoghegan, 1971).

[49]377 U.S. 533 (1964).

governments, inadequate welfare legislation, and budgetary discrimination against the cities--some or all of which malapportionment was supposed to generate.[50] Even though these studies examined the more extremely malapportioned southern states where the indicators used were common, they demonstrated little sign of a relationship between malapportionment and the effects claimed for it. It was the common technique of the professional studies to rank the states in order of malapportionment prior to Baker v. Carr,[51] and thereupon rank them according to level of party competition, frequency of divided government, distribution of state funds between urban and rural users, and level of expenditures for welfare. Then the effort would be made to see whether there was any relationship between the rank orders. Herbert Jacob used three measurements of malapportionment: population ratio between the largest and smallest districts, Dauer-Kelsay, scores of minimum population necessary to control a majority, and the David-Eisenberg index of "voting power"

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[50] See Herbert Jacob, "The Consequences of Malapportionment: A Note of Caution," 43 Social Forces 256 (1964); Thomas Dye, "Malapportionment and Public Policy in the States," 27 Journal of Politics 586 (1965); Alvin D. Sokolow, "After Reapportionment: Numbers or Policies" (unpublished paper, 1966, on file with Professor Ward Elliott, Claremont Men's College, Claremont, California); and Richard Hofferbert, "The Relation Between Public Policy and Some Structural Environmental Variables in the American States," 60 American Political Science Review 73 (1966).

[51] 369 U.S. 186 (1962).

by county.[52] Thomas Dye utilized the Schubert-Press I index for ranking of the states, allowing for skewness, kurtosis, and joint variability along with the Dauer-Kelsay and David-Eisenberg rankings.[53] Richard Hofferbert utilized the Schubert-Press II index, after it had been corrected for floterial districts as well as other factors.[54]

Each of these scholars utilized different indicators for "liberal" welfare policies and budgetary favoritism. Jacob relied on old-age assistance, per capita health expenditures, teachers' salary, teacher-pupil ratio, welfare expenditures, and tax structure, while Hofferbert was concerned with per-pupil aid to local education, per-recipient aid to the aged, the blind, and the unemployed, per-family aid to dependent children, and three derivatives of the David-Eisenberg index, and utilized highway and education grants and municipal annexation laws for policy variables. While the rank indicators for the various studies were not always the same, the results of comparison between policy ranking and apportionment ranking failed in almost every case to show a substantial relationship between

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[52]See Herbert Jacob, "Consequences of Malapportionment," pp. 257-58.

[53]See Thomas Dye, "Malapportionment and Public Policy," pp. 588-90.

[54]See Hofferbert, "Public Policy and Structural Variables," p. 74. It should be noted that Schubert-Press I and II indices are from Schubert and Press, "Measuring Malapportionment," 58 American Political Science Review 302 (1964).

malapportionment and its anticipated policy results.

Ward Elliott expressed a common view of the effect of reapportionment when he observed, "the available evidence seems more than sufficient to put the reapportionists' expectations of a great revitalization of state and local government into a more realistic perspective which should rank reapportionment as a trivial political influence compared to such traditional forces as parties, personalities, interest groups, and the perversities of popular fashion."[55]

Nevertheless, reapportionment, as has been pointed out, has done a great deal to equalize representation in states like Florida, Alabama, California, Nevada, and Maryland, where unequal districts did disenfranchise regions with population majorities. It has helped undermine white one-party government in the Deep South, as well as corrected blatant discrimination against large sectors of the populations of a dozen or so states, and has corrected minor discrimination in the remainder of the nation. These corrections, however, have not been made by the Supreme Court in a systematic and discerning way, except in the limited sense of requiring strict adherence to its rule of equal districts as its best strategy for securing compliance without venturing into the dreaded "political thicket."[56]

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[55]Elliott, "Prometheus Unbound," p. 481.

[56]See Chapter III of this dissertation for a detailed account of the problems and criticisms arising from reapportionment. See particularly n. 7 for a list

Therefore, because of the limited nature of the high Court's involvement in malapportionment, a number of significant questions remain unanswered.

Foremost among the lingering questions raised by the Supreme Court's adherence to the "one-man, one-vote" principle is gerrymandering. The coming of gerrymandering along with reapportionment has tempered earlier predictions that reapportionment would increase Republican and black representation by favoring cities in the South and suburbs throughout the nation. Early studies by Andrew Hacker, the Republican National Committee, and the Legislative Reference Service determined that Republicans and blacks stood to gain from reapportionment, which would give more votes to their strongholds in southern cities and to suburbs across the nation where Republicans were strongest, provided districts were drawn at random.[57] Nevertheless, except for some of the minority states that have nonlegislative redistricting,[58]

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of those most critical of its end results. See also Congressional Quarterly, pp. 38-50, 65-85.

[57]See 22 Congressional Quarterly Census Analysis 1786 (August 21, 1964); and United States Library of Congress, "Recent Supreme Court Decisions on Apportionment: Their Political Impact," Legislative Reference Service, pp. 11-12, 22-23 (1964).

