OTHER COMMENTS RECEIVED

Submitted by: Dan Richardson

OTHER DATA

Apportionment

The process by which legislative seats are distributed among units entitled to representation; determination of the number of representatives that a state, county, or other subdivision may send to a legislative body.

Both Article 1, Section 2, Clause 3, and Amendment 14, Section 2, of the Constitution provide that representatives shall be apportioned among the states according to their respective numbers and that a population count will be taken by census every ten years. Apportionment requires that each state's total population be divided by the population of "the ideal district" to determine the appropriate number of representatives. The population of an ideal district, for purposes of federal apportionment, is defined as the total population of the state (as determined by census) divided by one hundred (for the House of Representatives), or by 50 (for the Senate). **Note: this paragraph is specifically addressing the US House of Representatives and should not be construed to apply to a state senatorial district.**

One such effort to exclude these groups, which occurred during the 1866 debates over the passage of the Fourteenth Amendment, ultimately led to Congress's voting to continue basing apportionment on total population and to count the "whole number of persons in each state." In contrast, state legislatures have only been required to be based substantially on population since 1964 (REYNOLDS V. SIMS, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506). **Note: I believe The Court Ruled in error by applying this to state senatorial districts.**

Apportionment is related to, but is not the same as, the electoral system and the districting process: **apportionment** is the manner in which representation is distributed;

Census

The U.S. Constitution provides for a census every ten years, on the basis of which Congress apportions representatives according to population; each state, however, must have at least one representative.

Districting

The establishment of the precise geographical /electoral boundaries of each such unit or constituency

The Electoral system

The way an individual representative/senator is elected.

Seventeenth Amendment

Each state is assigned two senators, who were originally elected by state legislatures but since the adoption of the Seventeenth Amendment in 1913 have been chosen by direct voter election. **Note: This was the first step in the destruction of our Republican Form of Government).**

REDISTRICTING Part I

Here's a bit of information about the destruction of our republic form of government due to the US Supreme Court Ruling in "REYNOLDS V SIMS, 377 U.S. 533, 84 S. Ct. 1362,12 L. Ed. 2d 506 (1964).

FINDING: The Court ruled that a state's Apportionment plan for seats in both houses of a bicameral state legislature must allocate seats on a population basis so that the voting power of each voter be as equal as possible to that of any other voter.

CAUSE: The mis-application of the principle of "One man one vote" as enunciated by the Supreme Court in reynolds v. sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

EFFECT: This violates Article IV Section 4, US Constitution - Every ten years after a Census the state is required to redraw the boundary lines of each senate seat (46 in SC) causing much expense, confusion, gerrymandering and good ole boy political activity. Voter apathy prevails during the election process due too confusion of the district lines. At present many senate district lines cross county lines with some senate seats having three or more counties included. This has effectively destroyed our republic form of government. The larger populated counties are becoming more and more powerful with sometimes three to five senators representing portions of the same county. Other counties having one senator divided upon two and sometime three or four counties. It goes on and on!

SOLUTION: The State Legislature should initiate action to Nullify the US Supreme Court Ruling on Apportionment and Revert to the South Carolina Constitution requirements of one senator per county whereby each county will have equal representation in the government.

The US Constitution guaranties each state in the Union a republican form of government. It reads as follows: "The United States shall guarantee to every state in this union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened) against domestic Violence."

Before the Supreme Court heard the Baker case, courts had abstained from addressing apportionment issues because they were considered political in nature. In the 1946 Supreme Court case Cole-grove v. Green, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), Justice Felix Frankfurter called apportionment a "political thicket" into which the judiciary should not venture. The subsequent ruling in Baker changed that interpretation, stating that federal courts possessed jurisdiction of the subject, that the citizens in Tennessee were entitled to relief, and that the federal district court in the state could settle the challenge to the apportionment statute of Tennessee.

In addressing the concern of some of his fellow Supreme Court justices, who warned that the matter before them was a political question and therefore not appropriately dealt with in a court of law, Justice Brennan carefully wrote—and rewrote, ten times—his opinion in the 1962 decision. Brennan stated: "The mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words."

He added that the plaintiffs' complaint did present a Justifiable Cause of Action and that the Fourteenth Amendment did provide judicial protection to the right asserted. Justices Frankfurter and John Marshall Harlan dissented, stating that Brennan should not inject the Court "into the clash of political forces and political settlements."

The Court's 6–2 ruling in favor of the plaintiffs forced state legislatures to reapportion their seats to reflect population shifts before the elections that were to occur in the fall of 1962. It also decreed one person, one vote as part of the United States' constitutional heritage and opened the door to challenging state voting procedures and malapportionment on constitutional grounds.

The eight justices who struck down state senate inequality based their decision on the principle of "one person, one vote". In his majority decision, Chief Justice Earl Warren said "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."

Justice Potter Stewart issued a concurrence/dissent, in which he argued that while many of the schemes of representation before the court in the case were egregiously undemocratic and clearly violative of equal protection, it was not for the Court to provide any guideline beyond general reasonableness for apportionment of districts.

Stewart voted against the majority in the Colorado and New York cases; although Justice Tom C. Clark joined his concurrence/dissent, Clark did not join Stewart in voting differently in the Colorado and New York cases.

In dissent, Justice John Marshall Harlan II lambasted the Court for ignoring the original intention of the Equal Protection Clause, which he argued did not extend to voting rights. Harlan claimed the Court was imposing its own idea of "good government" on the states, stifling creativity and violating federalism.

Although the Constitution explicitly grants two senators per state, regardless of population, Harlan further claimed that if Reynolds was correct, then the United States Constitution's own provision for two United States Senators from each state would then be Constitutionally suspect as the fifty states have anything but "substantially equal populations."

"One person, one vote" was extended to Congressional (but not Senatorial) districts in 1964's Wesberry v. Sanders.

Reynolds v. Sims set off a legislative firestorm in the country. Senator Everett Dirksen of Illinois led a fight to pass a Constitutional amendment allowing unequal legislative districts.

He warned that "...the forces of our national life are not brought to bear on public questions solely in proportion to the weight of numbers. If they were, the 6 million citizens of the Chicago area would hold sway in the Illinois Legislature without consideration of the problems of their 4 million fellows who are scattered in 100 other counties.

Under the Court's new decree, California could be dominated by Los Angeles and San Francisco; Michigan by Detroit.." Dirksen was ultimately unsuccessful.

Senators, My question is when are we to right a wrong that has put our republic form of government on the fast track to a Democracy?

Stop this gerrymandering very ten years! Go back to our representative form of government created by the Founding Fathers.

Will you stand on principle, anchored in our Constitution or blown away with the winds of change?

Save Our Republic,

Dan Richardson
123 Richardson Drive
Greenwood, SC 29649
864-223-0413 Hm or 864-554-0814 Cell or E-mail: drichardson@simplepc.net

REDISTRICTING Part II

Before the Supreme Court heard the *Baker* case, courts had abstained from addressing apportionment issues because they were considered political in nature. In the 1946 Supreme Court case *Cole-grove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), Justice Felix Frankfurter called apportionment a "political thicket" into which the judiciary should not venture. The subsequent ruling in *Baker* changed that interpretation, stating that federal courts possessed jurisdiction of the subject, that the citizens in Tennessee were entitled to relief, and that the federal district court in the state could settle the challenge to the apportionment statute of Tennessee.

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Background

The House of Representatives grew proportionally with the population of the United States until 1912, when the House froze its size at 435 members. Since 1941, the CENSUS BUREAU has used the system of equal proportions to determine how many of the 435 representatives each state is entitled to have. This method, developed in 1920 by Professor Edward V. Huntington, of Harvard University, establishes the smallest possible difference between the representation of any two states, since a state's fair share of representatives will rarely be a whole number. The 1941 federal statute 2U.S.C.A. §§ 2a and 2b provides that under the equal proportions method, the priority list of states or counties among which Representatives in excess of one per state or county are to be allocated is obtained by dividing the population of each state or county by the geometric mean of successive numbers of Representatives.

Congress must decide how to treat the fractional components whenever it reapportions congressional seats based on new census data. This decision affects the distribution of only a few seats in Congress and the Electoral College, but in closely contested matters, such as the presidential election of 1876, those seats could mean the difference between victory and defeat. (The electoral college is the body of electors of each state chosen to elect the president and vice president. Apportionment affects the electoral college because it influences the number of electoral votes coming from various areas of the country.) Each state legislature is responsible for establishing the district boundaries of the congressional seats apportioned to the state by the federal government.

From 1842 to 1911, Congress required that all congressional districts be of compact and connecting territory. That stipulation was not continued after 1912, and by the 1960s, the districts within some states differed greatly in size. These disparities were caused in some cases by gerrymandering, which is the process of drawing boundaries for election districts so as to give one party a greater political advantage. Large disparities led a group of urban Tennessee voters to bring suit against their state's electoral commission on the ground that the apportionment of the legislature was unfair. The Supreme Court's March 1962 decision in favor of the voters in BAKER V. CARR, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, established the rule that a citizen may bring suit against legislative malapportionment when it deprives that citizen of equal protection under the law as guaranteed by the Fourteenth Amendment. Previously, in *Cole-grove v. Green*, 328 U.S. 549, 66 S. Ct. 1198, 90 L. Ed. 1432 (1946), the Court had refused to accept jurisdiction in apportionment cases.

Although the Supreme Court's decision in *Baker* was limited, it did rule that if a system other than one based on population is used for apportionment, the resulting districts must not be Arbitrary or irrational in nature. In 1964, the Supreme Court extended *Baker* by ruling in *Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526, 11L. Ed. 2d 481, that legislative districts for the House of Representatives must be drawn so as to provide "equal representation for equal numbers of people," a concept often referred to as the one-person, one-vote standard. Later that same year, in lawsuits directly involving 15 states, the Supreme Court ruled in *Reynolds v. Sims*, 377U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, that districts for state legislatures must also be substantially equal in population. Further extending the principle, the Court ruled in *Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968), that if county, city, and town governments elect their representatives from individual districts, the districts must be substantially equal in population.

Reynolds v. Sims

Supreme Court of the United States

Argued November, 1963
Decided June 15, 1964

Full case name	*Reynolds, Judge, et al. v. Sims, et al.*
Citations	377 U.S. 533 (*more*) 84 S. Ct. 1362; 12 L. Ed. 2d 506; 1964 U.S. LEXIS 1002
Prior history	Appeal from the United States District Court for the Middle District of Alabama

Holding

The Court struck down state senate inequality, basing their decision on the principle of "one person, one vote."

Court membership

Chief Justice
Earl Warren

Associate Justices
Hugo Black • William O. Douglas
Tom C. Clark • John M. Harlan II
William J. Brennan, Jr. • Potter Stewart
Byron White • Arthur Goldberg

Case opinions

Majority	Warren, joined by Black, Douglas, Brennan, White, Goldberg
Concurrence	Clark
Concur/dissent	Stewart, joined by Clark
Dissent	Harlan

Laws applied

U.S. Const. amend. XIV, Equal Protection Clause

Reynolds v. Sims, 377 U.S. 533 (1964) was a United States Supreme Court case that ruled that state legislature districts had to be roughly equal in population.

Voters from Jefferson County, Alabama, had challenged the apportionment of the Alabama Legislature. The Alabama Constitution provided that there be at least one representative per county and as many senatorial districts as there were senators. Ratio variances as great as 41 to 1 from one senatorial district to another existed in the Alabama Senate (i.e., the number of eligible voters voting for one senator was in one case 41 times the number of voters in another).

Having already overturned its ruling that redistricting was a purely political question in *Baker v. Carr*, 369 U.S. 186 (1962), the Court went further in order to correct what seemed to it to be egregious examples of malapportionment which were serious enough to undermine the premises underlying republican government. Before *Reynolds*, urban counties were often drastically underrepresented.

Among the more extreme pre-*Reynolds* disparities (compiled by Congressman Morris K. Udall):

- In the Connecticut General Assembly, one House district had 191 people; another, 81,000 (424 times more).
- In the New Hampshire General Court, one township with three people had a Representative in the lower house; this was the same representation given another district with a population of 3,244. The vote of a resident of the first township was therefore 1,081 times more powerful at the Capitol.

