LEGISLATIVE APPORTIONMENT: THE CONTENTS OF PANDORA'S BOX AND BEYOND

*By Robert F. Eimers**

Introduction

Two decisions of the United States Supreme Court in the 1960's, *Baker v. Carr*[1] and *Reynolds v. Sims*,[2] announced the entrance of the federal courts into an area which had theretofore been considered wholly left to both the various states and other branches of government—apportionment of state legislatures, congressional districts, and local governing bodies. The decade saw for the first time the federal courts taking jurisdiction of apportionment cases and announcing the principle of "one man, one vote"[3] for the apportionment of these bodies. What had been previously considered a "political"[4] question and thus left for other branches of government to decide came under the watchful eyes of the federal judiciary. The federal courts in effect opened Pandora's Box and entered what Justice Frankfurter had described as the "political thicket."[5]

The outcome of this was that both houses of state legislatures,[6] congressional districts,[7] and local governing bodies[8] were ordered apportioned according to population.

The Supreme Court, however, has begun to allow a divergence from this strict population standard in regard to the apportionment of

---

* A.B., 1971, University of California, Berkeley; J.D., 1974, University of California, Hastings College of the Law.

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

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

3. *Id.* at 560-61. The Court held that voting strength in legislative bodies must be apportioned according to population.

4. For the purposes of this note, the term "political" will refer to those areas and problems of the law in which decisions and solutions are committed to branches of government other than the court system. *See generally* R. VACHON, JUSTICIABILITY AND THE NATURE OF JUDICIAL OBLIGATION (1962).

5. Colegrove v. Green, 328 U.S. 549, 556 (1946).

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

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

8. Avery v. Midland County, 390 U.S. 474 (1968).

local[9] and state legislatures,[10] but still rigidly adheres to this standard for congressional districts.[11] 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. This note will consider the current situation, with forecasts of the directions the Court might take.

The Political Thicket

Historically the federal courts 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.[12] 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.[13] Generally the duty of reapportionment is delegated to the legislature, although in a few states another officer, such as the governor, is given the task.[14]

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 their populations would command. Certain areas of a state often came to be vastly overrepresented.[15] 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 a positive remedy.[16]

---

9. Abate v. Mundt, 403 U.S. 182 (1971).

10. Mahan v. Howell, 410 U.S. 315 (1973).

11. White v. Weiser, 412 U.S. 783 (1973).

12. Colegrove v. Green, 328 U.S. 549 (1946). *See also* Wood v. Broom, 287 U.S. 1 (1932).

13. *See, e.g.*, CAL. CONST. art. IV, § 6, and N.Y. CONST. art. III, §§ 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 (1962), Appendix A.

14. *E.g.*, the Hawaiian Constitution commits the task of reapportionment to the Executive. HAWAII CONST. art. III, § 4.

15. Douglas, J., 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).

16. R. CORTNER, THE APPORTIONMENT CASES 5-8 (1970) [hereinafter cited as CORTNER].

Colegrove v. Green[17] was a landmark reapportionment case. It involved the apportionment of congressional districts in Illinois, which at that time (1946) had both the largest and smallest congressional districts in regard to population in the whole country.[18] A seven man Court refused to involve the federal courts in the issue and affirmed the decision of the lower court.[19] 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 "[c]ourts 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."[20] 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 the courts should not enter so delicate an area unless clearly compelled to do so.[21] 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.[22]

Although there was no majority opinion in *Colegrove v. Green*,[23] a series of *per curiam* dismissals of reapportionment cases followed.[24]

17. 328 U.S. 549 (1946).

18. CORTNER, *supra* note 16, at 15.

19. 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. Broom, 287 U.S. 1 (1932).

20. 328 U.S. at 556.

21. *Id.* at 565.

22. *Id.* at 566-74. While the Court refused to 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. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1927) which held the denial of the right to vote in a primary election to a black citizen to be a denial of the equal protection clause. *Cf.* Gomillion v. Lightfoot, 364 U.S. 339 (1960), which held that the gerrymandering of the boundaries of the City of Tuskagee, Alabama, with the result that most of the black citizens in the area were excluded from voting in municipal elections, was a denial of equal protection and invidious discrimination. The latter case suggests that possibly any voter's equal protection right might be violated by gerrymandering, a common process used in apportionment. The Court has yet to squarely confront this issue, although a few cases suggest that the question may ultimately be considered. *See* WMCA, Inc. v. Lomenzo, 382 U.S. 4 (1965) (Harlan, J., concurring). *See also* G. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?* in REAPPORTIONMENT IN THE 1970s (N. Polsby ed. 1971).