[58]Six states in 1962 had nonlegislative reapportionment: Alaska, Arizona, Arkansas, Hawaii, Missouri, and Ohio. In addition, seven other states had made provisions for nonlegislative apportionment if the legislature failed to act within a specified time: California, Illinois, Michigan, North Dakota, Oregon, South Dakota, and Texas. As well, seven states provided for court review of apportionment plans: Alaska, Arkansas, Hawaii, New York,

it has not been the tradition to redistrict at random, but to redistrict to the advantage of whoever was doing the redistricting. The early years of reapportionment took place at an especially bad time for Republicans, especially after the elections of 1964. In that year Republicans lost 101 seats in state senates and 426 seats in state houses of representatives.[59] The Congressional Quarterly concluded: "The result may be a built-in Democratic advantage . . . for years to come."[60] In the California elections of 1966, the Democrats retained majorities in both houses of the state legislature and in the state's United States congressional delegation even though they were outpolled by Republicans by substantial margins in all three elections.[61] This perhaps best demonstrates how reapportionment, combined with gerrymandering, took away in practice the equal representation it promised on paper to deliver.

While blacks no doubt gained overall from reapportionment in the South, they also suffered no less than other

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Oklahoma, Oregon, and Texas. Advisory Commission on Intergovernmental Relations, A Commission Report: Apportionment of State Legislatures (Washington, D.C.: Government Printing Office, 1962), pp. 21-22. For a more recent update of the states making constitutional amendments authorizing bipartisan commissions with tie-breakers to perform the function of state legislative apportionment, see also Chapter IV of this dissertation, n. 13.

[59] Congressional Quarterly, pp. 68-69 (1966).

[60] Congressional Quarterly, p. 4 (1966).

[61] See Totton J. Anderson and Eugene C. Lee, "The 1966 Election in California," 20 Western Political Quarterly 535 (1967).

local minorities that were submerged in multi-member districts,[62] as all minorities shared in the general efflorescence of discriminatory districting. In the states of Georgia, Virginia, and Tennessee, blacks saw their hopes of electing black representatives shattered in part by the gerrymanderer.[63] Unfortunately they appealed in vain to the United States Supreme Court and state courts, whose rule-making resources were not equal to dealing with such duties,[64] even though in most instances the gerrymandered districts had been created under the judicially sponsored pressure of reapportionment.

One of the most striking evidences of gerrymandering in the course of reapportionment was the profusion of grotesque districts which the map-makers of the 1960s left behind.[65] State legislators in Texas set up a district two hundred fifty miles long and one county wide for much of its

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[62]See Jo Desha Lucas, "Of Ducks and Drakes: Judicial Relief in Reapportionment Cases," 38 Notre Dame Lawyer at 409-10 (1963).

[63]Ibid., pp. 412-14. [64]Ibid., pp. 403, 411.

[65]For perhaps the most systematic and exhaustive account of gerrymandered and thus distorted districts, see Robert J. Sickels, "Dragons, Bacon Strips, and Dumbbells--Who's Afraid of Reapportionment?" 75 Yale Law Journal at 1300, 1303 (1966). Sickels noted: "In the great majority of states with congressional gerrymanders, unequal district size either has not affected the gerrymander or has made it less effective than it would have been had the districts been equal" (p. 1300). Indeed it has even been suggested that the "Elbridge Gerry Memorial Award for Creative Cartography" be initiated. See R. Dietsch, "The Remarkable Resurgence of Gerry's Gambit," Saturday Review, June 3, 1972, p. 42.

length for Congressman Olin E. Teague.[66] Colorado's legislators stretched the Fourth Congressional District four hundred miles diagonally across the state from the Nebraska border in the northeast to the southwestern tip of the state where it borders Utah, Arizona, and New Mexico.[67] In New York the 148th Assembly District was made to extend forty-three miles in length, taking a slice of Rochester, continuing through the towns of Greece, Parnea, and Hamlin, and then stretching twenty-four miles into Orleans County.[68] In addition, the 153rd District was drawn in two sections separated by three towns and two other districts.[69] A federal court comprised of three judges invalidated a New York congressional plan, describing the wild contortions of four Brooklyn districts as "bizarre."[70] The federal court in North Carolina invalidated a congressional apportionment plan whose districts deviated no more than 8.9 percent from average because of what the court referred to as the "tortuous lines" of districts drawn to protect incumbents.[71]

Anticipating profiting from reapportionment, cities

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[66]See New York Times, May 25, 1967, p. 3.

[67]See the Congressional Quarterly, p. 87.

[68]See Orans Petition, 45 Misc.2d 616, 652; 257 N.Y.S.2d 839, 873 (Supreme Court, 1965).

[69]Id. [70]See New York Times, May 11, 1967, p. 1.

[71]Congressional Quarterly, p. 57.

and urban minority groups found themselves instead cut into patches and tacked on to districts of different political makeup. For example, in Texas, Dallas-Fort Worth and San Antonio were divided into eight districts, four of which were tied to expanded rural districts.[72] Other cities such as Memphis;[73] Kansas City, Kansas;[74] Wichita;[75] Oklahoma City;[76] and Newark[77] were also dramatically gerrymandered. Another curiosity was Elizabeth, the county seat of Union County, New Jersey, which was detached and joined to unlikely Hudson County on the far side of Newark Bay.[78] Blacks in communities in both Boston and New York City were divided and the pieces distributed to districts with white majorities.[79] As well, blacks in urban communities in Georgia, Tennessee, and Virginia protested their dilution in specially created multi-member districts.[80] Complaints of submersion were leveled in multi-member districts or

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[72]Ibid. [73]Ibid. [74]Ibid., p. 89. [75]Ibid.