- In the Utah State Legislature, the smallest district had 165 people, the largest 32,380 (196 times the population of the other).
- In the Vermont General Assembly, the smallest district had 36 people, the largest 35,000, a ratio of almost 1,000 to 1.
- Los Angeles County, California, with 6 million people, had one member in the California State Senate, as did the 14,000 people of one rural county (428 times more).
- In the Idaho Legislature, the smallest Senate district had 951 people; the largest, 93,400 (97 times more).
- In the Nevada Senate, 17 members represented as many as 127,000 or as few as 568 people, a ratio of 224 to 1.

The eight justices who struck down state senate inequality based their decision on the principle of "one person, one vote". In his majority decision, Chief Justice Earl Warren said "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."

Justice Potter Stewart issued a concurrence/dissent, in which he argued that while many of the schemes of representation before the court in the case were egregiously undemocratic and clearly violative of equal protection, it was not for the Court to provide any guideline beyond general reasonableness for apportionment of districts. Stewart voted against the majority in the Colorado and New York cases; although Justice Tom C. Clark joined his concurrence/dissent, Clark did not join Stewart in voting differently in the Colorado and New York cases.

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Reynolds v. Sims set off a legislative firestorm in the country. Senator Everett Dirksen of Illinois led a fight to pass a Constitutional amendment allowing unequal legislative districts. He warned that

> "...the forces of our national life are not brought to bear on public questions solely in proportion to the weight of numbers. If they were, the 6 million citizens of the Chicago area would hold sway in the Illinois Legislature without consideration of the problems of their 4 million fellows who are scattered in 100 other counties. Under the Court's new decree, California could be dominated by Los Angeles and San Francisco; Michigan by Detroit.." Dirksen was ultimately unsuccessful.

Some Forms of government

List of government types

- Confederation
- Democracy
  - Consensus
  - Consociationalism
  - Deliberative democracy
  - Democratic socialism
  - Totalitarian democracy
    - Dictatorship of the proletariat
    - Guided democracy
    - Managed democracy
  - Direct democracy
  - Egalitarianism
  - Futarchy
  - Industrial
  - Open source governance
  - Participatory democracy
  - People's
  - Pure
  - Representative democracy
    - Parliamentary system
      - Consensus government
      - Westminster system
    - Polyarchy
    - Presidential system
    - Semi-presidential system
- Despotism
- Dictatorship
  - Autarchy
  - Autocracy
  - Despotism

    - Enlightened absolutism
    - Military dictatorship
        - Military junta
    - Nazism
    - Right-wing
    - Stratocracy
    - Authoritarianism
        - Totalitarianism
- Empire
- Ethnic democracy
- Ethnocracy
- Fascism
    - Corporative state
- Federation
- Feudalism
- Garrison state
- Hierocracy
- Isocracy
- Interregnum
    - Caretaker government
    - Interrex
    - Provisional government
    - Regent
    - Transitional government
- Minarchism
    - Night watchman state
- Monarchy
    - Absolute monarchy
    - Constitutional monarchy
    - Duchy
    - Grand Duchy
    - Diarchy
    - Enlightened absolutism
    - Elective monarchy
    - Hereditary monarchy
    - Non-Sovereign Monarchy
    - Popular monarchy

    - Principality
    - New Monarchs
    - Self-proclaimed monarchy
- Nanny state
- Nation-state
- Monocracy
- Nomocracy
- Noocracy
- Ochlocracy
    - Mobocracy
- Oligarchy
- Panarchism
- Pantisocracy
- Paparchy
    - Pornocracy
    - Saeculum obscurum
- Parliamentary
- Patriarchy
- Plutocracy
    - Plutarchy
- Police state
- Polyarchy
    - Triarchy
    - Tetrarchy
    - Pentarchy
    - Heptarchy
- Presidential
- Puppet state
- **Republic**
    - Crowned
    - Capitalist
    - Constitutional
    - Single Party
    - Federal
    - Parliamentary
        - Federal
- Slave state

    - Slavocracy
- Socialist state
- Sociocracy
- Squirearchy
- Stratocracy
- Sultanism
- Superpower
    - Hyperpower
    - Inverted totalitarianism
- Supranational union
- Synarchy
- Technocracy
- Thalassocracy
- Theocracy
    - Islamic state
    - Theodemocracy
- Timocracy
- Tribal
    - Chiefdom
- Tyranny
- Unitary state
- Welfare state

A **republic** is a form of government in which the people, or some significant portion of them, retain supreme control over the government.[1][2] The term is generally also understood to describe a government where most decisions are made with reference to established laws, rather than the discretion of a head of state, and therefore monarchy is today generally considered to be incompatible with being a republic. One common modern definition of a republic is a government having a head of state who is not a monarch.[3][4] The word "republic" is derived from the Latin phrase *res publica*, which can be translated as "a public affair", and often used to describe a state using this form of government.

Both modern and ancient republics vary widely in their ideology and composition. In classical and medieval times the archetype of all republics was the Roman Republic, which referred to Rome in between the period when it had kings, and the periods when it had emperors. The Italian medieval and Renaissance political tradition today referred to as "civic humanism" is sometimes considered to derive directly from Roman republicans such as Sallust and Tacitus. But Greek-influenced authors about Rome, such as Polybius

and Cicero, also sometimes used the term as a translation for Greek *politeia* which could mean regime generally, but could also be applied to certain specific types of regime, not exactly corresponding to the Roman Republic, for example including Sparta, which had two kings but was not considered a normal monarchy as it also had ephors representing the common people. Republics were not equated with classical democracies such as Athens, but had a democratic aspect to them.[5]

In modern republics such as the United States and India, the executive is legitimized both by a constitution and by popular suffrage. In the United States, James Madison compared the *republic* to democracy,[6] and found democracy wanting. Montesquieu included both democracies, where all the people have a share in rule, and aristocracies or oligarchies, where only some of the people rule, as republican forms of government.[7] In modern political science, republicanism refers to a specific ideology that is based on civic virtue and is considered distinct from ideologies such as liberalism.[8]

Most often a republic is a sovereign country, but there are also subnational entities that are referred to as republics, or which have governments that are described as "republican" in nature. For instance, Article IV of the Constitution of the United States "guarantee[s] to every State in this Union a Republican form of Government."[9]

SHOULD TINY DEVIATIONS FROM "ONE PERSON, ONE VOTE" BE STRUCK DOWN?

States Face The Question Of How Precisely Equal Districts Must Be

By GRANT HAYDEN

Tuesday, Aug. 27, 2002

For many, the phrase "one person, one vote" captures the essence of our democratic system - and, indeed, it is part of our Constitution, as interpreted by the Supreme Court. Because of this principle, state legislature must ensure that they draw political districts to encompass equal numbers of voters. But courts have recently had to confront the question of exactly how equal "equal" must be.

For example, last spring, in Pennsylvania, three voters challenged the legislature's new congressional districting plan because it contained districts that were not equally sized. The challenged variations were minuscule - at most, 19 voters. (The largest district had a population of 646,380; the smallest districts, 646,361.)

Nevertheless, a federal court, in *Vieth v. Pennsylvania*, struck down the plan. The state legislature then responded by adjusting its plan to reduce the difference down to one. (Concerned its ruling would throw off impending primaries, the court later restrict its holding to apply only to elections in or after 2004.)

Other states have faced similar lawsuits over tiny deviations from the one person, one vote principle. Some might say that all this fine tuning represent democracy at its finest. But the better view, I believe, is that counting very small numbers of heads when apportioning voting districts makes little sense. Indeed, it demonstrates the folly of applying such a precise legal rule to something as messy as democratic politics.

The History of U.S. Population-Based Vote Apportionment

After the Civil War, however, a shift away from population-based apportionment began. And the trend really picked up steam through the first half of the twentieth century.

By 1920, as a result of the waves of European- and African-Americans who migrated to urban areas, white, protestant, rural Americans had become a minority. That minority, however, retained control over state legislatures and thus over the reapportionment process.

And it did what it could to preserve its own power - refusing to redraw political districts in light of the population changes. The effect was to numerically concentrate the voting power of those in smaller and shrinking rural districts and dilute the power of those in the burgeoning urban districts.

The disparities grew quite large. In Vermont, for example, the most populous district had over 900 times the number of people than the least populous, and ratios of 20-1 and 30-1 were commonplace. By mid-century, the political system had reached the breaking point - and the Supreme Court intervened.

The Supreme Court Steps into the Political Thicket

In 1962, in *Baker v. Carr*, the Court decided that a "justiciable" constitutional Equal Protection claim could be brought based upon the unequal legislative districts in Tennessee (which were a result of the legislature's refusal to redraw district lines). The result of the ruling was to invite redistricting questions to be raised not only in the legislatures, but also in the courts.

In the years following, the Court developed the one person, one vote standard. It applied the standard to state legislative districts (for both houses of state legislatures) in *Reynolds v. Sims*, and to congressional districts in *Wesberry v. Sanders*. Those cases, and the ones that followed, dramatically transformed the country's political landscape.

The Courts Begin to Hear Cases About Smaller and Smaller Vote Disparities

Once the dramatic population disparities were remedied, though, the Court was forced to attend to cases that presented smaller and smaller variations in district sizes. It addressed these cases in two different ways, depending on the type of district involved.

Congressional districts, on the other hand, were given almost no latitude to deviate from precisely equal district sizes. And that rule led to cases based on tiny variations - such as the recent Pennsylvania suit.

Why Small Variations In District Size Should Be Legally and Politically Acceptable

The malapportionment problem did not require the exacting solution the Court applied to congressional districts. The precision of the solution was at odds with the institutions and realities of democratic politics. Moreover, this exceedingly precise "cure" ended up being far worse than the "disease" of slightly unequal district sizes.

It's important to recall that despite its widespread rhetorical appeal, the one person, one vote standard is only applicable to a limited number of our governmental institutions. The most obvious exceptions are the U.S. Senate and the Electoral College.

The two senators from Wyoming represent 495,304 people; the two from California represent 33,930,798. In the Senate, then, Wyoming voters have almost seventy times the voting power of California voters - a difference that dwarfs most of the pre-*Baker* irregularities.

Moreover, each state's power in the Electoral College is based, in part, on its representation in the Senate. (That's one reason why a presidential candidate may win the

popular vote but lose the election, as Al Gore did in 2000. Thus, ironically, even "counting every vote" in the election, as Gore supporters urged, would not have led to a result in which every vote actually counted equally.)

Even congressional districts, to which the standard directly applies, vary quite a bit from state to state: The equality the Court has insisted upon is only among districts *within a given state*, not among all districts nationwide. Nationwide, there is - and is quite legally - a large variance.

Quibbling about a 19 person difference between the largest and the smallest Pennsylvania congressional districts seems a bit silly in this context. Compare, for instance, the radical difference between district sizes in Wyoming (495,304) and those in Montana (905,316), or even between those in Pennsylvania (646,371) and those in Ohio (630,730). These differences cannot be the basis for a lawsuit - but the 19 person difference can.

On a more local level, there are a host of what the Court calls "special purpose districts" that are altogether exempt from the one person, one vote requirements. For example, residents in water storage districts may only get to vote in the water board's elections if they own land. And if that is the system, residents receive votes based upon a "one acre, one vote" system.

Even for the institutions that are subject to the "one person, one vote" standard, the elegance of the phrase itself masks some not-so-elegant complexities.

First, what, exactly, is meant by "person"? That is, how the court should calculate the total number of "persons" in a district? Should it go by total population? Voting-age population? Voting-eligible population (which, in addition to those under 18, may also exclude resident aliens and felons)? Registered voters?

The Supreme Court originally spoke of ensuring equal numbers of "residents, or citizens, or voters," as if each guaranteed the same sort of equality. As these different and contrasting metrics show, they most definitely do not.

Second, even if we agree on how to define who counts as a "person" for these purposes, the source of the numbers for our calculations-the decennial census - has several shortcomings. It overcounts some populations and undercounts others, yet the Census Bureau is prohibited from correcting systemic errors through sampling.

In addition, even if the census were perfect, it would offer only a snapshot of a dynamic demographic process as people are born, die, move, and hide. Of course, these imperfections are no reason to discard the entire census enterprise, or the entire voting equality project. But they do swamp the precise tolerances built into the law governing "one person, one vote."