23. 328 U.S. 549 (1946).

24. 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).

In *South v. Peters*,[25] involving a challenge to the county unit system of primary elections in Georgia,[26] 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 electoral strength.[27] The dissent emphasized the "invidious discrimination" aspect[28] of the action of the state of Georgia.[29]

Thus 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. Justice Frankfurter had stated that both the legislatures of the several states and Congress possesssed ample powers to deal with the situation.[30] It was apparently felt that, if the voters began to press the various legislatures or Congress, reform would be forthcoming. If this were the hope of the Court, it was not to be realized.

Pandora's Box Opened

De Tocqueville once stated that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[31] Legislative apportionment historically had been considered a "political"[32] question; that is, the constitutions of the various states (and the federal Constitution) gave the power of apportionment to either the executive or legislative branches of government and precluded effective review by the courts. Citizens attempted to obtain a judicial remedy for malapportionment, but were rebuffed.

A Break in the Dike

Tennessee was a state in which no reapportionment had occurred since 1901. Because of urbanization, which brought about population shifts, the rural areas of the state eventually held political power, and were not going to relinquish it willingly. A voters' suit was instituted in the Middle District of Tennessee in 1959 under the Civil Rights

25. 339 U.S. 276 (1950).

26. The county unit system allotted six unit votes to the eight most populous Georgia counties, and two each to most of the other counties. Votes in the most populous county allegedly had ten per cent of the voting impact of those in other counties. *Id.* at 277.

27. *Id.* at 276-77.

28. *Id.* at 277-81.

29. 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).

30. Colegrove v. Green, 328 U.S. 549, 556 (1946).

31. I A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 209 (Knoph Vintage Books, 1954).

32. See note 4 *supra*.

Act[33] to redistrict the legislature. A three judge court relying on *Colegrove v. Green*[34] dismissed the suit both for want of jurisdiction and because no claim had been stated upon which relief could be granted.[35] A direct appeal was taken to the Supreme Court,[36] 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*.[37] Instead the Court was persuaded to cast aside previous rulings.

In *Baker v. Carr*,[38] the majority of the Court reversed the decision of the district court, holding that the petitioner's complaint stated a cause of action, finding 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 "[t]he mere fact that the suit seeks protection of a political right does not mean it presents a political question."[39] 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.[40] The legislature, however, had failed to reapportion for over fifty years. Justice Douglas, in a concurring opinion, noted the vast differences in representation among the various counties in Tennessee which had occurred as a result of non-reapportionment.[41] *Baker v. Carr*[42] was a narrow decision and merely 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.[43]

The Tennessee legislature, despite enormous pressure from various interest groups in the state, had failed to reapportion.[44] On the practical side the Court was faced with a situation for which really no solution other than a judicial one existed. The chronicle of attempts to force the Tennessee legislature to reapportion was long and without result. In essence, the situation was "dumped into the lap of the court". Justice Clark, in a concurring opinion, stated that the

33. 42 U.S.C. §§ 1983, 1988 (1970).
34. 328 U.S. 549 (1946).
35. Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959).
36. 28 U.S.C. § 1253 (1948).
37. 328 U.S. 549 (1946).
38. 369 U.S. 186 (1962).
39. *Id.* at 209.
40. TENN. CONST. art. II, §§ 3-5.
41. See note 15 *supra*.
42. 369 U.S. 186 (1962).
43. *Id.* at 237.
44. *See generally* G. GRAHAM, ONE MAN, ONE VOTE: BAKER V. CARR AND THE AMERICAN LEVELLERS (1972) and CORTNER, *supra* note 16.

apportionment situation in Tennessee was a "crazy quilt without rational basis."[45]

An equitable remedy appeared to be the only solution to the problem of malapportionment. For many decades the apportionment question was labeled "political,"[46] which precluded intervention by the judiciary. Eventually the pressure for correction became so great that the judiciary felt pressed to act to relieve the inequitable situation. The question of reapportionment suddenly became a problem for the judiciary, thus in effect removing it from the "political" sphere. Indeed De Tocqueville's remarks proved to be true; a political problem became a judicial one.