[76]26 Congressional Quarterly Weekly Report 22 (January 5, 1966).

[77]Jones v. Falcey, 48 N.J. 25, 222 A.2d 101 (1966).

[78]Id. [79]New York Times, March 29, 1967, p. 33.

[80]See Fortson v. Dorsey, 379 U.S. 433 (1965); Burnette v. Davis, 382 U.S. 42 (1965), aff'd per curiam; Mann v. Davis, 245 F.Supp. 241 (E.D. Va., 1965), and the Congressional Quarterly, p. 25. For an up-to-date account of the submersing or dilution of votes when apportioning, see John Kruger, "The Reapportionment Controversy--The Process of Dilution," 4 Memphis State University Law Review 565 (1974).

at-large elections in Hawaii,[81] Iowa,[82] New Mexico,[83] and Pennsylvania.[84] Party cartographers were never so busy as they have been since reapportionment.

Thus it cannot be expected that the gerrymandered and multi-member districts will become weakened with time and population changes in fulfilling its discriminatory function, for the districts must be redrawn every ten years according to "the fundamental principle of representative government in this country" which the high Court has described as "one of equal representation for equal numbers of people."[85] Under such a system equal districts can be expected to discriminate in favor of those holding power in the 1970s and 1980s and perhaps for as long as they hold power. Reapportionment appears to have brought with it more and better gerrymanders, and it can be expected to go on doing the same in the future as long as the district system which is conducive to gerrymandering is there to provide the motivation to keep discrimination up to date.

After gerrymandering, perhaps the next most

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[81] Burns v. Richardson, 384 U.S. 73 (1966).

[82] Congressional Quarterly, p. 25.

[83] See Gordon W. Hatheway, "Political Gerrymandering: The Law and Politics of Partisan Districting," 36 George Washington Law Review at 144, 148 (1967).

[84] Drew v. Scranton, 229 F.Supp. 310 (M.D. Pa., 1964), vacated and remanded, 379 U.S. 49 (1964).

[85] Reynolds v. Sims, 377 U.S. at 560-61 (1964).

prominent question raised and not satisfactorily answered by adherence to the "one-man, one-vote" principle is, To what extent should race, political identity or even economic level be considered when drawing district boundary lines? The case used most frequently and, undoubtedly, the first to be supportive of the rationale that race be considered as a factor in apportionment is a 1960 Alabama case, Gomillion v. Lightfoot.[86] The Supreme Court held that the attempted detachment of the black community from within the city boundaries of Tuskegee, Alabama, was in violation of the Fifteenth Amendment's guarantee of the franchise. The special significance of Gomillion in connection with the racial issue is in the justiciability question. The courts after Gomillion could assume that any claim of racial discrimination in the apportionment process was justiciable in that it acknowledged race as grounds for consideration.

The next Supreme Court decision to deal with the matter of race when drawing district boundary lines was Wright v. Rockefeller[87] in 1964. The charge was made that four congressional districts in Manhattan, New York, were arranged in such a way as to segregate black and Puerto Rican voters largely into one district, in violation of the Fifteenth Amendment and the equal protection clause of the Fourteenth Amendment. Though the Court dismissed the case stating that the plaintiffs' argument had not been proved,

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[86]364 U.S. 339 (1960). [87]376 U.S. 52 (1964).

its concluding majority statement implicitly accepted the plaintiffs' contention that a purposeful segregation of racial and ethnic groups in political districting was a violation of both the equal protection clause and the Fifteenth Amendment.

In a dramatic dissent in Wright, Justice William O. Douglas made a no doubt later-to-be-regretted sweeping statement that "government has no business designing electoral districts along racial or religious lines."[88] The following year in Mann v. Davis[89] the lower court was found to have relied heavily on the earlier Douglas dissent, concluding that the Constitution did not demand an alignment of political districts which assures the electoral success of any particular race.

Six years later, however, in 1971, in Whitcomb v. Chavis[90] black and poor voters living in the Indianapolis Township Ghetto area challenged the state multi-member legislative district (from which Marion County, Indiana, elected its representative to the state assembly) and contended that as black and poor voters they were not able, as an identifiable political interest group, to accomplish their own distinct legislative goals. Douglas maintained in this case in another dissent that the law had developed to the point that groups other than racial minorities were

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[88] Id. at 66. [89] 382 U.S. 42 (1965).