Finally, and most importantly, the "one person, one vote" standard has failed to achieve its goal of equal representation. That is because legislatures can still use other devices -

such as at-large elections and racial gerrymanders - to effectively shut certain groups out of the political process. Sometimes these strategies are provably illegal; sometimes they are not. Sadly, ensuring numerical equality, it turns out, is a far cry from ensuring equal political participation.

Why the Precise Form of "One Person, One Vote" Is Actually Harmful

So, even with all of its shortcomings, what's so bad about forcing legislatures to so closely toe the "one person, one vote" line when designing districts? Is there really any harm?

In a word, yes. For one thing, this absurdly formalistic standard sanctions a race to the courthouse. As soon as the new census numbers are released, virtually every political district becomes unconstitutional, prompting a wave of lawsuits.

The case in Pennsylvania, for example, was brought by three Democrats who were upset that the legislature's original districting plan sought to aggressively increase Republican representation in the state's congressional delegation.

The Democrats may have had a valid gripe, but it was one properly raised in the legislature, not the courts. And that brings me to another, more general harm that derives from precise adherence to the "one person, one vote" standard: It shifts power away from legislatures to the courts.

This shift, of course, was signaled long ago, in the original Supreme Court malapportionment cases, but at the time, dramatic deviations called for a strong judicial role. Now the days of dramatic malapportionments are gone, yet the strong judicial role in democratic politics is reinforced with every new decision.

But, one might ask, what's so bad about having a strong judicial role in democratic politics? The answer, I think, is the slipshod Supreme Court decision in *Bush v. Gore*.

The Benefits of Relaxing A Strict "One Person, One Vote" Standard

A more relaxed standard might not only avert these harms, but also carry some positive benefits.

First, it would allow local governments to experiment with new democratic governing structures. And that in turn might allow them, for example, to develop innovative solutions to urban problems.

Second, it might give plaintiffs and courts in racial vote dilution cases more leeway in devising remedies. For example, they could create majority-minority districts (the traditional remedy for such claims) that were smaller than adjoining districts. For states with small minority populations, this could make an important difference.

It would also be easier to make sure that such districts didn't run afoul of other constitutional requirements on district shape. (Particularly strange shapes have sometimes been seen by the Court as evidence of improper racial gerrymandering.)

The Supreme Court would do well to relax the standard a bit, and slowly begin to back out of the everyday business of politics - turning in its scalpel and using a somewhat blunter instrument to judge whether political districts are equal enough to satisfy the Constitution.

Grant Hayden is an associate professor of law at Hofstra Law School, where he teaches Voting Rights, among other subjects.

CONGRESSMAN'S REPORT

MORRIS K. UDALL • 2d DISTRICT OF ARIZONA

October 14, 1964

Reapportionment--I
"One Man, One Vote" . . . That's All She Wrote!

In the closing days of the 88th Congress, when it appeared we would never adjourn, I found myself hearing echoes of 1937 -- that year when the famous "Nine Old Men" of the Supreme Court had struck down a series of New Deal economic measures and President Roosevelt, in retaliation, tried but failed to "pack" the Court with six more judges who presumably would be more favorable to his point of view. Congress has now adjourned, and we can all take advantage of the "breather" to assess what this latest debate is all about.

The most striking fact to be noted is that the Court's defenders and attackers have switched sides. Conservatives of 1937 regarded that Court as the "country's greatest symbol of orderly, stable and constitutional government," while some conservatives of 1964 view the present tribunal as a "destroyer of the Constitution, enemy of federalism, and perhaps the Communist Party's best friend." Roosevelt attacked the Court for obstructing legislative power; today's charge is that the Court usurps legislative power.

But such attacks and switches are an old story to American historians. Sine 1789 the three separate and equal branches of our national government have often collided in bitter contests of power. And in nearly every era the Supreme Court -- one of those equal branches -- has been a center of controversy. Marbury v. Madison, Chief Justice Marshall's history-making decision of 1801, claimed for the Court the now-accepted right to make acts of Congress invalid; this decision stirred passions for more than a decade. The Dred Scott fugitive slave decision of 1857 wrecked the Missouri compromise and, historians agree, brought on the Civil War.

In all the stormy history of the Court, however, no panel of judges has been involved in more controversy than the "Warren Court" of 1953-64. While the decisions of the "Nine Old Men" of the 1930s centered on economic legislation, the controversial Court decisions of the 50s and 60s have dealt largely with personal freedoms and civil liberties: school desegregation, prayer in public schools, free speech vs. obscenity, and the rights of individuals charged with crime.

Now in this election year of 1964 a new series of decisions has disrupted the Congress, aroused the wrath of hundreds of State legislators, and set off a heated national debate. It seems likely the controversy will be settled only by 1) the defeat or 2) the passage of a

constitutional amendment.

THREE DECISIONS IN ALL

These new decisions are based on a theory of representative government with the catchy slogan: "One man, one vote." I have been asked by many people to explain the basis and impact of these decisions on the governments of our 50 States -- and on Arizona's, in particular. Let's take a look at them.

While a large number of separate cases have been decided, they fall into a pattern of three separate rulings:

THE FIRST RULING: Baker v. Carr, 1962

Tennessee's constitution requires both its House and Senate seats to be divided among counties on the basis of population, with a new allocation to be made by the legislature after each 10-year census. In 1901 the seats were properly divided on the basis of the State's then largely rural population. Since 1901 Tennessee's impressive population gains have been mostly in the cities. In the face of its own State constitution the legislature refused in 1911, 1921, 1931 and subsequent years to reapportion itself -- proving an old adage of political science: a politician will almost never vote himself out of office. As a result, by 1960 it developed that 60 percent of the State's senators were being elected by 37 percent of the voters. Of the State's representatives 64 percent were being elected by 50 percent of the voters. One county with 3,084 people had the same legislative representation as another county of 33,990 people.

Baker, a Nashville citizen, argued, and the Supreme Court agreed, that the Court could order Tennessee to comply with its own constitution. This was done in 1963 and 1964.

The Baker case caused some controversy, but the decision was accepted by most lawyers, most political scientists and most of the people of Tennessee.

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THE SECOND RULING: Wesberry v. Sanders, 1963

If Federal courts can make State legislatures follow their own State

constitutions, it would seem even more likely that Federal courts could make State legislatures follow the plain and unambiguous provisions of the Federal constitution. In a report of April 16, 1962, commenting on Baker, I predicted that such a decision would follow. It did in 1963. The Court decided Wesberryv. Sanders, dealing with U.S. Congressional districts. The Federal constitution requires that Congressional districts be of approximately equal population. Georgia, with 4,000,000 people, was entitled to 10 representatives in Congress, or one representative for each 400,000 people. However, the Georgia legislature, itself heavily weighted in favor of rural areas, had created Congressional districts in which one man represented Atlanta with nearly 1,000,000 people while a rural Congressman -- also with one vote in Congress -- represented only 270,000.

Wesberry, an Atlanta resident, won an order requiring the Georgia legislature to draw new and approximately equal districts.

The backwash of Wesberry reached Arizona in May 1964 when a Phoenix resident filed suit asking that Arizona's three Congressional districts be equalized. The present districts have these population figures:

District	Counties Included	Population	% of State
1	Maricopa	663,500	51.0%
2	Cochise, Pima, Pinal, Santa Cruz, Yuma	440,500	33.8%
3	Apache, Coconino, Gila, Graham, Greenlee, Mohave, Navajo, Yavapai	198,000	15.2%

The Arizona suit is pending, but its outcome is not in doubt: equal districting will be ordered.

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THE THIRD RULING: Reynolds v. Sims (Alabama), and Lucas v. Colorado General Assembly, 1964

While many persons were aroused and angry with the First and Second rulings, it was the Third group of cases which really touched off the storm. In June 1964 the Court decided Reynolds v. Sims (Alabama) and a group of related cases from New York, Colorado, Maryland, Delaware and Virginia. The Colorado case (Lucas v. Colorado General Assembly) goes a little farther than the others and is based on a situation almost like Arizona's; for these reasons let's examine it as illustrative of the group.

About 65 percent of Colorado's 2,000,000 population lives in Denver and Colorado Springs. The rest is widely scattered and rural. The Colorado House seats (like Arizona's) are allocated on a reasonably equal population basis which fairly satisfies the "one man, one vote" principle. After much discussion the Colorado legislature in 1962 submitted to the voters a "little Federal plan" under which the State Senate was constituted to give rural areas many more seats than a strict population apportionment would allow. This referendum was approved by 64 percent of the voters state-wide -- and, in fact, by 55 percent of the Denver County voters as well. (Note: In 1952 Arizona voters approved a somewhat similar plan giving each of our 14 counties two senators.) Lucas, a Denver resident, refused to accept the decision of his fellow voters and brought suit. His argument ran something like this:

"The Federal Constitution guarantees me free speech. The 14th Amendment guarantees me 'equal protection of the laws.' I do not have equal protection of the laws when my vote in the Senate is worth perhaps 1/50th of the vote of a man in some small hamlet in the Rockies. My Federal right of free speech does not depend on how popular it is, and cannot be taken from me by a vote of even 98 percent of Colorado voters. Neither can my right to an equal voice in the legislature be taken away by 64 percent of the voters."

The Supreme Court, agreeing with Lucas, ordered Colorado to allocate its Senate seats, as well as its House seats, on population. If this far-reaching decision stands, all 50 State legislatures must be organized in both chambers (if they have two chambers) on a "one man, one vote" basis.

At this point "the fat was really in the fire." Note that in these "Third Ruling" cases there was no claim (as in Baker) that any State

legislature had violated its own constitution. The people of these States had deliberately written constitutions allowing non-population factors in apportioning one or both houses. Nor was there any claim (as in Wesberry) that the State legislatures were interfering with proper representation in the Federal Congress. These cases involved interference with the manner in which individual sovereign States had chosen (some long ago, some like Colorado very recently) to apportion their own legislatures.

UNEQUAL REPRESENTATION: LOWER LEVEL

Whether these "Third Ruling" cases are right or wrong, good or bad, no one can deny that some of the States have allowed thinly-populated areas to exercise extra, and often strikingly disproportionate, power in making State laws. This is a result of 1) the immense growth of cities and the decline of rural populations, and 2) a failure of these States to adjust the allocation of legislative seats as the population distribution has changed.

Consider these statistics: In 1910 the counties in this country having 100,000 or more residents had a combined population of 31 million, or 33 percent of the nation's population. By 1960 counties in this category had a combined population of more than 114 million, or 64 percent of the nation's population. Yet few States had given these counties any additional representation in either house, and there are even examples of their representation having been decreased.

Here are some of the most striking disparities in lower house apportionment:

** In Connecticut one House district has 191 people; another, 81,000.

** In New Hampshire one township with 3 (three!) people has a state assemblyman; this is the same representation given another district with 3,244. The vote of a resident of the first town is 108,000 percent more powerful at the Capitol.

** In Utah the smallest district has 164 people, the largest 32,280 (28 times the population of the other). But each has one vote in the House.

** In Vermont the smallest district has 36 people, the largest 35,000 a ratio of almost 1,000 to 1.

What about Arizona? The Arizona House of Representatives, by contrast with the cases cited above, is one of the most fairly apportioned legislative chambers

governor in the last election and re-divides the 80 House seats among the counties.

In similar fashion the U. S. House of Representatives is reapportioned after every census. The seats are automatically re-divided by a simple and mechanical notification by the House Clerk to the States.

These are sound procedures which never put an elected legislator in the position of having to decide that ultimately painful political question: "Should my own seat be abolished?" However, our Arizona Constitution provides that each of the 14 counties shall have at least one representative, and this does create some departure from strict, "one man, one vote" apportionment. For example, Mohave's one state representative speaks for 7,700 people, while Maricopa's 40 members represent an average of 14,000 and Pima's 17 members represent an average of 15,000.

UNEQUAL REPRESENTATION: UPPER LEVEL

In State Senates, many of them patterned on the Federal Congress (with lower house based on population and upper house on area) the extreme examples are equally startling:

** In California the 14,000 people of one small county have one State senator to speak for them; so do the 6 million people of Los Angeles County. It takes 430 Los Angelenos to muster the same influence on a State senator that one person wields in the smaller district.