After the decision of *Baker v. Carr*,[47] the 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.[48] The legislative districts of the state were reapportioned. The lower court, although not completely satisfied with the resulting plan, accepted it.[49]

One Man, One Vote

Two years later the United States Supreme Court further ventured into the depths of the political thicket. In *Reynolds v. Sims*,[50] together with five companion cases,[51] and others,[52] the Court an-

45. 369 U.S. 186, 254 (1962). Frankfurter, J., dissented, including a long treatise on the historical evolution 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 very little on the political doctrine issue. *Id.* at 301-24.

46. See note 4 *supra*.

47. 369 U.S. 186 (1962).

48. CORTNER, *supra* note 16, at 151-55.

49. Baker v. Carr, 296 F. Supp. 341 (M.D. Tenn. 1962). For a summary 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. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 275-458 (1965).

50. 377 U.S. 533 (1964).

51. 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. Lomenzo, 377 U.S. 633 (1964) (New York).

52. 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); Williams v. Moss, 378 U.S. 558 (1964) (Oklahoma); Nolan v. Rhodes, 378 U.S. 556 (1964) (Ohio); Meyers v. Thigpen, 378 U.S. 554 (1964) (Washington); Swann v. Adams, 378 U.S. 553 (1964) (Florida).

nounced a broad policy decision that both houses of a bicameral state legislature[53] must be apportioned substantially a population basis.[54] 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."[55]

Previously at least one house of some state legislatures had been apportioned on an other than population basis.[56] Typical of this was the assignment of one legislator per county for the upper house.[57] A popular 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.[58] It was reasoned, by 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 "[p]olitical subdivisions . . . counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as

53. Forty-nine of the fifty states have a two house (bicameral) legislature. Nebraska has a one house (unicameral) legislature.

54. A voters' suit under the Civil Rights Act, *supra* note 33, had been brought in the Middle District of Alabama shortly before the decision of *Baker v. Carr*. After 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).

55. 377 U.S. at 568.

56. Population was the basis for apportioning both houses of the legislature in Colorado, Indiana, Massachusetts, Minnesota, North Dakota, South Dakota, Virginia, Washington, and Wisconsin, as well as the one house legislature in Nebraska. In addition, population was the basis for apportioning the seats of the lower houses of the legislatures of the states of California, Illinois, and Montana. The upper houses in Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Tennessee, and Utah were apportioned according to population. Population with weighted ratios was used to apportion the upper house of the legislature of Oregon, and the lower houses of the legislatures of Alaska, Hawaii, Michigan, New Hampshire, Oklahoma, and Oregon. Population and area were considered in the apportionment of the lower house of the Connecticut legislature, and both the California and Florida upper houses. An assignment of a representative to an established unit (*e.g.* county) was used to apportion the lower house of Vermont, as well as the upper houses of Arizona, Idaho, Montana, Nevada, New Jersey, New Mexico, and South Carolina. Fixed constitutional apportionment existed in both houses of the legislature of Delaware, as well as in the upper houses of Arkansas, Michigan, and Hawaii. Finally, the senate districts of New Hampshire were apportioned on the basis of direct taxes paid. G. BLAIR, AMERICAN LEGISLATURES: STRUCTURE AND PROCESS 80-83 (1967) [hereinafter cited as BLAIR].

57. *E.g.*, New Mexico. N.M. CONST. art. IV, § 3.

58. The United States is a union of sovereign states. U.S. CONST. art. IV, §§ 3-4, amend. X. Counties, however, are mere creatures of the state, authorized by the respective state constitutions. *See, e.g.*, CAL. CONST. art. XI, § 1.

subordinate governmental instrumentalities created by the State."[59] 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."[60]

Another decision in the 1964 Term of the Court, *Lucas v. Forty-fourth General Assembly*,[61] affirmed the ruling of *Reynolds* that both houses of a state legislature must be apportioned according to population. 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.[62] The Supreme Court disagreed and stated that the plan did not meet the population test of *Reynolds*. Chief Justice Warren stated:

> 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*.[63]

Trail Blazing Throught the Political Thicket

In the same term, the Supreme Court extended the one man, one vote rule to congressional apportionment. In a case from Georgia, *Wesberry v. Sanders*,[64] with Justice Black writing for the majority, the Court stated that under the Constitution "the command of Art. 1 § 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

59. 377 U.S. at 575. *See also* BLAIR, *supra* note 56, at 92-4; McKay, *The Federal Analogy and State Apportionment Standards*, 18 NOTRE DAME LAW. 487 (1963).