[90] 403 U.S. 124 (1971).

protected from electoral discrimination.[91] Justice Douglas's later statement in Whitcomb thus reversed his earlier dissent stated so strongly in Wright. The holding of the lower federal district court in Whitcomb, which was focused on poor and black voters, represented the high point for the view that any discernible interest group (blacks and the poor) in the community with common legislative goals was protected by the equal protection clause against discrimination in the drawing of district boundary lines. The Supreme Court, however, reversed the lower court finding and chose not to address the question of the law and its attitude to electoral discrimination, but instead considered only the matter of multi-member districts in a rather narrow sense.[92]

Whitcomb concluded by strongly hinting that proving a discriminatory effect is not adequate to meet the required burden of proof but, rather, what must be shown is intent to disadvantage or discriminate against some group on the part of the body performing the districting function. The high Court's decision reflected an interest in avoiding an "endless litigation" which it feared would occur if it should confirm the lower district court's holding. Undoubtedly, more guidance is needed from the high Court if the lower federal courts are to have direction and if racial and other socioeconomic demographic factors are to be taken into

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[91]Id. at 177. [92]Id. at 142-43.

account in redistricting a gerrymandered apportionment scheme.

Another unanswered question is, How does apportionment apply to local government? That is, in protecting the genuinely local nature of representation, how much and for what reason should variation from "one man, one vote" be permitted? A standard of strict mathematical equality for apportionment of congressional districts still prevails; however, the policy for state and local apportionment is not so absolutely demanding. Since the early 1970s, beginning with Mahan v. Howell[93] and moving through White v. Regester,[94] Gaffney v. Cummings,[95] Salyer Land Company v. Tulare Lake Basin Water Storage District,[96] and Abate v. Mundt,[97] all of which have been discussed earlier, have come a series of cases dealing with local units of government such as state house and senate seats, cities, towns, and special districts. Based upon the experience of the holdings of the Court in these cases, it seems that historic and traditional justifications for variations would be acceptable in situations where there is less than a 10-percent variation. Take, for example, the Abate decision which stands for the rationale of preserving the integrity of political subdivisions as a justification for deviance in

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[93]410 U.S. 315 (1973). [94]412 U.S. 755 (1973).

[95]412 U.S. 735 (1973). [96]410 U.S. 719 (1973).

[97]403 U.S. 186 (1971).

voting equality. After Abate, equal apportionment in local government becomes no longer a call to a "one-man, one-vote" standard but a concept that develops from balancing whatever relevant factors come into play against the "one-man, one-vote" principle. It appears that the earlier more egalitarian principle is under challenge as well as being eroded. Even in the case of Mahan, where the excess of deviation was beyond 10 percent, the Court termed the excess a relatively minor variation and in effect established the precedent that if state or local governments can show a rational basis for their districting scheme, at least a 17-percent variation will be upheld. The high Court has not specified, however, an upper limit beyond which even a rational justification will not be acceptable.

Perhaps the final unanswered question arising in connection with "one man, one vote" and related to the question of local government is that of multi-member districts. Stated simply, the question could be asked, Does the multi-member district, at whatever level, have a place in a completely representative system of government or does it submerge various identifiable minorities and thereby deny them equal protection of the laws under the Fourteenth Amendment?

Fortson v. Dorsey[98] and Burns v. Richardson,[99] decided in 1965 and 1966, held that multi-member districts

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[98]379 U.S. 433 (1965). [99]384 U.S. 73 (1966).

are not automatically or inherently unconstitutional under the Fourteenth Amendment and do not per se violate the "one-man, one-vote" test. However, they were considered to be unconstitutional when they operated so as to submerge or otherwise cancel out the effectiveness of the voting strength of minority groups. Thus, not since Burns has the high Court, after complete briefing and oral argument, addressed the question of alleged political gerrymandering by use of multi-member districts, although in 1967 it held in Kilgarlin v. Hill, [100] in a per curiam judgment without oral argument, that under certain particular circumstances of a given case, multi-member districts may be "invidiously discriminatory." No further elaboration was offered with regard to the constitutionality and limits of multi-member districts, thus signaling the Supreme Court to be in no hurry to consider the question. It appears that the position of the Court with regard to the constitutionality of multi-member districts may still be summed up best in the words of Justice Douglas: "I am not sure in my own mind how this problem should be resolved."[101]

What has been characterized as the "reapportionment revolution" and its ongoing development have proved to be an ideal forum in which to consider not only the nuances of judicial interpretation and resulting scholarly and professional criticism, but also a critical contribution in the

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[100] Kilgarlin v. Hill, 386 U.S. 122 (1967). [101] Id.

continuing process of perfecting representative democracy. Although it has not been the answer to all our governmental problems and frustrations, it has opened the way for an overdue adjustment of some inequitable minority representation. This is perhaps in large measure due to the fact that matrixes within which public policies are formed are complex and not always directly attributable to governmental form.

While our expectations of reapportionment as a cure-all have been overly enthusiastic, reapportionment has proved effective as a dynamic interface with the structure of our mixed nation-state political party system and as a positive and integrative force within and between the various levels of American government. If anything, our recent experiment and experience with reapportionment shows us that it alone is not enough. Indeed, it must be combined with a creative districting formula that goes beyond a restricted attention to population equality alone, in order that it might bring to bear at all levels of government--from the most local governing agencies to those at the state and even the national congressional level--the entire spectrum of interests and citizens to be found in the population. It continues to offer the hope of modifying unsatisfactory problem areas and at the same time reinforcing some of our most fundamental values and institutions. "One man, one vote" is really the symbol for the goal of greater fairness, equality, and simplicity in our political system.

Obviously these ideals have not been achieved. Even so, "one man, one vote" remains a worthy goal.