** In Idaho the smallest Senate district has 951 people; the largest, 93,400.

** Nevada's 17 State senators represent as many as 127,000 or as few as 568 people -- a ratio of 224 to 1.

of In Arizona, Mohave County's 7,700 people have two State senators; so do the 663,000 people of Maricopa. The ratio is 86 to 1.

THE FIGHT SHIFTS TO CONGRESS

The ink was hardly dry on the Reynolds and Lucas cases when the first cries of outrage went up from State officials across the country -- and especially State legislators whose jobs might be at stake.

It was quickly apparent that only an immediate constitutional amendment (or perhaps some action by Congress) could prevent the Federal courts from putting this decision into prompt effect in all 50 States. In fact, a few legislatures (Michigan and Oklahoma, for example) have already been reapportioned by Federal court order, and many other suits have been filed but not acted upon. (Included is one directed at the Arizona State Senate.) Governor Fannin has appointed a blue-ribbon, bi-partisan committee to study the impact of the Arizona suit and make recommendations.

The two houses of Congress are sharply divided on their approach to this issue. Most United States Senators owe their election to voting majorities in the large cities found in almost every State. However, a majority of United States Representatives are elected from areas which have large rural and small-county populations with pivotal voting strength. My district is mixed: one large city with 65 percent of the people and four smaller counties with the remaining 35 percent.

SENATE ACTION

In August, Senator Dirksen of Illinois, spokesman for the anti-decision forces, offered the "Dirksen rider" to the foreign aid bill. The rider was designed to hold off enforcement of the "one man, one vote" decisions for two years, giving the States time to pass a Constitutional amendment to legalize the present legislatures. In late September, after a bi-partisan group of urban-oriented senators had conducted a leisurely two-month filibuster against any action to delay the Supreme Court's decisions, the Senate rejected the "Dirksen rider". It did pass a non-binding advisory resolution which, in effect, accepts the Supreme Court decision but states the "sense of Congress" that States should have a reasonable time to set the "one man, one vote" legislatures. This resolution later was stripped from the foreign aid bill in a House-Senate conference, and Congress adjourned without taking any action on the subject.

HOUSE ACTION

In the House a group of Members from rural districts mutinied against the leadership, ignored the House Judiciary Committee, and brought up for debate a bill by Representative Tuck of Virginia. This drastic and far-reaching proposal would have deprived the Federal courts of all jurisdiction to hear or decide or enter orders in any State reapportionment case. This bill passed August 19th by a vote of 218 to 175. I voted against it for these reasons:

1. The bill was clearly unconstitutional. In our constitutional system

there must be an umpire whose decisions are accepted; the alternatives are anarchy or revolution. If the people believe the Court has improperly decided a constitutional question, they can impeach the justices or amend the Constitution. These are the only proper checks and balances against the judiciary's disposition of constitutional questions. But Congress alone cannot amend the Constitution; only the States, acting with Congress, can do so. The Court interpreted the "equal protection" clause of the 14th Amendment to require "one man, one vote" legislatures. As a legal decision this may be right or wrong, but only the Court and not the Congress can say what the Constitution means. If Congress could thus override the Constitution as interpreted by the Court, it could also pass a bill depriving the Court of jurisdiction to hear or enforce cases involving freedom of press, or religion, or speech. While these rights might remain in the Constitution, they could not be enforced, and freedom which cannot be enforced is no freedom at all.

2. This is an issue which deserves the most careful study and debate. The debate now beginning is going to be one of the great constitutional debates of this century. The people need time to think about it, and the Congress needs time to hold hearings, to hear all sides, and to act in wisdom and not in haste. While I am distressed and troubled by situations in which one citizen has 1,000 times the voting strength of another, I believe there is more at stake than a mere mathematical division of voters. For this reason I was prepared to support the Dirksen proposal to give the States and the people a two-year period to review the apportionment of their legislatures and to consider possible constitutional amendments. I believe the people should have time to reflect on these far-reaching changes before they become accomplished fact. But the House shouted down those of us who took a middle-ground between the extremes of 1) doing nothing, or 2) doing violence to the Constitution. I had no choice but to vote "no."

In the 173 years since the 10-amendment Bill of Rights was ratified, the Constitution has been amended only 14 times. I objected to the House of Representatives undertaking what amounted to a backdoor amendment after only two hours of debate when no committee hearings had been held and when most of the people of this country had had no opportunity to consider its implications. The Tuck bill was ignored by the Senate and the whole issue was left open for the 89th Congress convening next January.

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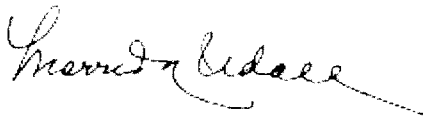
In a subsequent report I shall discuss the pros and cons of a constitutional amendment and will suggest a compromise which I think would be a realistic

solution to this problem.



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Congressman's Report
Newsletters by Morris K. Udall

CONGRESSMAN'S REPORT

MORRIS K. UDALL · 2ND DISTRICT OF ARIZONA

December 11, 1964

Reapportionment--II
Where Do We Go From Here?

In my October report I outlined the reapportionment rulings of the U.S. Supreme Court which brought on the current controversy, gave examples of unequal representation in various States, and detailed the deadlock which existed when the 88th Congress adjourned. In this second newsletter I want to examine the arguments for and against the Court's ruling and suggest a possible solution.

Because the Court found that "one man, one vote" legislatures are required by the U.S. Constitution, no mere act of Congress can halt this basic change. The Federal courts are rapidly implementing the ruling, and unless a constitutional amendment is passed and ratified immediately, all 50 State legislatures will be reapportioned on strictly population bases in both their branches before the 1966 elections. Indeed, more than 20 States already have acted under court order or threatened court order.

What does this mean for Arizona? It means that unless we act a Federal court will act for us, and we could find ourselves in the sad plight of voters in Illinois this year who were given a "bedsheet" ballot to elect all 177 members of the Illinois House, atlarge.

In recent months I have had many letters on this subject, some approving the Court ruling and declaring it long overdue, others demanding an immediate amendment to restore State legislatures to their composition prior to the bombshell decision of June 1964. Here are the main arguments made on each side.

ARGUMENTS FOR A CONSTITUTIONAL AMENDMENT

Those who are critical of the Court's ruling make these points:

** U.S. Senate Analogy. Both Alaska with its 1/4 million people and, New York with its 17 million have two U.S. Senators, while the U.S. House of Representatives, based on population, gives New York 41 seats and Alaska only one. This system, recognizing the diversity of our people and the special interests of smaller States, has worked reasonably well for 175 years. Surely the Federal government and its courts cannot deny the States the right to adopt similar arrangements.

** State's Rights. Our uniquely successful Federal system is one of dual sovereignty with

a carefully-drawn system of divided Federal-State rights and powers. We destroy this diversity and undermine State's rights when States are denied the basic right to establish legislative bodies of their own design and composition.

** Tyranny of the Majority. One of the great features of American democracy is the recognition and protection of minority rights. The tyranny of the majority is little worse than tyranny of the minority. People living in small counties, small towns and sparsely-populated areas have a right to play a part in the decisions of government. This right is now endangered and needs to be reaffirmed.

** City Legislators Don't Know Rural Problems. Many rural areas are situated far from population centers. City legislators can't possibly understand the problems and needs of rural people. Arizona's smaller communities produce half the nation's copper and much of its livestock and cotton; they should and must be given special consideration in the allocation of seats in at least one branch of the legislature as a check on urban majorities.

** Grab for Power. This is another outrageous grab for power by the U.S. Supreme Court. If it is not checked, the Court will soon declare the U.S. Senate unconstitutional too, and smaller States like Arizona then will lose the only forum in which they can make their needs known on the national scene.

** Access to One's Representatives. A voter should be able to see and talk with his State representative or senator without traveling great distances. If the Court ruling takes effect, many rural voters will have to travel 150 miles or more to see their nearest legislator.

Leading spokesman for the anti-Court, pro-amendment forces is Senator Everett Dirksen of Illinois. He summed up their arguments when he wrote several months ago:

> ". . .the forces of our national life are not brought to bear on public questions solely in proportion to the weight of numbers. If they were, the 6 million citizens of the Chicago

> area would hold sway in the Illinois Legislature without consideration of the problems of their 4 million fellows who are scattered in 100 other counties. Under the Court's new decree, California could be dominated by Los Angeles and San Francisco; Michigan by Detroit.. ."

ARGUMENTS AGAINST A CONSTITUTIONAL AMENDMENT

Those who support the Court's ruling and oppose any constitutional amendment

come back with these major arguments:

** Majority Rule. The very foundation of democratic government is "majority rule." A majority of Americans -- some 70 percent, in fact -- now live in cities. What is logical or fair or democratic about a government which lets 30 percent of the people write the laws for the other 70 percent? We wouldn't tolerate such a situation in a business or fraternal group, a PTA, a school board or a city council. Surely fair representation is even more important where the laws of the land are at stake.

** Senate Analogy Is False. The analogy to the U.S. Senate is false. The 13 American colonies before 1789 were actually separate nations. In order to form one country and adopt the Constitution a number of compromises were necessary, and the key compromise was equal Senate representation for all States. This is guaranteed forever -- and the Supreme Court can't possibly change it. Article V provides:

> ". . . .no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

While this bargain was obviously undemocratic and a heavy burden on the big States, one undemocratic compromise does not justify 50 more. Because New York City's 8 million people are at a heavy disadvantage in the U.S. Senate does not mean that they must also have their State laws written by upstate, rural legislators.

No one can argue that Arizona's 14 counties were separate sovereign States which got together to form a new State. Counties are merely administrative arms of the State government; they can be abolished or consolidated at any time.

** Avenue for Special Interests. Unequal representation provides an avenue for special interests. A complete "saturation" campaign for State Senator in a small county can be run for a few hundred dollars, while a modestly-financed Maricopa County race might cost $50,000. It takes only 13 percent of the electorate to gain a majority in the Arizona Senate today.

** Rural Votes vs. Rural Votes. It is false to argue this issue in terms of cities vs. rural areas. Cities have "special problems" too, and many rural areas even now enjoy no such favoritism. Ajo has about the same population as Mohave County, but it has no Senators all to itself. Wickenburg and Gila Bend are rural and isolated; surely they have special problems, but they're represented by the same Senators who serve Phoenix with its 439,000 people.

If the amendment arguments are valid, why don't we give thinly-populated areas

extra representation on school boards, boards of supervisors and city councils? For years Tucson residents complained that 30,000 people in western Pima County had one supervisor while the other two supervisors each represented as many as 150,000. Finally a suit filed by the publisher of the Tucson Daily Citizen forced the establishment of equal supervisory districts. Can the people of Pueblo Gardens and Mission Manor possibly understand the problems of El Encanto Estates? If not, perhaps amendment advocates would feel this area of a few hundred people deserved a city councilman all to itself.

** Toward Stronger State Governments. The Court's decision, rather than weakening State governments, will give them at long last legislatures which are truly representative and capable of solving long-neglected State and municipal problems. The result will be a lessening of dependence on Washington. In the early years of this century, before State legislatures were so badly malapportioned, it was not the Federal government which led in solving social and welfare problems; it was the legislatures of progressive States. The first laws governing child labor, minimum wages and hours for women, civil rights, etc., were not passed by Congress but by States like Massachusetts, New York and Washington. The Federal government is so deeply involved in social legislation today mainly because malapportioned State legislatures have refused to act.

A leader in support of the Supreme Court is Mayor Raymond R. Tucker of St. Louis, president of the U.S. Conference of Mayors. He summed up the case for the Court and against any amendment in a letter to all Members of Congress last August. He wrote:

> "The Supreme Court has acted to strengthen democracy .... Let us not act to perpetuate the old system, but let us add strength to the federal system of government, in which strong state governments should be a key element. Nothing can better secure and enhance the position of the states in the federal system than genuinely representative

> legislative bodies. Urban and metropolitan areas are where most of our population lives and this trend will continue. Proper representation of these areas is essential if we are adequately to cope with the problems of an urban society."

WHAT HAPPENS NOW?

I think it is clear that the Supreme Court decision is going to have an effect on

every legislature in the land. I have two basic reactions to all this: (1) There can hardly be an adequate defense for some of the extreme examples of unequal representation mentioned in my last report. Cases of voters having a thousand times the influence of other voters through arbitrary apportionment will be no more. (2) On the other hand, I am troubled by the extremely broad sweep of the Court's decision and by its failure to give the States more time to comply.