60. 377 U.S. at 568.

61. 377 U.S. 713 (1964).

62. Lisco v. Love, 219 F. Supp. 922 (D. Colo. 1963).

63. 377 U.S. at 737.

64. 376 U.S. 1 (1964). Between 1872 and 1929, Congress required that members of the House of Representatives be elected from districts as nearly equal in regard to population as possible. Act of Feb. 2, 1872, ch. 11 § 2, 17 Stat. 28. This was abandoned in 1929. Act of Jun. 18, 1929, ch. 28 § 22(a)(3), 46 Stat. 26. In 1932 the Court in Wood v. Broom, 287 U.S., 1 (1932), dismissed a suit involving the redistricting of congressional districts. Colegrove v. Green, 328 U.S. 549 (1946), also involved congressional districts and the Court disposed of it in a like manner.

election is to be worth as much as another's."[65] In the 1969 case of *Kirkpatrick v. Priesler*,[66] together with a companion decision,[67] the Court stated 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*.[68] In *Wells v. Rockefeller*,[69] decided on the same day, the majority of the Court held that congressional districts must be divided as equally as possible, using the whole state as the starting point.[70] In 1973 these rulings were again affirmed. The Court voided a congressional apportionment plan from Texas in *White v. Weiser*[71] because the districts were not mathematically as equal as reasonably possible in regard to population.[72]

One Man, One Vote at the Local Level

In 1968, the Court in effect completed the implementation of the "one man, one vote" principle in *Avery v. Midland County*.[73] 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."[74] The Court viewed with disfavor the Supreme Court of Texas' holding 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.[75]

In 1970, this ruling was refined in *Hadley v. Junior College Dist.*,[76] which involved apportionment of seats for the local junior college school board of Kansas City, Missouri. The majority of the Court, Justice Black writing, held that the popular election of persons to perform public functions requires proportional districting under the

65. 376 U.S. at 7-8.
66. 394 U.S. 526 (1969).
67. Heinkel v. Preisler, 394 U.S. 526(1969).
68. 394 U.S. at 530-31.
69. 394 U.S. 542 (1969).
70. Brennan, J., writing for the majority, stated that "[t]he 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.
71. 412 U.S. 783 (1973).
72. *Id.* at 790.
73. 390 U.S. 474 (1968).
74. *Id.* at 485.
75. Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966).
76. 397 U.S. 50 (1970).

authority of *Reynolds*.[77] The Missouri Supreme Court had dismissed the case, stating that the "one man, one vote" principle did not apply.[78] 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 so as to allow the decision of *Avery v. Midland County*[79] to justify the ruling in this case.[80]

Chief Justice Warren stated upon his retirement from the Supreme Court in 1969 that he considered the apportionment rulings to be the major decisions of his era.[81] Previously in many states political power had resided with a minority. Now it had been returned to the "grass roots" level. The Court in essence was faced with the problem of returning the control of the legislatures to the general population. The apportionment decisions established the principle that the federal courts can exercise jurisdiction in malapportionment cases.[82] Consequently if a legislature fails to reapportion according to constitutional directives,[83] voters in that state may invoke judicial machinery to effect reapportionment. Therefore the legislatures have been forced to reapportion as mandated, as failure to do so may result in the courts performing the task.[84] The transformation of this political[85] question a judicial one certainly ranks as one of the great achievements of the Warren Court.

Ventures Into the Heart of the Political Thicket

Substantial Population

The majority opinion in *Reynolds* also stated that criteria other than population might be taken into account in the apportionment

77. *Id.* at 52.

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

79. 390 U.S. 474 (1968).

80. 397 U.S. at 53-4. *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 Dist., 395 U.S. 621 (1969). *Cf.* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973), in which the Court held that a water district, which exists for the purpose of acquiring and distributing water for farming, need not grant the franchise to all that resided in its boundaries. The Court distinguished this case from the holding of Hadley v. Junior College Dist., 397 U.S. 50 (1970), by stating that even though the district did possess some limited governmental powers, it possessed relatively limited authority and provided none of the general public services attributed to a governing body. 410 U.S. at 726-29.

81. N.Y. Times, June 27, 1969, at 17, col. 6.

82. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).