BIBLIOGRAPHY

I. Primary Sources

A. United States Supreme Court Decisions

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

Allen v. State Board of Education, 393 U.S. 544 (1969).

Archer v. Smith, 409 U.S. 808 (1972).

Avery v. Midland County, 390 U.S. 474 (1968).

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

Burnette v. Davis, 382 U.S. 42 (1965).

Burns v. Richardson, 384 U.S. 73 (1966).

Cipriano v. City of Mouma, 395 U.S. 701 (1964).

City of Virginia Beach v. Howell, 410 U.S. 315 (1973).

Colegrove v. Green, 328 U.S. 549 (1946).

Cook v. Fortson, 329 U.S. 675 (1946).

Cox v. Peters, 342 U.S. 936 (1952).

Duddleston v. Grills, 385 U.S. 455 (1967).

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

Franks v. Bowman Transportation Company, 424 U.S. 747 (1976).

Gaffney v. Cummings, 412 U.S. 735 (1973).

Gomillion v. Lightfoot, 364 U.S. 339 (1960).

Gordon v. Lance, 403 U.S. 1 (1971).

Gray v. Sanders, 376 U.S. 368 (1963).

Hadley v. Junior College, 397 U.S. 50 (1970).

Heinkel v. Preisler, 394 U.S. 526 (1969).

Howard v. Adams County Board of Supervisors, 407 U.S. 925 (1972).

Hunter v. Erickson, 393 U.S. 385 (1969).

Katzenbach v. Chavis, 403 U.S. 124 (1971).

Kilgarlin v. Hill, 386 U.S. 120 (1967).

Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

Kramer v. Union Free School District, 395 U.S. 621 (1969).

Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964).

Mahan v. Howell, 410 U.S. 315 (1973).

Mann v. Davis, 382 U.S. 42 (1965).

Nixon v. Herndon, 273 U.S. 536 (1927).

Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

Remmey v. Smith, 342 U.S. 916 (1952).

Reynolds v. Sims, 377 U.S. 533 (1969).

Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973).

South Carolina v. Katzenbach, 383 U.S. 334 (1966).

South v. Peters, 339 U.S. 276 (1950).

Swann v. Adams, 385 U.S. 440 (1967).

Turman v. Duckworth, 329 U.S. 675 (1946).

United Jewish Organizations of Williamsburgh, Inc., et al. v. Hugh L. Carey et al., 97 S.Ct. 996 (1977).

United States v. Montgomery Board of Education, 395 U.S. 225 (1969).

Weinberg v. Prichard, 410 U.S. 315 (1973).

Wells v. Rockefeller, 394 U.S. 542 (1969).

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

Whitcomb v. Chavis, 403 U.S. 124 (1971).

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

White v. Weiser, 412 U.S. 783 (1973).

Wood v. Broom, 287 U.S. 1 (1932).

B. Federal District and State Supreme Court Decisions

Avery v. Midland County, 406 S.W.2d 422 (Tex., 1966).

Baker v. Carr, 296 F.Supp. 341 (M.D. Tenn., 1962).

Baker v. Clement, 247 F.Supp. 889 (M.D. Tenn., 1965).

Bannister v. Davis, 263 F.Supp. 202 (E.D. La., 1966).

Bussie v. Governor of Louisiana, 333 F.Supp. 452 (E.D. La., 1971).

Cummings v. Meskill, 341 F.Supp. 139 (D.Conn., 1972).

Dinis v. Volpe, 264 F.Supp. 425 (D. Mass., 1967).

Drew v. Scranton, 229 F.Supp. 310 (M.D. Pa., 1964).

Dunn v. Oklahoma, 343 F.Supp. 320 (W.D., Okla., 1972).

Gilbert v. Sterrett, 509 F.2d 1382 (5th Cir., 1975).

Graves v. Barnes, 343 F.Supp. 704 (W.D. Tex., 1972).

Hadley v. Junior College District, 432 S.W.2d 328 (Mo., 1968).

Kelley v. Bumpers, 340 F.Supp. 568 (E.D. Ark., 1972).

Legislature v. Reinecke, 10 Cal.3d 396, 516 P.2d 6, 110 Cal.Rptr. 718 (1973).

Lisco v. Love, 219 F.Supp. 922 (D. Colo., 1963).

Mann v. Davis, 245 F.Supp. 241 (E.D. Va., 1965).

Paulson v. Meier, 246 F.Supp. 36 (D. N.D., 1965).

Prince v. Kramer, Civil No. 9668 (W.D. Wash., 1972).

Sims v. Baggett, 247 F.Supp. 96 (M.D. Ala., 1965).

Sims v. Frink, 208 F.Supp. 431 (M.D. Ala., 1962).

Sincock v. Gately, 262 F.Supp. 739 (D. Del., 1967).

Swann v. Adams, 258 F.Supp. 819 (S.D. Fla., 1965).

Taylor v. McKeithen, 499 F.Supp. 139 (D. Conn., 1972).

United Jewish Organizations v. Wilson, 510 F.2d 512 (2d Cir., 1975).

Whitcomb v. Chavis, 305 F.Supp. 1364 (S.D. Ind., 1969).