Will this process be slowed? Can an amendment be passed and ratified to save the status quo in Arizona and other States? Here are the hard realities. The U.S. Constitution has been amended only 14 times in 175 years. An amendment requires (a) a two-thirds vote of the U.S. House, (b) a two-thirds vote of the U.S. Senate, and (c) ratification by 38 State legislatures. What are the prospects for each?

** House. In the more conservative 88th Congress only 218 House members voted for the Tuck Bill, a step short of a constitutional amendment. This was far less than the 290 votes needed for a two-thirds margin, and there will be fewer, not more, votes for this position in the 89th Congress.

** Senate. In the Senate last September the amendment forces couldn't even get a majority for the so-called "Dirksen rider", which would merely have delayed enforcement of the Court's ruling Finally, a bare majority (44 -38) was obtained for the Mansfield substitute, which said district courts could hold up action for six months but otherwise approved the Court's decision.

** Legislatures. Even assuming an amendment could pass both houses of Congress, it will take only one house in just 13 State legislatures to block ratification. In a majority of legislatures the lower house is apportioned according to population rightnow. Thus ratification by both houses in all of 38 legislatures is, at best, a very long shot. Beyond this, there is the hard fact that within a very few months the Federal courts will have reconstituted most legislatures to comply with the decree, and these new legislatures will be the ones to pass on any constitutional amendment.

'LAST DITCH' EFFORT IS OUT

With these harsh realities in mind it is obvious that heroic "last-ditch" efforts to preserve the status quo are out. And yet there are complexities in electing a representative government for a pluralistic society. In fact, it is quite possible that arbitrary lines could be drawn which, though setting up mathematically equal districts, might so ignore community-of-interest that areas of sizeable population might be under-represented and others over-represented.

If we in Arizona want to save our small counties from the total domination they fear from Phoenix and Tucson, our only chance lies in a compromise which

would be acceptable to the pro-Court, anti-amendment forces. I have prepared such a compromise amendment, and from my discussions with congressmen and senators representing urban areas I believe it might have a chance. These Members tell me they are willing to give the States some reasonable leeway in establishing legislatures which might give some extra consideration to rural, isolated or "special problem" areas of a State. However, they will fight forever against any proposal to return to a system in which some States allowed some voters to have hundreds or thousands of times as much voting strength as other voters.

My amendment would permit any State to apportion one house of a bicameral legislature on factors other than strict population. To obtain that right, however, the State would be required to arrange its legislative and electoral machinery to meet three criteria:

1. The other house would have to be apportioned and kept regularly apportioned on a strict population basis with each member representing substantially the same number of people. Bear in mind that in many States both houses are now malapportioned, and neither is population-based.

2. While the legislators in the non-population-based house could represent unequal numbers of people, there would be a definite limitation on the degree of disparity. I am thinking in terms of a ratio not to exceed 1 1/2-to-1, 2-to-1, or perhaps 3-to-1. Thus, if the permitted disparity were 2-to-1, the smallest district might have 20,000 people and the largest not more than 40,000. This would protect voters from the kind of outrageous extremes existing today.

3. If a State decided to make the arrangement permitted by No. 1 and No. 2 above, it could not do so until and unless this was approved by a majority of the voters of the

4.

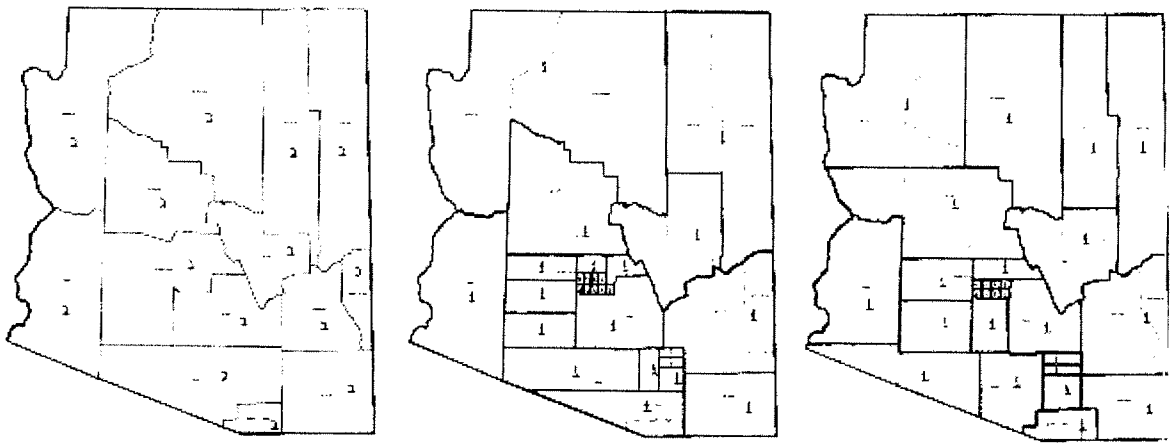
State, and machinery (such as we have in Arizona) were established to permit voters by petition to review and change the arrangement from time to time.

A LOOK AT THE ALTERNATIVES

The subject of reapportionment is sure to be the biggest issue of the 1965 Arizona

Legislature. A lot is at stake.

Although I will have no part in the reapportionment process, I have been asked by readers of my first report to depict in a rough, approximate way how our State Senate might be apportioned if the Court's ruling is adhered to and how it might be apportioned if my compromise amendment were to be passed and ratified. Here, in map form, is a picture of our present Senate and some guesswork on the other two alternatives:



PRESENT SENATE | 'ONE MAN, ONE VOTE' | COMPROMISE AMENDMENT (2-1)

WILL PHOENIX AND TUCSON RUN THE STATE?

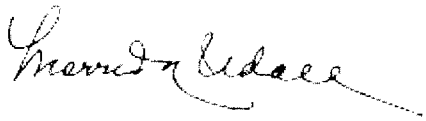
I don't fully share the fears of those who say that either the compromise plan or the Court plan would mean total State domination by Phoenix and Tucson forces. Pima and Maricopa Counties now have 57 of the 80 seats in the House of Representatives, yet these 57 people have rarely had total agreement on anything. If the new State Senators are assigned to definite geographical areas of Maricopa and Pima County, as they should be, I would expect to find them differing markedly in philosophies and views. The new Senate districts would cover approximately three present House districts; I would not expect a senator from South Phoenix, for example, always to agree with a senator from Scottsdale anymore than the representatives from those areas always agree today.

Not only area interests but political philosophies, personal loyalties and party programs are important factors in any legislative body. City officials of Tucson and Phoenix tell me they often have had more consideration and understanding from small-county legislators than from many urban members. I would hope and expect that responsible city legislators would take the same kind of state-wide view on small-county problems.

WE'RE, UNDER THE GUN

On this big problem Arizona, like most other States, is "under the gun." We face hard work and tough decisions, but I see no reason to panic. With cool heads and a will to

work out our problems I think we can avoid the sort of difficulty that has developed in Illinois, Oklahoma and other States.
But, above all, I believe we want to keep the initiative in our hands -- and not the Court's.



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Newsletters by Morris K. Udall

From the New York Times January 3, 2006 Editorial Observer

Question for Judge Alito: What About One Person One Vote?

By ADAM COHEN

When Samuel Alito Jr. applied for a top job in the Reagan Justice Department, he explained what had attracted him to constitutional law as a college student. He was motivated, he said, "in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment." The reapportionment cases that so upset young Mr. Alito were a series of landmark decisions that established a principle that is now a cornerstone of American democracy: one person one vote.

There has been a lot of talk about the abortion views of Judge Alito, President Bush's Supreme Court nominee. But his views on the redistricting cases may be more important. Senator Joseph Biden Jr., the Delaware Democrat who will be one of those doing the questioning when confirmation hearings begin next week, said recently that Judge Alito's statements about one person one vote could do more to jeopardize his nomination than his statements about Roe v. Wade.

Rejecting the one-person-one-vote principle is a radical position. If Judge Alito still holds this view today, he could lead the court to accept a very different vision of American democracy, one in which it would be far easier for powerful special interests to get a stranglehold on government.

Even if Judge Alito has changed his position on the reapportionment cases, the fact that he was drawn to constitutional law because of his opposition to those rulings raises serious questions about his views on democracy and equality.

The one-person-one-vote principle traces to the Supreme Court's 1962 decision in Baker v. Carr. At the time, legislative districts had wildly unequal numbers of people, and representatives from underpopulated rural districts controlled many state legislatures. In Maryland, 14 percent of the voters could elect a majority of the State Senate, and 25 percent could elect a majority of the State House. In Alabama, the county that includes Birmingham, which had 600,000 people, got the same number of state senators - one - as a county with barely 15,000 people.

In Baker v. Carr, Tennessee voters challenged their state's unequal legislative districts, which had not been redrawn in 60 years. The Supreme Court had rejected a similar claim out of Illinois in 1946, saying it did not want to enter the "political thicket." But in 1962, the Warren court decided it had to enter the thicket to vindicate the rights of Tennesseans whose votes were being unfairly diluted. It ordered Tennessee's lines redrawn.

Two years later, in Reynolds v. Sims, the court struck down Alabama's legislative districts. The Reynolds decision did what Baker had not: it established a clear mathematical standard.

The court held that the equal protection clause required that "as nearly as is practicable one man's vote" must "be worth as much as another's."

Baker v. Carr set off what a leading election law treatise calls "the reapportionment revolution." In nine months, lawsuits challenging district lines were filed in 34 states. They did not solve all the problems with legislative districts - the current court is still wrestling with partisan gerrymandering - but they made American democracy much fairer.

As a Princeton undergraduate, Samuel Alito sided with Tennessee and Alabama in the reapportionment cases. What is unclear - and what senators will no doubt try to pin down - is whether he ever changed his mind. He cited his opposition to the reapportionment cases, apparently as a point of pride, in his application for the Reagan Justice Department job in 1985, when he was 35 years old and a midcareer lawyer.

Baker and Reynolds seem so self-evidently correct today that it is hard to imagine that Judge Alito could still really oppose them. But there is a strong strand of antidemocratic thinking among far-right lawyers. Jay Bybee, who helped develop the Bush administration's pro-torture policy and is now a federal judge, has criticized the 17th Amendment, which requires that United States senators be elected by the people, instead of by state legislatures, as they once were. And an American Enterprise Institute scholar, writing in The Washington Times, recently defended Judge Alito by suggesting that Baker v. Carr was wrong.

If Judge Alito was able to forge a conservative Supreme Court majority to overturn the reapportionment cases, the results would be disastrous. The next Tom DeLay-style redistricting in Texas could conceivably stuff most of the state's Democratic voters into two or three multimillion-person Congressional districts, while reserving the state's remaining 30 or so seats for Republicans. Small claques could control entire state governments - as they did until 1962.

Whatever the chances of overturning the reapportionment cases, the Senate should ask Judge Alito what he so disliked about them. The idea that reapportionment is territory the court cannot enter was long ago rejected by the legal mainstream. Baker v. Carr and Reynolds v. Sims may have been "activist" rulings, but for the most justifiable reason: to ensure that the democratic process is not rigged to thwart the will of the majority.

Judge Alito has himself espoused more activist views, notably his legally dubious vote to overturn a Congressional ban on machine guns. One possibility is that Judge Alito, who was a member of an alumni group that opposed coeducation and affirmative action at Princeton, is at heart an elitist who believes the reapportionment cases simply made the country too democratic.

Judge Alito will most likely insist at his hearings that he feels bound by Baker v. Carr and Reynolds v. Sims. Even if he can be trusted, it will say a great deal about him if he supports one person one vote only because he believes that respect for precedent, or confirmation politics, requires it. Most Americans know, based on their innate sense of justice and the Constitution, why the pre-1960's way of electing legislators was not acceptable then and is not now.

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Following completion of the 1970 federal census, as you know, the Washington legislature will again be faced with the dual tasks of congressional and legislative redistricting. In order to assist the legislature in its enactment of constitutionally defensible legislation regarding these subjects the two of you have asked this office to prepare a general resume of the pertinent judicial decisions governing redistricting principally, the recent decisions of the United States Supreme Court rendered in connection with its "one man one vote" doctrine under the equal protection clause of Amendment 14 to the United States Constitution.