83. See note 13 *supra.*

84. *Cf.* Legislature v. Reinecke, 10 Cal. 3d 396, 516 P.2d 6, 110 Cal. Rptr. 718 (1973). The California state legislature failed to reapportion according to the constitutional mandates. CAL. CONST. art IV, § 6. The California Supreme Court eventually appointed a panel of special masters who reapportioned the legislature. *See also*

plan, provided population remained the prime criterion. Chief Justice Warren noted that

> [s]omewhat more flexibility may . . . be constitutionally permissible with respect to state legislative 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.[86]

The chief justice, however, did not define 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.

A minority of the Court in *Reynolds* felt that some other basis than population should be considered in the apportionment of one house of a state legislature.[87] Justice Clark stated 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.[88]

Unfortunately, Justice Clark did not elaborate what these rational criteria might be.[89]

The first major state apportionment case[90] to come before the Supreme Court after the 1964 Term was *Swann v. Adams*.[91] The Florida legislature had adopted an apportionment plan, supposedly to comply with *Reynolds*, which provided for a maximum population var-

---

Lerner, *The Role of the State Judiciary in Redistricting and Reapportionment*, 18 N.Y.U. INTRA. L. REV. 79 (1963).

85. See note 4 *supra*.

86. 377 U.S. 533, 578-79 (1964).

87. *Id.* at 587-88 (Clark, J., concurring), and *id.* at 588-89 (Stewart, J., concurring).

88. *Id.* at 588 (concurring opinion).

89. Harlan, J., dissented, stating that he felt that reapportionment is not within the scope of judicial review and that the ruling of the majority of the Court failed to take into account such factors 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 representatives 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.

90. The case of Burns v. Richardson, 384 U.S. 73 (1966), from Hawaii, held that the population test of Reynolds v. Sims, 377 U.S. 533 (1964) applied to the redistricting of a state legislature. In addition there were three *per curiam* affirmances of lower court apportionment decisions on state legislatures. Harrison v. Schaefer, 383 U.S. 269 (1966) (Wyoming); Burnette v. Davis, 382 U.S. 42 (1965) (Virginia); Forty-fourth General Assembly v. Lucas, 379 U.S. 693 (1965) (Colorado).

91. 385 U.S. 440 (1967).

iance of 25.65 per cent and 33.55 per cent in the upper and lower houses of the legislature, respectively. The 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.[92] Justice White, writing for the majority of the Court, stated:

> 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 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.[93]

He further stated that "[*d*]*e minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house district can hardly be deemed *de minimis* . . . ."[94] The case squarely placed the burden of proof on the states to articulate acceptable reasons for any deviations from the population standard which might be allowed under the authority of *Reynolds*.

In *Kilgarlin v. Hill*,[95] decided in the same term, the Court in a *per curiam* opinion stated that a deviation of 26.48 per cent 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*.[96]

Relaxed One Man, One Vote Rule

Abate v. Mundt[97] saw the Court begin to deviate from the "one man, one vote" principle of *Reynolds*. The Court allowed an 11.9 per cent deviation 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 apparently 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, explicitly state this, and tied the decision narrowly to the facts of the case.[98]

92. Swann v. Adams, 258 F. Supp. 819 (S.D. Fla. 1965).
93. 385 U.S. at 445.
94. *Id.* at 444.
95. 386 U.S. 120 (1967).
96. *Id.* at 122.
97. 403 U.S. 182 (1971).
98. *Id.* at 187.

Abate v. Mundt[99] was decided only six months after *Hadley v. Junior College Dist.*,[100] in which no deviation from the population standard in regard to apportionment of a local body with quasi-governmental powers was allowed. Why did the Court suddenly allow a population deviation in an apportionment scheme? The Court stated in *Abate v. Mundt*[101] that "[w]e 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."[102] 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*.[103] The Court did not distinguish *Hadley* or offer any reason why *Abate* might have been different.