Wright v. Rockefeller, 211 F.Supp. 460 (S.D. N.Y., 1965).

C. Public Documents

Advisory Commission on Intergovernmental Relations. A Commission Report: Apportionment of State Legislatures. Washington, D.C.: Government Printing Office, 1962. Appendix A.

Arizona Annotated Statutes. As amended sections 16-1401-02 (1970); as amended sections 16-1401-02 (Supplement 1973).

California Constitution

Civil Rights Act of 1964

Civil Rights Act of 1965

Colorado Constitution

Connecticut Constitution

Hawaii Constitution

Illinois Constitution

Missouri Annotated Statutes. Section 128 (1967); as amended Missouri Annotated Statutes, section 128 (Supplement 1974).

New Jersey Constitution

New Mexico Constitution

New York Law. Sections 110-11 (McKinney 1968); as amended New York State Law, sections 110-11 (McKinney Supplement 1973-74).

Pennsylvania Constitution

Rhode Island Constitution

United States Constitution

United States Library of Congress. "Recent Supreme Court Decisions on Apportionment: Their Political Impact," Legislative Reference Service, 1964.

Voting Rights Act of 1970

Washington Constitution

D. Papers and Reports

Congressional Quarterly Background Report, Representation and Reapportionment. Washington, D.C.: Congressional Quarterly, 1966.

Engstrom, Richard L. "The Supreme Court and Equi-Populous Gerrymandering." A paper presented at the 1975 Annual Meeting of the American Political Science Association, San Francisco, California, September 2-5, 1975.

Hough, Lawrence E. "Representation Theory: An Appraisal." Unpublished Ph.D. dissertation, Oklahoma University, 1973.

Sokolow, Alvin D. "After Reapportionment: Numbers or Policies?" Unpublished paper, 1966, on file with Professor Ward Elliott, Claremont Men's College, Claremont, California.

E. Periodicals

Congressional Quarterly Weekly Report, 1962-1977.

Los Angeles Times, 1977.

National Civic Review, 1962-1977.

New York Times Magazine, 1958.

New York Times, 1969-1977.

Saturday Review, 1972.

Tyler, G., and Wells, D. "The New Gerrymander Threat," AFL-CIO AM Federationist, February 1971.

F. Miscellaneous

One Man--One Vote. New York: Twentieth Century Fund, 1962.

II. Secondary Works

A. Law Review Articles, Notes and Comments

Askin, Charles A. "The Burger Court and Reapportionment: From One Person, One Vote to One Corporation, Many Votes," 62 Georgia Law Journal 1001 (1974), Comment.

Belsky, Martin H. "Reapportionment in the 1970's--A Pennsylvania Illustration," 47 Temple Law Quarterly 3 (1973).

Berman, Robert S. "Constitutional Law--Due Process--Non-retrogressive Reapportionment Plan Upheld," 60 Marquette Law Review 173 (1976).

Casper, Gerhard. "Apportionment and the Right to Vote: Standards of Judicial Scrutiny," The Supreme Court Review (1973), p. 1.

Clinton, Robert N. "Further Explorations in the Political Thicket: The Gerrymander and the Constitution," 59 Iowa Law Review 1 (1973).

"Developments in the Law--Equal Protection," 82 Harvard Law Review 1065 (1969), Note.

Dixon, Robert G. "The Warren Court Crusade for the Holy Grail of 'One-Man, One-Vote," The Supreme Court Review (1969), p. 231.

Edwards, James M. "The Gerrymander and 'One Man, One Vote," 46 New York University Law Review 879 (1971).

Eimers, Robert F. "Legislative Apportionment: The Contents of Pandora's Box and Beyond," Hastings Constitutional Law Quarterly (1974), p. 289.

Eisen, Robert A. "Constitutional Law: State Apportionment--A Still Emerging Standard for Equal Protection," 25 University of Florida Law Review 829 (1973).

Elliott, Ward. "Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment," 37 The University of Chicago Law Review 474 (1970).

Engstrom, Richard L. "The Supreme Court Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation," 76 Arizona State Law Journal 277 (1976).

Flaherty, James T., and Sheard, Kevin. "DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas," 12 Duquesne Law Review 745 (1974).

Garton, William A. "One Person, One Vote in Special District Elections: Two Ideas and an Illustration," 20 South Dakota Law Review 245 (1975).

Gordon, J. Houston, and Woodward, James David. "Congressional Reapportionment: The Pandora's Box of Judicial Intervention in Politics and How to Put the Lid Back On," 6 Memphis State University Law Review 403 (1976).

Gottlieb, Stephen E. "Identifying Gerrymanders," 15 Saint Louis University Law Journal 540 (1971).

Halpin, Stanley A., Jr., and Engstrom, Richard L. "Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations under the Voting Rights Act," 22 Journal of Public Law 37 (1973).

Hardy, LeRoy C. "Congressional Redistricting in California, 1965-1967: The Quilting Bee and Crazy Quilts," 10 San Diego Law Review 757 (1973).

Hatheway, Gordon W. "Political Gerrymandering: The Law and Politics of Partisan Districting," 36 George Washington Law Review 144 (1967).