Secondarily, based upon these decisions, you have requested our opinion on a number of specific questions designed to establish guidelines for future redistricting in the state of [[Orig. Op. Page 2]] Washington. These questions, which we will set forth, and answer, within the body of this opinion, deal with such matters as what is required by our state Constitution with respect to redistricting; when must redistricting be accomplished; whether congressional and legislative redistricting may be enacted by referendum bills; and lastly, the ingredients of a constitutionally defensible redistricting plan.

ANALYSIS

I. Resume of Redistricting Decisions

A. Background

Historically, the constitutions of virtually all of the various states have required that at least one house of a bicameral state legislature be apportioned on the basis of equally populated legislative districts. Similarly, the provisions of Article I, § 2 of the United States Constitution, since its inception, have required the apportionment of members of the United States House of Representatives among the several states in accordance with their respective populations. And, in addition, although the United States Constitution establishes a scheme for the election of United States Senators (as distinguished from representatives) which is unrelated to population, many of the state constitutions (including our own) long have contemplated equal population as a basis for representation inboth of their legislative houses.

However, until the early 1960's, judicial enforcement of these constitutional requirements was totally lacking at the federal court level. See, Colegrove v. Green, 328 U.S. 549 (1946), in which the United States Supreme Court refused to consider a claim of malapportionment aimed at congressional districts in the state of Illinois. At the state court level, in turn, enforcement was, at best (at least in most states, including Washington) somewhat loose and imprecise. See, in so far as this state was concerned, State ex rel. Warson v. Howell, 92 Wash. 540, 159 Pac. 777 (1916), the tone of which is well reflected by the following excerpt from the court's decision:

"It cannot be disputed that the presumption of constitutionality attaches to apportionment acts in the same manner that it does to any other act of the legislature, and that any doubt as to the power of the legislature to pass the particular act must result in a finding that the act is [[Orig. Op. Page 3]] within the legislative power. It is axiomatic also that the constitution is a limitation of power, not a grant of power, and that, save for constitutional restrictions, the legislature could apportion the state in any manner it deemed fit and the courts would be powerless to inquire into the validity of the act. It follows, therefore, that the facts adduced to show the alleged unconstitutionality of the act in question must be clear and convincing, and must establish beyond question that the legislature in enacting the law went entirely beyond the limits marked by the constitution. It is clear, furthermore, in providing that the apportionment should be made according to the number of inhabitants, the framers of the constitution did not intend that this should be done with mathematical exactness. Indeed, it requires no demonstration to show that, because of the other restrictions imposed, this is wholly impossible. Something, therefore, was left to the discretion of the legislature. If in complying with the other mandates of the constitution it finds that it is compelled to ignore equality in population to some extent, its enactment will nevertheless be valid because of the necessity of the case. Before it will be invalid, its action must partake of an arbitrary disregard of the requirements of the constitution, or be so gross and inconsistent as to imply arbitrary action."

Note, also, State ex rel. O'Connell v. Meyers, 51 Wn.2d 454, 319 P.2d 828 (1957), where, disposing of a challenge that had been made as to the constitutionality of a legislative apportionment scheme contained in chapter 289, Laws of 1957 ("amending" Initiative 199) the Washington court said:

"The relator, in attacking the constitutionality of chapter 289 as being violative of Art. II, § 3, of the Constitution, had the burden of proof to establish (1) the number of inhabitants in each legislative district in March, 1957, and (2) that disproportionateness exists [[Orig. Op. Page 4]] among the various districts. SeeFrach v. Schoettler, 46 Wn.2d 281, 280 P.2d 1038 (1955). The relator failed to prove either of these essential elements.

"There is a presumption that the legislature performed its duty by establishing the districts according to law. Frach v. Schoettler,supra, p. 285. The authority and duty to ascertain facts which control legislative action are upon those to whom was given the power to legislate. Courts will not inquire into a legislative factual determination, beyond consideration of that which appearsupon the face of the act, aided by judicial notice. State ex rel. Hamilton v. Martin, 173 Wash. 249, 257, 23 P.2d 1 (1933). See, also,In re Bailey's Estate, 178 Wash. 173, 177, 34 P.2d 448 (1934);Ajax v. Gregory, 177 Wash. 465, 476, 32 P.2d 560 (1934)."

B.Malapportionment Becomes Justiciable

Largely as a consequence of this attitude of judicial restraint, most of the federal and state constitutional mandates regarding congressional and legislative apportionment were historically ignored by the legislative bodies to which they were directed until the latter years of the last decade, following the issuance of the United States Supreme Court decision in Baker v. Carr, 369 U.S. 186 (1962). In Washington for example, although required by Article II, § 3 of our state Constitution to reapportion both of its houses after each decennial federal census, the legislatureitself (following its initial statutory apportionment in 1890)1/ failed do so during this "pre Baker" period except (a) in 1901, following completion of the second federal census after statehood2/ and, (b) in 1957, as a reaction to the passage of Initiative 199.3/ In addition to these two acts of the legislature itself, redistricting was accomplished by the initiative process in 1930 an approach which was upheld by the Washington [[Orig. Op. Page 5]] court in State ex rel. Miller v. Hinkle, 156 Wash. 289, 286 Pac. 839 (1930), and was again utilized in the case of Initiative 199, in 1956.

InBaker v. Carr,supra, however, the United States Supreme Court precipitated a profound change by holding that a claim of legislative malapportionment presents a justiciable question under the equal protection clause of the 14th Amendment to the United States Constitution. The nature of this claim was described by the court as follows (369 U.S. 187, 207):

". . . Their [the plaintiffs] constitutional claim is, in substance, that the 1901 statute constitutesarbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionallyunjustifiable inequality vis-a-vis voters inirrationally favored counties. . . ." (Emphasis supplied.)

A similar ruling with respect to congressional redistricting was made some two years later inWesberry v. Sanders, 376 U.S. 1 (1964), and these two cases, taken together, constituted an overruling of Colegrove v. Green, supra, and set the foundation for all that has followed, both in this state and elsewhere, in the ensuing period since they were decided.

C. "One Man One Vote"

In ruling upon the question from the standpoint of congressional districts inWesberry, the court also made the following significant substantive holding (376 U.S. 1, 7):

"We hold that, construed in its historical context, the command of Art. I, § 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. . . ." (Emphasis supplied.)

[[Orig. Op. Page 6]]

Although this decision was actually based upon Article I, § 2 of the United States Constitution, requiring that members of the house of representatives in our federal congress be chosen ". . . by the people of the several states . . .." rather than upon the 14th Amendment equal protection clause, it could hardly be doubted that the supreme court's decision inWesberry had to a large extent ordained the approach the court would take in cases involving state legislative malapportionment. This was so because the key relationship which concerned the court in Wesberry that of the people visavis their representative lawmakers was also present in the "state legislative" cases. Thus, the results were not surprising when, on June 15, 1964, the supreme court filed its decisions in six landmark legislative redistricting cases: Reynolds v. Sims, 377 U.S. 533;WMCA, Inc. v. Lomenzo, 377 U.S. 633; Lucas v. Forty-Fourth General Assembly of the State of Colorado, 377 U.S. 713;Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656;Davis v. Mann, 377 U.S. 678; and Roman v. Sincock, 377 U.S. 695. These six cases were only a few among the many state legislative redistricting cases which had reached the high court on appeal from district courts during the summer and fall of 1963. They had been commenced, initially, in the states of Alabama, New York, Colorado, Maryland, Virginia and Delaware, and had been

carefully selected by the supreme court as the cases most amenable to serving as vehicles for the logical extension of Baker v. Carr, supra. Of these six cases the lead case was the one from Alabama, Reynolds v. Sims, supra. In essence, the court decided in this case (and concurred therewith in the companion cases) that, (377 U.S. 533, 568):

". . . as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral legislature must be apportioned on a population basis. . . ." (Emphasis supplied.)

In arriving at this result the court reasoned, in significant part, as follows (377 U.S. 533, 565):

"'Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. . . . Since legislatures are responsible for enacting laws by which all [[Orig. Op. Page 7]] citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. . . . Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race. . . ." (Emphasis supplied.)

To the argument that by applying this concept to both houses of a bicameral legislature (in contravention of the federal analogy)4/ the court was undermining the concept of bicameralism, it replied as follows (377 U.S. 533, 576-77):

"We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is required to be the same - population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in [[Orig. Op. Page 8]] the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis."

D. How "Equal" Must Equal Protection Be The Reynolds View:

As for the critical question of what is meant by apportionment on the basis of population, in terms of how closely related to population a legislative apportionment plan must be, the United States Supreme Court in Reynolds v. Sims, supra, set forth its position as follows (377 U.S. 533, 577):

"By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

"In Wesberry v. Sanders, supra, the Court [[Orig. Op. Page 9]] stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry equality of population among districts some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be

unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Cf. Slaughter-House Cases, 16 Wall. 36, 78-89. . . . Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact [[Orig. Op. Page 10]] districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

"History indicates, however, that many States have deviated, to a greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. 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. But neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. [[Orig. Op. Page 11]] Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

"A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. Such a result, we conclude, would be constitutionally impermissible. And careful judicial [[Orig. Op. Page 12]] scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." (Emphasis supplied.)

For the most part, the five companion cases to Reynolds simply represented applications of these principles to the varying factual patterns presented in each of these cases every one of which (likeReynolds itself) resulted in a determination that the particular legislative apportionment scheme which was before the court, viewed as a whole, failed to pass constitutional muster. However, certain points were made by the court in these cases which are worthy of some mention.

Thus, on the issue of justiciability, the court held in the Colorado case ofLucas v. Forty-Fourth General Assembly Etc. of Colo., supra, that the presence of an ability on the part of the people to adopt or alter an apportionment plan by means of the initiative5/ could not be asserted as a justification for judicial nonintervention, saying (377 U.S. 713, 736):

"While a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy, such as initiative and referendum, individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial

remedy through which relief against the alleged malapportionment, which the individual voters seek, might be achieved. An individual's constitutionally protected right to cast an equally weighted [[Orig. Op. Page 13]] vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638, 'One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose to do so. 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 in Reynolds v. Sims. And we conclude that the fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportionment are pending and will be submitted to the State's voters at the next election."

And in Roman v. Sincock, supra, involving the Delaware legislative apportionment scheme, the court underscored its statement in Reynolds that "what is marginally permissible in one state may be unsatisfactory in another, depending on the particular circumstances of the case . . ." when it said (377 U.S. 695, 710):

"Our affirmance of the decision below is not meant to indicate approval of the District Court's attempt to state in mathematical [[Orig. Op. Page 14]] language the constitutionally permissible bounds of discretion in deviating from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

Lastly, in two of these companion cases the court laid a foundation for its subsequent consideration of the appropriate apportionment base i.e., total population, resident population, or registered voters, etc. In the New York case of WMCA, Inc. v. Lomenzo, supra, the court treated an apportionment based upon United States citizen population (total census population minus aliens)

". . . as presenting problems no different from apportionments using a total population measure . . ."6/

And in Davis v. Mann, supra, from Virginia, the court stated, and rejected, an argument based upon the presence of large numbers of military personnel in certain areas of a state, saying (377 U.S. 678, 691):

"We reject appellants' argument that the underrepresentation of Arlington, Fairfax and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. [[Orig. Op. Page 15]] Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible. Additionally, no showing was made that the Virginia Legislature in fact took such a factor into account in allocating legislative representation. And state policy, as evidenced by Virginia's election laws, actually favors and fosters voting by military and military-related personnel. Furthermore, even if such persons were to be excluded in determining the populations of the various legislative districts, the discrimination against the disfavored areas would hardly be satisfactorily explained, because, after deducting military and military-related personnel, the maximum population-variance ratios would still be 2.22-to-1 in the Senate and 3.53-to-1 in the House."