In 1973 an even greater population deviation in an apportionment plan was allowed. In *Mahan v. Howell*,[104] together with two companion cases,[105] the Court allowed a maximum population deviation of 16.4 per cent[106] 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 traditional political boundaries of the state.[107] The majority of the Court apparently felt that this was a rational state policy that justified such a high population deviation. The majority opinion failed to distinguish this case from previous rulings and did not offer any justification for the population deviation allowed. A minority of the Court 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.[108]

99. 403 U.S. 182 (1971).
100. 397 U.S. 50 (1970).
101. 403 U.S. 182 (1971).
102. *Id.* at 187.
103. 397 U.S. at 51.
104. 410 U.S. 315 (1973).
105. City of Virginia Beach v. Howell, 410 U.S. 315 (1973); Weinberg v. Prichard, 410 U.S. 315 (1973).
106. Brennan, J., in a partial dissent, noted that the record was unclear as to the maximum population deviation and that it might have been 23.6 per cent. 410 U.S. at 336.
107. The Court, however, upheld the district court's invalidation of a section of the apportionment plan which counted all U.S. Naval personnel "homeported" at the Norfolk Naval Base as residing there regardless of where they in fact resided. Howell v. Mahan, 330 F. Supp. 1138 (E.D. Va. 1971). The Court felt that there was no rational basis for this classification. 410 U.S. at 330-33. This would amount to discrimination against military personnel. *Accord*, Davis v. Mann, 377 U.S. 678 (1964).
108. 410 U.S. at 343-44.

Two additional cases in 1973 also allowed the states to have more leeway in the apportionment of their respective legislatures. In *Gaffney v. Cummings*,[109] the Court allowed a maximum population deviation of 1.81 per cent and 7.83 per cent for the upper and lower houses respectively in an apportionment plan for the Connecticut legislature. A three judge federal court had invalidated the plan as repugnant to the equal protection clause of the Fourteenth Amendment.[110] Towns, rather than counties, constitute the basic unit of local government in Connecticut. No town was divided in the apportionment scheme, since such a division would be prohibited under the state constitution.[111] The Court felt that this should be allowed in the interest of "political fairness",[112] although Justice Rehnquist, writing for the majority, did not explicitly define this term.

A companion case, *White v. Regester*,[113] allowed a maximum population deviation of 9.9 per cent in an apportionment plan for the Texas state legislature, although the Court did not explicitly state why this was being allowed.[114] The Court, however, upheld the ruling of a lower federal court[115] invalidating a provision in the plan for multi-member districts[116] in both Bexar and Dallas counties because of the historic discrimination against Mexican and black Americans in these counties.[117]

The question must also be raised as to whether changes in the personnel of the Court brought about the current trend of decisions. In *Hadley v. Junior College Dist.*,[118] Justices Harlan and Stewart, together with Chief Justice Burger, dissented. Justices Black, Brennan, Douglas, Fortas, Marshall, and White constituted the majority. In *Abate v. Mundt*,[119] Justices Brennan and Douglas dissented. They had previously been in the ranks of the majority in *Hadley*. Two of the dissenters in *Hadley*, Chief Justice Burger and Justice Stewart, joined the ranks of the majority in *Abate*, and Justice Harlan, another

109. 412 U.S. 735 (1973).

110. Cummings v. Meskill, 341 F. Supp. 139 (D. Conn. 1972).

111. CONN. CONST. art. III, § 4.

112. 412 U.S. at 752-53.

113. 412 U.S. 755 (1973).

114. The Court, however, did cite Gaffney v. Cummings, 412 U.S. 735 (1973) as controlling. 412 U.S. at 764.

115. Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972).

116. A multi-member district is one in which more than one person is elected to the same legislative body to represent the district at large.

117. The Court noted that multi-member districts are not *per se* unconstitutional, but in this case upheld the invalidation of their use in the apportionment plan, because of this 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).

118. 397 U.S. 50 (1970).

119. 403 U.S. 182 (1971).

dissenter in *Hadley*, concurred in the result. Justice Fortas was no longer on the Court when *Abate* was decided. Justice Blackmun, a new member of the Court, joined the majority in this case. Justices Marshall, Black, and White, in the majority in *Hadley*, also joined the ranks of the majority in *Abate*.

In *Mahan v. Howell*,[120] Justice Marshall, a member of the majority in *Abate*, joined with Justices Brennan and Douglas who dissented in *Abate*, in a partial dissent. One new member of the Court, Justice Rehnquist, wrote the majority opinion. Justice Powell, also a new member of the Court, did not take part in this decision. He, however, joined the majority in *Gaffney v. Cummings*[121] and *White v. Register*.[122] In 1973, Justices Black and Harlan were no longer on the Court, both having died in 1971. Justice Black had sided with the majority in *Hadley* and *Abate*; and Justice Harlan dissented in *Hadley* and only concurred in the result of *Abate*. Some might attribute the trend of the new rulings to the new personnel on the Court; others might argue that the fact situations presented in the new cases brought about the rulings.