Hubbard, Stephen L. "Constitutional Law--Reapportionment--Potential Dilution of Minority Voting Strength Not Within Area of Constitutional Review," 7 St. Mary's Law Journal 447 (1975).

Israel, Jerold. "Nonpopulation Factors Relevant to an Acceptable Standard of Apportionment," 38 Notre Dame Lawyer 449 (1963).

Kruger, John. "The Reapportionment Controversy--The Process of Dilution," 4 Memphis State University Law Review 565 (1974).

Kurland, Philip B. "Egalitarianism and the Warren Court," 68 Michigan Law Review 629 (1970).

_____. "Apportionment-Districting Method: Key to Achieving Fair and Effective Representation," The Supreme Court Review 244 (1969).

Laughlin, Charles V. "Proportional Representation: It Can Cure Our Apportionment Ills," 49 A.B.A.J. 1065 (1963).

Leggett, Isiah. "Reapportionment: The Delicate Balance," 18 Howard Law Journal 184 (1973).

Lewis, Anthony. "Legislative Apportionment and the Federal Courts," 71 Harvard Law Review 1057 (1958).

Lucas, Jo Desha. "Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot," The Supreme Court Review 194 (1961).

_____. "Of Ducks and Drakes: Judicial Relief in Reapportionment Cases," 38 Notre Dame Lawyer 401 (1963).

Martin, David L. "'One Person, One Vote' and California's Water Districts," 8 Natural Resources Law Review 9 (1975).

Martin, Philip L. "Local Reapportionment: The Exemption of Water Management Districts," 14 Santa Clara Law Review 31 (1973).

_____. "The Supreme Court and State Legislative Reapportionment: The Retreat from Absolutism," 9 Valparaiso University Law Review 31 (1974).

McEvoy, Christine M. "Constitutional Law--Reapportionment--Compensatory Racial Reapportionment but No Right to Community Unity--United Jewish Organizations v. Wilson, 510 F.2d 512 (2d Circuit 1975)," 9 Suffolk University Law Review 1496 (1975).

McKeever, Edward D. "A Flexible Standard for State Reapportionment Cases," 42 Fordham Law Review 641 (1974).

Morrill, Richard L. "Lampadephoria or Criteria for Redistricting," 48 The University of Washington Law Review 847 (1973).

Myers, Robert M. "Public Officials Represent Acres, Not People," 7 Loyola of Los Angeles Law Review 227 (1974).

"Proportional Representation by Race: The Constitutionality of Benign Racial Redistricting," 74 Michigan Law Review 820 (1976).

Quinlan, Patrick. "Legislative Reapportionment: A Policy Emerges," 25 Baylor Law Review 660 (1973).

Scudder, Charles S. K. "Councils of Governments Mark Their Initial Escape from Equal Apportionment: Educational Instruction, Inc. v. Moore, 503 F.2d 1187 (2d Cir. 1974), cert. denied, 419 U.S. 1109 (1975)," 7 Connecticut Law Review 529 (1975).

Sickels, Robert J. "Dragons, Bacon Strips, and Dumbbells--Who's Afraid of Reapportionment?" 75 Yale Law Journal 1300 (1966).

Silbaugh, Timothy W. "Apportionment Problems in Local Government," 48 Notre Dame Lawyer 671 (1974).

Sloan, Virginia E. "Judicial Intervention in Political Party Disputes: The Political Thicket Reconsidered," 22 U.C.L.A. Law Review 622 (1975).

Stern, Robert S. "Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence," 41 University of Chicago Law Review 398 (1974).

Wilkinson, J. Harvie, III. "The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality," 68 Virginia Law Review 629 (1970).

Young, Richard. "Compensatory Racial Reapportionment," 25 Stanford Law Review 84 (1972).

B. Journal Articles, Notes, Reviews and Comments

Anderson, Totton J., and Lee, Eugene C. "The 1966 Election in California," 20 Western Political Quarterly 535 (1967).

Dye, Thomas. "Malapportionment and Public Policy in the States," 27 Journal of Politics 586 (1965).

Eisenberg, Ralph. "Book Reviews and Notes," 63 American Political Science Review 567 (1969).

Flinn, Thomas A. "Book Reviews and Notes," 67 American Political Science Review 1380 (1973).

Hamilton, Howard D. "Legislative Constituencies: Single Member Districts, Multi-Member Districts, and Floterial Districts," 20 Western Political Quarterly 321 (1967).

Hofferbert, Richard. "The Relation between Policy and Some Structural Environmental Variables in the States," 60 American Political Science Review 73 (1966).

Jacob, Herbert. "The Consequences of Malapportionment: A Note of Caution," 43 Social Forces 256 (1964).

Karning, Albert K. "Black Representation on City Councils: The Impact of District Elections and Socio-Economic Factors," 12 Urban Affairs Quarterly 223 (1976).

Klain, Maurice. "A New Look at the Constituencies: The Need for a Recount and a Reappraisal," 49 American Political Science Review 1105 (1955).

Nagel, Stuart S. "Computers & the Law & Politics of Redistricting," Polity 77 (1972).

Prewitt, Kenneth, and Eulau, Heinz. "Political Matrix and Political Representation: Prolegomenon to a New Departure from an Old Problem," 63 American Political Science Review 427 (1969).