E. Decisions Since Reynolds

There have been two principal thrusts to the United States Supreme Court's redistricting decisions since June 15, 1964, when its opinions in Reynolds v. Sims and companion cases, supra, were filed. On the one hand, the court with certain qualifications has extended the basic "one man one vote" doctrine beyond congressional and legislative apportionments to reach local governmental legislative and/or administrative bodies as well.7/ See, Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Bd. of Education, etc., 387 U.S. 105 (1967); Avery v. Midland County, 390 U.S. 474 (1918); and Hadley et al. v. The Junior College District, etc., 397 [[Orig. Op. Page 16]] U.S. 50 (1970).8/ And on the other hand, the court has further refined its application of that doctrine to congressional and legislative districting primarily through its decisions in the following six cases: Fortson v. Dorsey, 379 U.S. 433 (1965); Burns v. Richardson, 384 U.S. 73 (1966); Swann v. Adams,

385 U.S. 440 (1967); Kilgarlin v. Hill, 386 U.S. 120 (1967); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); and Wells v. Rockefeller, 394 U.S. 542 (1969).9/

Fortson v. Dorsey, the first of these post-Reynolds congressional or legislative redistricting cases, involved a senatorial apportionment plan adopted by the Georgia legislature which at least purportedly used an equal population [[Orig. Op. Page 17]] base for the allocation of senatorial districts but which included several multi-member districts along with a predominant number of single member districts. The federal district court had rejected this approach, saying that:

". . . 'The statute causes a clear difference in the treatment accorded voters in each of the two classes of senatorial districts. It is the same law applied differently to different persons. The voters select their own senator in one class of districts. In the other they do not. They must join with others in selecting a group of senators and their own choice of a senator may be nullified by what voters in other districts of the group desire. This difference is a discrimination as between voters in the two classes. . . . The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not. It is an invidious discrimination tested by any standard.' 228 F.Supp. 259, 263. . . ."

Upon appeal to the United States Supreme Court, the only issue before the court was the correctness of this ruling. The supreme court reversed, saying (379 U.S. 433, 436):

"Only last Term, in our opinion in Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362, decided after the decision below, we rejected the notion that equal protection necessarily requires the formation of single member districts. In discussing the impact on bicameralism of the equal-protection standards, we said, 'One body could be composed of single member districts while the other could have at least some multi-member districts.' 377 U.S., at 577, 12 L.Ed.2d at 536. (Emphasis supplied.) Again, in holding [[Orig. Op. Page 18]] that a State might legitimately desire to maintain the integrity of various political subdivisions, such as counties, we said: 'Single member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.' 377 U.S., at 579, 12 L.Ed.2d at 537. (Emphasis supplied.)

"It is not contended that there is not 'substantial equality of population' among the 54 senatorial districts. The equal protection argument is focused solely upon the question whether county-wide voting in the seven multi-district counties results in denying the residents therein a vote 'approximately equal in weight to that of' voters resident in the single member constituencies. Contrary to the District Court, we cannot say that it does. There is clearly no mathematical disparity. Fulton County, the State's largest constituency, has a population nearly seven times larger than that of a single district constituency and for that reason elects seven senators. Every Fulton County voter, therefore, may vote for seven senators to represent his interests in the legislature. But the appellees assert that this scheme is defective because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted. But this is only a highly hypothetical assertion that, in any event, ignores the practical realities of representation in a multi-member constituency. It is not accurate to treat a senator from a multi-district county [[Orig. Op. Page 19]] as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. If the weight of the vote of any voter in a Fulton County district, when he votes for seven senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident of a single member constituency, we cannot say that his vote is not 'approximately equal in weight to that of any other citizen in the State.'"

Next came Burns v. Richardson, supra, which involved the constitutionality of an interim legislative apportionment plan for the state of Hawaii. Except for its reaffirmation of the Reynolds v. Sims precept that "one man one vote" applies to both houses of a bicameral state legislature, the case added little to the purely "numbers game" aspect of redistricting; i.e., how equal must equal protection be. However, the court's opinion in this case is important in terms of two related points.

Under the Hawaii constitution, the senate was to be apportioned on the basis of geography and the house on the basis of population so, obviously, the senate portion of this scheme was unconstitutional as all of the parties had conceded in the trial court. Following this concession, the Hawaii legislature enacted a new, population related, apportionment plan for use in the election of senators on an interim basis only. In so far as is material to the present discussion, its significant features were (1) a use of registered voters as the apportionment base; and (2) single member districts covering some areas of the state, with multi-member districts covering others as in the Georgia case discussed above.

[[Orig. Op. Page 20]]

The district court, upon reviewing this plan, approved the use of the "registered voters" measure of population; however, it disapproved the failure of the legislature to have established single member senatorial districts throughout the entire state. It is for the supreme court's observations on both of these aspects of the lower court's decision that this case is significant.

With respect to multi-member districts, the supreme court reiterated its view as to this issue as expressed in Fortson, supra, and overturned the district court ruling saying (384 U.S. 73, 88):

"But the Equal Protection Clause does not require that at least one house of a bicameral state legislature consist of single member legislative districts. See Fortson v. Dorsey, 379 U.S. 433, 13 L.Ed.2d 401, 85 S.Ct. 498. Where the requirements ofReynolds v. Sims are met, apportionment schemes includingmulti-member districts will constitute an invidious discrimination only if it can be shown 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.' Id., at 439, 13 L.Ed.2d at 405.

"It may be that this invidious effect can more easily be shown if, in contrast to the facts in Fortson, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record. Cf.McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101. . . ." (Emphasis supplied.)

[[Orig. Op. Page 21]]

As for the use of registered voters as an apportionment base, the supreme court said (384 U.S. 73, 90):

"The dispute over use of distribution according to registered voters as a basis for Hawaiian apportionment arises because of the sizable differences in results produced by that distribution in contrast to that produced by the distribution according to the State's total population, as measured by the federal census figures. In 1960 Oahu's share of Hawaii's total population was 79%. Its share of persons actually registered was 73%. On the basis of total population, Oahu would be assigned 40 members of the 51-member house of representatives; on the basis of registered voters it would be entitled to 37 representatives. Probably because of uneven distribution of military residents -largely unregistered - the differences among various districts on Oahu are even more striking. For example, on a total population basis, Oahu's ninth and tenth representative districts would be entitled to 11 representatives, and the fifteenth and sixteenth representative districts would be entitled to eight. On a registered voter basis, however, the ninth and tenth districts claim only six representatives and the fifteenth and sixteenth districts are entitled to 10.

"The holding inReynolds v. Sims, as we characterized it in the other cases decided on the same day, is that 'both houses of a bicameral state legislature must be apportioned substantially on a population basis.' We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in that case and most of the others decided [[Orig. Op. Page 22]] that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. Indeed, inWMCA, Inc. v. Lomenzo, 377 U.S. 633, 12 L.Ed.2d 568, 84 S.Ct. 1418, decided the same day, we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. Neither inReynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., e.g., Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby.

"Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate

underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of [[Orig. Op. Page 23]] prior malapportionment.' Moreover, 'fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions.' Ellis v. Mayor & City Council of Baltimore, 352 F.2d 123, 130 (C.A. 4th Cir. 1965). Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years. In view of these considerations, we hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."10/ (Emphasis supplied.)

Two years later, inSwann v. Adams, supra, the supreme court disposed of a legislative apportionment plan for the state of Florida a plan which the court in its opinion described as follows (385 U.S. 440, 442):

"The new plan provides for 48 senators and 117 representatives, and includes what in effect are multimember districts for each house. The senate districts range from 87,595 to 114,053 in population per senator, or from 15.09% over-represented to 10.56% under-represented. The ratio between the largest and the smallest district is thus 1.30:1. The deviation from the average [[Orig. Op. Page 24]] population per senator is greater than 15% in one senatorial district, is greater than 14% in five more districts and is more than 10% in still six other districts. Approximately 25% of the State's population living in one quarter of the total number of senatorial districts is under or over-represented by at least 10%. The minimum percentage of persons that could elect a majority of 25 senators is 48.38%.

"In the house the population per representative ranges from 34,584 to 48,785 or from 18.28% over-represented to 15.27% under-represented. The ratio between the largest and the smallest representative district is 1.41 to 1. Two districts vary from the norm by more than 18% and another by more than 15%, these three districts having seven of the 117 representatives. Ten other districts with 22 representatives vary from the norm by more than 10%. There is thus a deviation of more than 10% in districts which elect 29 of the 117 representatives. 24.35% of the State's population live in these districts. The minimum percentage of persons that could elect 58 representatives is 47.79% and a majority of 59 representatives could be elected by 50.43% of the population."

The federal district court in Florida had upheld the constitutionality of this plan on the ground that:

". . . '[s]uch departures as there are from the ideal are not sufficient in number or great enough in percentages to require an upsetting of the legislative plan . . . what deviation there is does not discriminate to any great extent against any section of the state or against either rural or urban interests.'"11/

[[Orig. Op. Page 25]]

However, the supreme court reversed, saying (385 U.S. 440, 443):

"We reverse for thefailure of the State to present or the District Court toarticulate acceptable reasons for the variations among the populations of the various legislative districts with respect to both the senate and house of representatives. Reynolds v. Sims,supra, recognized that mathematical exactness is not required in state apportionment plans. De minimus deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed de minimus and none of our cases suggests that differences of this magnitude will be approvedwithout a satisfactory explanation grounded on acceptable state policy. On the contrary, theReynolds opinion limited the allowable deviations to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.' 377 U.S. 533, 579. Thus that opinion went on to indicate that variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines. Likewise, in Roman v. Sincock, 377 U.S. 695, 710, the Court stated that the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.'" (Emphasis supplied.)

In addition to its emphasis upon the "failure of the state to . . . articulate acceptable reasons for . . ." the population variances involved in the plan under consideration, the supreme court here appears to have been influenced by the fact that, on the record,

". . . the State could have come much closer to providing districts of equal population than it did. . . ." (385 U.S. 440, 445.)

[[Orig. Op. Page 26]]

This conclusion was explained by the court as follows (385 U.S. 440, 445-6):

". . . 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. Furthermore, appellants suggested to the District Court specific amendments to the legislative plan which, if they had been accepted, would have measurably reduced the population differences between many of the districts. Appellants' own plan and their suggested amendments to the legislative plan might have been infirm in other respects but they do demonstrate that a closer approximation to equally populated districts was a feasible undertaking. . . ."

Shortly thereafter, in Kilgarlin v. Hill, supra, (involving legislative redistricting in the state of Texas) the supreme court clearly enunciated the point it had initially made in Swann v. Adams, supra, that once the plaintiff in a case such as this has proven the existence of population disparities under the plan he is attacking, the burden shifts to the state to justify these disparities from a constitutional standpoint. Because the district court here had ruled that the plaintiff had both the burden of proving population disparities and the absence of any justifications, its decision (sustaining the constitutionality of the plan under attack) was reversed.

The remaining two post-Reynolds redistricting cases above noted, Kirkpatrick v. Preisler and Wells v. Rockefeller, which were decided on the same day 12/ pertained to congressional redistricting in the states of Missouri and New York.

Under the Missouri plan which was before the court in Kirkpatrick, the state was divided into 10 congressional districts. On the basis of 1960 census figures, the ideal [[Orig. Op. Page 27]] population per district would have been 431,981. In fact, these districts varied from this ideal within a range of from 12,260 below it to 13,542 above it. The difference between the least and most populous districts was 25,802. In percentage terms, the most populous district was 3.13% above the mathematical ideal, and the least populous was 2.83% below.

Persuaded largely by a showing that "the simple device of switching some counties from one district to another would have produced a plan with markedly reduced variances among districts," 13/ the district court had held that this plan

". . . did not meet the constitutional standard of equal representation for equal numbers of people 'as nearly as practicable,' and that the State had failed to make any acceptable justification for the variances. 279 F.Supp. 952 (1967). . . ." 14/

On appeal the United States Supreme Court first described the arguments which the state, as appellant, was making in its attempt to have this ruling overturned (394 U.S. 526, 530):

"Missouri's primary argument is that the population variances among the districts created by the 1967 Act are so small that they should be considered deminimis and for that reason to satisfy the 'as nearly as practicable' limitation and not to require independent justification. Alternatively, Missouri argues that justification for the variances was established in the evidence: it is contended that the General Assembly provided for variances out of legitimate regard for such factors as the representation of distinct interest groups, the integrity of county lines, the compactness of districts, the population trends within the State, the high proportion of military personnel, college students, and [[Orig. Op. Page 28]] other nonvoters in some districts, and the political realities of 'legislative interplay.'" (Emphasis supplied.)