The Future

At the present juncture, 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.[123] A deviation up to 16.4 per cent in population in the apportionment plan of a state legislature has been allowed[124] under the substantial population ruling of *Reynolds*. What does the future hold for apportionment, federal, state, and local?

Congressional Apportionment

In regard to congressional apportionment, the decisions of the Court emphatically state that Article I, Section 2 of the Constitution mandates congressional districts be apportioned as equally as possible in regard to population,[125] using the whole state as the starting point in the process.[126] The Court, on the practical side, 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

120. 410 U.S. 315 (1973).
121. 412 U.S. 735 (1973).
122. 412 U.S. 755 (1973).
123. White v. Weiser, 412 U.S. 783 (1973); Wesberry v. Sanders, 376 U.S. 1 (1964).
124. Mahan v. Howell, 410 U.S. 315 (1973).
125. *E.g.*, Wesberry v. Sanders, 376 U.S. 1 (1964).
126. Wells v. Rockefeller, 394 U.S. 542 (1969).

to achieve mathematical equality.[127]

Furthermore, the Court has separated state 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."[128] Despite this language, the district court in *Howell v. Mahan*[129] relied on *Wesberry v. Sanders*[130] and subsequent congressional apportionment decisions[131] 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.[132] The Supreme Court clearly stated that these cases did not apply to state apportionment controveries.[133] Since 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 achived by deviation from numerical equality in congressional apportionment.[134] Thus, the Supreme Court expressly separates the issue of congressional apportionment from state and local apportionment.

State and Local Legislatures

The trend of cases in the area of state and local apportionment is not as clear. When does the deviation of population become too greast for acceptance by the Court under the substantial population test of *Reynolds*? What are legitimate state interests? Can a certain legitimate state interest justify a greater population deviation than another?

Two possibilities appear as to the direction the Court will take in regard to the substantial population test of *Reynolds*. The first is to draw a line beyond which population deviation will violate this test. Where the Court desires to draw this is entirely unknown. In previous apportionment decisions, the Court had overruled deviations

127. White v. Weiser, 412 U.S. 783 (1973).
128. 377 U.S. 533, 560 (1964).
129. 330 F. Supp. 1138 (E.D. Va. 1971).
130. 376 U.S. 1 (1964).
131. Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).
132. 330 F. Supp. at 1139.
133. Mahan v. Howell, 410 U.S. 315, 320 (1973).
134. *Id.* at 322.

of 26.48,[135] 25.65,[136] and 33.55 per cent.[137] But departures from strict numerical equality by 11.9,[138] 7.83,[139] and 9.9[140] per cent have been allowed. In *Mahan* the Court approved a deviation of 16.4 per cent.[141] None of these decisions have given any indication of an arbitrary point at which the Court might state that the deviation is too great to meet the substantial population test of *Reynolds*. In addition 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* that 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.

Equal Protection

The Fourteenth Amendment guarantees 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."[142] The difference of each group must be real and not just illusory. One method of discerning whether a group is real is to decide whether they possess a common interest. This is obviously a subjective judgment at best.[143] 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

135. Kilgarlin v. Hill, 386 U.S. 120 (1967).
136. Swann v. Adams, 385 U.S. 440 (1967).
137. *Id.*
138. Abate v. Mundt, 403 U.S. 186 (1971).
139. Gaffney v. Cummings, 412 U.S. 735 (1973).
140. White v. Regester, 412 U.S. 755 (1973).
141. 410 U.S. 315 (1973).
142. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1166 (1969).
143. For a discussion of the use of language, see J. WILSON, LANGUAGE AND THE PURSUIT OF TRUTH (1967).

persons who are similarly situated in respect to the purpose of the law."[144]

The question must be asked as to what the other criteria might be. Urban and rural groups could be considered such a criterion. 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 Fourteenth Amendment, specifically making sure that the reality of the classification has been established and that each group similarly situated is equally represented.[145]

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."[146] 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 stated:

> We are not prepared to say that the decision of the people of Virginia to grant the General Assembly the power to enact local legislation dealing with the political subdivisions is irrational. 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.[147]