Reock, Ernest, Jr. "A Note: Measuring Compactness as a Requirement of Legislative Apportionment," 5 Midwest Journal of Political Science 71 (1970).

Schubert, Glendon, and Press, Charles. "Measuring Malapportionment," 58 American Political Science Review 302 (1964).

Silva, Ruth C. "Compared Values of the Single and Multi-Member Legislative District," 17 Western Political Quarterly 504 (1969).

Tussman, Joseph, and ten Brock, Jacobus. "The Equal Protection of the Laws," 341 California Law Review 346 (1949).

C. Books

Abraham, Henry. Justices and Presidents: A Political History of Appointments to the Supreme Court. New York: Oxford Press, 1974.

Auerbach, Carl A. "Commentary" on Alexander M. Bickel, "The Supreme Court and Reapportionment," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Baker, Gordon E. "Gerrymandering: Privileged Sanctuary or Next Judicial Target," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

_____. Rural Versus Urban Political Power. New York: Random House, 1955.

Ball, Howard. The Warren Court's Conceptions of Democracy: An Evaluation of the Supreme Court's Apportionment Opinions. Cranbury, New Jersey: Associated University Presses, 1971.

Bickel, Alexander. "The Supreme Court and Reapportionment," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Blair, George S. American Legislatures: Structure and Process. New York: Harper & Row, 1967.

Braybrooke, David. "Commentary" on Douglas W. Rae, "Reapportionment and Political Democracy," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Bushnell, Eleanore, ed. Impact of Reapportionment on the Thirteen Western States. Salt Lake City: University of Utah Press, 1970.

Cortner, Richard C. The Apportionment Cases. Knoxville: University of Tennessee Press, 1970.

Cummings, Milton C., Jr. "Reapportionment in the 1970's: Its Effect on Congress," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Dixon, Robert G., Jr. Democratic Representation: Reapportionment in Law and Politics. New York: Oxford Press, 1968.

_____. "The Court, the People, and 'One Man, One Vote,'" in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Dolce, Philip C., and Skau, George H., eds. Power and the Presidency. New York: Charles Scribner's Sons, 1976.

Freund, Paul A. Foreword, Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Goldwin, Robert A. Representation and Misrepresentation. Chicago: Rand McNally, 1968.

Graham, Gene. One Man, One Vote: Baker v. Carr and the American Levellers. Boston: Atlantic Monthly Press, 1972.

Hacker, Andrew. Congressional Districting: The Issue of Equal Representation, rev. ed. Washington, D.C.: Brookings Institution, 1964.

Hare, Thomas. Election of Representatives. N.p.: 1865.

Jewell, Malcolm E. "Commentary" on Robert G. Dixon, Jr., "The Court, the People, and 'One Man, One Vote,'" in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

_____. Metropolitan Representation: State Legislative Redistricting in Urban Counties. New York: National Municipal League, 1969.

Jones, Charles O. "Commentary" on Milton C. Cummings, Jr., "Reapportionment in the 1970's: Its Effect on Congress," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Kolmier, Louis. This Honorable Court. New York: Charles Scribner's Sons, 1972.

Luce, Robert. Legislative Principles, rev. ed. Cambridge, Massachusetts: Riverside Press, 1971.

Mayhew, David R. "Congressional Representation: Theory and Practice in Drawing the Districts," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

McKay, Robert B. Reapportionment: The Law and Politics of Equal Representation. New York: Simon & Schuster, 1970.

Murphy, Russell D. "Commentary" on William E. Bicker, "The Effects of Malapportionment in the States--A Mistrial," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Ornstein, Norman J. Congress in Change: Evolution and Reform. New York: Praeger Publishers, 1975.

O'Rourke, Terry B. Reapportionment. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1972.

Pennock, Roland J., and Chapman, J. Political Representation: An Overview in Representation. New York: Atherton Press, 1968.

Pitkin, H. The Concept of Representation. Berkeley: University of California Press, 1967.

Plano, Jack C., and Greenberg, Milton. The American Political Dictionary, 4th ed. Hinsdale, Illinois: Dryden Press, 1976.

Polsby, Nelson W., ed. Reapportionment in the 1970's. Berkeley: University of California Press, 1971.

Press, Charles. "Commentary" on Gordon E. Baker, "Gerrymandering: Privileged Sanctuary or Next Judicial Target?" in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Rae, Douglas W. "Reapportionment and Political Democracy," in Reapportionment in the 1970's, ed. Nelson W. Polsby. Berkeley: University of California Press, 1971.

Rieselbach, LeRoy N. Congressional Reform in the Seventies. Morristown, New Jersey: General Learning Press, 1977.

Scammon, Richard M., and Wattenberg, Ben J. The Real Majority: An Extraordinary Examination of the American Electorate. New York: Coward, McCann & Geoghegan, 1971.

Simon, James. In His Own Image: The Supreme Court in Richard Nixon's America. New York: David McKay, 1973.

Wasby, Stephen L. Continuity and Change: From the Warren Court to the Burger Court. Pacific Palisades, California: Goodyear Publishing Co., 1976.

Wicker, Tom. JFK and LBJ: The Influence of Personality upon Politics. Baltimore: Penguin Books, 1969.