The Court in this case advanced no other reason for its decision to accept traditional political boundaries as rational state criteria. Indeed it appears that the majority uncritically has established the legitimacy of political subdivisions as a rational state interest. No particular reason was advanced by the Court other than the delegation by the people of Virginia of power to enact local legislation to the state legis-

144. Tussman and tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341, 346 (1949).

145. *See generally* Israel, *Nonpopulation Factors Relevant to an Acceptable Standard of Apportionment,* 38 NOTRE DAME LAW. 499 (1963); and Laughlin, *Proportional Representation: It Can Cure Our Apportionment Ills,* 49 A.B.A.J. 1065 (1963). This also raises the question of how representation is exactly defined. *See generally,* H. PITKIN, THE CONCEPT OF REPRESENTATION (1967).

146. 410 U.S. 315, 328 (1973).

147. *Id.* at 325-26.

lature. 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* would appear to be contrary to the ruling in *Swann v. Adams*,[148] 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*,[149] and will apply the particular fact situation to the particular apportionment plan.

In *Abate v. Mundt*,[150] the rational state interest advanced to justify the deviation from a strict population standard was 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 state policy, without an examination of it under the particular fact situation of the case.

Political subdivisions were also advanced as rational state policy in *Gaffney v. Cummings*.[151] 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.[152] In addition, the majority opinion of the Court also stated that the apportionment plan should be allowed in the interest of "political fairness",[153] 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. On its face this criterion appears to be ambiguous at best.

The lack of precision by 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 policial fairness as legitimate state criteria make arrival at a legitimate apportionment plan difficult. In addition to these omissions, the Court fails to provide to the lower federal courts, the forums which will initially hear any challenges to state ap-

148. 385 U.S. 440 (1967).
149. *Id.*
150. 403 U.S. 182 (1971).
151. 412 U.S. 735 (1973).
152. CONN. CONST. art. III, § 4.
153. 412 U.S. at 752-53.

portionment plans at the federal level, adequate guidelines on which to base a decision.

Summary

At one time apportionment was considered to be a "political"[154] question, and the courts refrained from intervention in its domain,[155] even though they recognized that malapportionment did exist. *Baker v. Carr*[156] established the jurisdiction of the federal courts in apportionment controversies. The Court later held that congressional districts must be apportioned on a population basis with no deviation permitted.[157] In *Reynolds v. Sims*,[158] the Court announced that both houses of a state legislature must be apportioned on substantially a population basis, but with some deviation allowed in cases where the state desires to give effect to a legitimate interest, provided that population remains the prime criterion.[159] The *Reynolds* rule later was extended to local popularly elected bodies possessing quasi-legislative authority.[160]

The substantial population rule of *Reynolds v. Sims*[161] has created a line of extremely difficult cases for the Court. Some deviation from the population standard in regard to the apportionment of state legislatures and local governing bodies has been allowed.[162] The Court has yet to indicate the maximum deviation that is allowable under *Reynolds*. The Court further has failed to define what exactly constitutes a "legitimate state interest" and has uncritically accepted the criteria of "political subdivisions"[163] and "political fairness"[164] as such interests. Also unanswered is whether certain legitimate state interests would permit a greater population deviation than others. The possibility also remains that the Court might altogether abandon the substantial population standard of *Reynolds* and allow at least one house of a state legislature (or even a local governing body) to be apportioned on a basis other than population. If this were allowed, what criteria could be used which would not violate the equal protection

154. See note 4 *supra*.
155. Colegrove v. Green, 328 U.S. 549 (1946).
156. 369 U.S. 186 (1962).
157. Wesberry v. Sanders, 376 U.S. 1 (1964).
158. 377 U.S. 533 (10 (1964).
159. *Id.* at 578-79.
160. Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968).
161. 377 U.S. 533 (1964).
162. Mahan v. Howell, 410 U.S. 315 (1973); Abate v. Mundt, 403 U.S. 182 (1971).
163. Mahan v. Howell, 410 U.S. 315 (1973).
164. Gaffney v. Cummings, 412 U.S. 735 (1973).

clause of the Fourteenth Amendment? Can objective criteria be advanced by the proponents of such a plan?

The Court is presently at a critical juncture 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.[165] The Court has failed to articulate, however, exactly how far states may deviate from the population standard and exactly what constitute "legitimate state interests". This task remains for the future, as a challenge the Court must undoubtedly accept.

165. *Cf.* Mahan v. Howell, 410 U.S. 315 (1973).