In response, however, the court held as follows (394 U.S. 526, 530):

(a) Re deminimis:

"We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered deminimis and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district. Since 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives,' Wesberry v. Sanders, supra, at 18, the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small."

And further.

"There are other reasons for rejecting the de minimis approach. We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly becomedeminimis. Moreover, to consider a certain range of variances deminimis would encourage legislators to strive for that range rather than for equality as nearly as practicable. The District Court found, for example, that at least one leading Missouri legislator deemed it proper to attempt [[Orig. Op. Page 29]] to achieve a 2% level of variance rather than to seek population equality.

"Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."

(b) Justifications:

"We agree with the District Court that Missouri has not satisfactorily justified the population variances among the districts."

(1)Special Interests:

"Missouri contends that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress. But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. '[N]either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes.' Reynolds v. Sims,supra, at 579-580. See alsoDavis v. Mann, 377 U.S. 678, 692 (1964)."

(2)Legislative Interplay:

"We also reject Missouri's argument that '[t]he [[Orig. Op. Page 30]] reasonableness of the population differences in the congressional districts under review must . . . be viewed in the context oflegislative interplay. The legislative leaders all testified that the act in question was in their opinion a reasonable legislative compromise. . . . It must be remembered . . . that practical political problems are inherent in the enactment of congressional reapportionment legislation.' We agree with the District Court that 'the rule is one of "practicability" rather than political "practicality."' 279 F.Supp., at 989. Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." (Emphasis supplied.)

(3)Political Subdivisions:

"Similarly,we do not find legally acceptable the argument that 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. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." (Emphasis supplied.)

(4)Special Population Factors; Military Personnel, Etc.:

"Missouri further contends that certain population variances resulted from the legislature's taking account of the fact that the percentage of eligible voters among the total population differed significantly from district to district -some districts contained disproportionately large numbers of military personnel stationed at bases [[Orig. Op. Page 31]] maintained by the Armed Forces and students in attendance at universities or colleges. Theremay be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2. But assuming without deciding that apportionment may be based on eligible voter population rather than total population, the Missouri plan is still unacceptable. Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly. At best it made haphazard adjustments to a scheme based on total population: overpopulation in the Eighth

District was explained away by the presence in that district of a military base and a university; no attempt was made to account for the presence of universities in other districts or the disproportionate numbers of newly arrived and short-term residents in the City of St. Louis. Even as to the Eighth District, there is no indication that the excess population allocated to that district corresponds to the alleged extraordinary additional numbers of noneligible voters there." (Emphasis supplied.)

(5)Projected Population Shifts:

"Missouri also argues that population disparities between some of its congressional districts result from the legislature's attempt to take into account projected population shifts. We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an adhoc, manner. Missouri's attempted justification of the substantial under-population [[Orig. Op. Page 32]] in the Fourth and Sixth Districts falls far short of this standard. The District Court found 'no evidence . . . that the . . . General Assembly adopted any policy of population projection in devising Districts 4 and 6, or any other district in enacting the 1967 Act.' 279 F.Supp., at 983."

(6)Geographical Compactness:

"Finally, Missouri claims that some of the deviations from equality were a consequence of the legislature's attempt to ensure that each congressional district would be geographically compact. However, inReynolds v. Sims,supra, at 580, we said, 'Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.' In any event, Missouri's claim of compactness is based solely upon the unaesthetic appearance of the map of congressional boundaries that would result from an attempt to effect some of the changes in district lines which, according to the lower court, would achieve greater equality. A State's preference for pleasingly shaped districts can hardly justify population variances." (Emphasis supplied.)

(c)Missouri "Could Have Done Better."

Lastly, the court's opinion in this case again as in Swann v. Adams, supra included a critical reference to a fact of record that an apportionment plan which would have produced a greater degree of population equality was available to the legislature (394 U.S. 526, 531):

[[Orig. Op. Page 33]]

"Clearly, the population variances among the Missouri congressional districts were not unavoidable. Indeed, it is not seriously contended that the Missouri Legislature came as close to equality as it might have come. The District Court found that, to the contrary, in the two reapportionment efforts of the Missouri Legislature sinceWesberry 'the leadership of both political parties in the Senate and the House were given nothing better to work with than a makeshift bill produced by what has been candidly recognized to be no more than . . . an expedient political compromise.' 279 F.Supp., at 966. Legislative proponents of the 1967 Act frankly conceded at the District Court hearing that resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality. The District Court found, moreover, that the Missouri Legislature relied on inaccurate data in constructing the districts, and that it rejected without consideration a plan which would have reduced markedly population variances among the districts. Finally, it is simply inconceivable that population disparities of the magnitude found in the Missouri plan were unavoidable. The New York apportionment plan of regions divided into districts of almost absolute population equality described in Wells v. Rockefeller,post, at __, provides striking evidence that a state legislature which tries can achieve almost complete numerical equality among all the State's districts. In sum, 'it seems quite obvious that the State could have come much closer to providing districts of equal population than it did.' Swann v. Adams, 385 U.S. 440, 445 (1967)." (Emphasis supplied.)

The New York congressional districting plan which was before the court in the companion case ofWells v. Rockefeller presented a novel feature of equally populated congressional districts within each of several unequally populated major geographic areas of the state a scheme which was described by the court as follows (394 U.S. 542, 545):

[[Orig. Op. Page 34]]

"The heart of the scheme, however, lay in the decision to treat seven sections of the State as homogeneous regions and to divide each region into congressional districts of virtually identical population. Thirty-one of New York's 41 congressional districts were constructed on that principle. The remaining 10 districts were composed of groupings of whole counties. A chart showing the population of each district under the 1968 statute appears in the Appendix to this opinion. The seven regions are: (a) Suffolk and Nassau Counties on Long Island with five districts having an average population of 393,391 and a maximum deviation from that average of 208; (b) Queens County with four districts having an average population of 434,672 and a maximum deviation from that average of 120; (c) Kings County plus a district made up of part of Kings and part of Queens, and a district made up of Richmond County and part of Kings, with seven districts having an average population of 417,171 and a maximum deviation from that average of 307; (d) New York and Bronx Counties with eight districts having an average population of 390,415 and a maximum deviation from that average of 496; (e) Westchester and Putnam Counties with two districts having an average population of 420,307 and a maximum deviation from that average of 161; (f) Wayne plus part of Monroe and the remainder of Monroe plus four other counties with two districts having an average population of 410,688 and a maximum deviation from that average of 256; and (g) Erie and Niagara Counties with three districts having an average population of 435,652 and a maximum deviation from that average of 228. The 10 remaining 'North country' districts were composed of groupings of whole counties."

In this case, unlike Kirkpatrick, supra, the federal district court had approved the plan under consideration. However, the supreme court here reversed, saying (394 U.S. 542, 546):

[[Orig. Op. Page 35]]

"It is clear that our decision in Kirkpatrick v. Preisler, ante, compels the conclusions that this scheme is unconstitutional. We there held, at___, that 'the command of Art. I, § 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.' 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. New York could not and does not claim that the legislature made a good-faith effort to achieve precise mathematical equality among its 41 congressional districts. Rather, New York tries 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. But we made clear inKirkpatrick that 'to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people.' To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be over-represented at the expense of districts with different interest orientations. Equality of population among districts in a sub state is not a justification for inequality among all the districts in the State.

"Nor are the variations in the 'North country' districts justified by the fact that these districts are constructed of entire counties. Kirkpatrick v. Preisler,ante." (Emphasis supplied.)

The court in this case also had occasion to express itself on another redistricting issue which had rather been lingering in the background ever since the "political thicket"15/

[[Orig. Op. Page 36]] was first entered inBaker v. Carr, supra that of the justiciability of political gerrymandering.

In challenging the 1968 New York congressional redistricting statute which had been upheld by the district court, the appellant, asserted,interalia,

". . . that the statute represents a systematic and intentional partisan gerrymander violating Art. I, § 2, of the Constitution and the Fourteenth Amendment. . . ."16/

However, because of its disposition of the appellant's primary argument that the statute violated the equal protection principle ofWesberry v. Sanders, supra the court responded by stating (394 U.S. 542, 544):

". . . We do not reach, and intimate no view upon the merits of, the attack upon the statute as a constitutionally impermissible gerrymander. . . ."

Later Developments:

The events which transpired in the state of New York following this decision in theRockefeller case are also worth noting as recorded in Wells v. Rockefeller, 311 F.Supp. 48 (U.S. D.C., S.D. N.Y., March 23, 1970). On January 22, 1970, the New York legislature repealed its previous congressional districting act and substituted a new plan under which utilizing 1960 census figures17/ - the state's forty-one congressional seats were allotted to districts ranging in population from a low of 409, 011 to a high of 409,814, with a mean average of 409,324.

[[Orig. Op. Page 37]]

Thereafter, the plaintiff in this case, although apparently satisfied with the population aspects of the latest plan, renewed the attack upon it based upon asserted political gerrymandering. However, the district court rejected this attack and held that (1) the plan was in accordance with the supreme court's mandate in Wells v. Rockefeller, supra; and (2) that the evidence offered by the plaintiff did not support his claims that, in redistricting, the legislature engaged in "partisan gerrymandering."

Following this ruling, the plaintiff again appealed to the supreme court. See 38 U.S. L.W. 3398; however, on May 14, 1970, the supreme court entered a simple one line order to the effect that the judgment of the district court (upholding the plan) was affirmed. 34 U.S. L.W. 3452.18/

F. Pending Cases Before United States Supreme Court:

As of this writing there are a total of three redistricting cases currently pending before the United States Supreme Court only two of which have yet been argued. They areAbate v. Mundt, No. 71, Whitcomb v. Chavis, No. 52 (coupled withRuckelshaus v. Chavis, No. 53 and Whitcomb v. Chavis, No. 92); and Ely v. Klahr, No. 548.

TheAbate case is a local governmental redistricting case [[Orig. Op. Page 38]] involving an apportionment plan for the Board of Supervisors of Rockland County, New York. Under this plan, eighteen members of the board were to be chosen from five districts, as follows:

Districts	Population	No. of Representatives
Stony Point	12,114	1
Haverstraw	23,676	2
Orangetown	52,080	4
Clarkstown	57,883	5
Ramapo	73,051	6

The plan was upheld by the New York court of appeals on October 8, 1969. See, 25 N.Y.2d 309, 305 N.Y.S.2d 465, and an application for certiorari was filed with the United States Supreme Court shortly thereafter. On February 24, 1970, certiorari was granted19/ and the case was argued on November 16 of this year.

In upholding this apportionment scheme, the New York court expressed itself, in material part, as follows:

(a)As to Population Variances:

". . . it should be recognized that the 'one man-one vote' cases have involved at least three levels of legislative reapportionment and that, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance different considerations both as to the permissible variations from strict equality and as to the justification for variations from such strict equality. The United States Supreme Court decisions indicate that, in regard to apportionment of congressional districts, the permissible variation from strict equality is indeed almost micrometric and the justification required for such deviation is correspondingly stringent (see Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481; Kirkpatrick v. Preisler, [[Orig. Op. Page 39]] 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519;Wells v. Rockefeller, 394 U.S. 542, 89 S.Ct. 1234, 12 L.Ed.2d 535). Decisions dealing with apportionment of State Legislatures tend to reflect a broader scope for permissible deviations and a more tolerant attitude toward the practical justification for deviations (see Fortson v. Dorsey, 379 U.S. 433, 437, 85 S.Ct. 498, 13 L.Ed.2d 401; Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376;Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501). Similarly, and of particular relevance on this appeal, the court has indicated a willingness to allow a still broader scope for permissible deviations from strict population equality and the justification for such deviations when dealing with local, intrastate legislative bodies (see Sailors v. Board of Educ., 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650;Dusch v. Davis, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656;Blaikie v. Wagner, D.C., 258 F.Supp. 364).

"In light of this apparent difference in treatment, it seems clear that we may find the population variance here to be within permissible limits (seeTown of Greenburgh v. Board of Supervisors, 25 N.Y.2d 817, 303 N.Y.S.2d 673, 250 N.E.2d 719,supra) and the practical and historical justification for the variance to be sufficient. What the plan does isnot to ignore population equality, but rather to achieve substantial equality within the context of a long-established town government framework, thus accommodating both constitutional and practical considerations. (SeeJackman v. Bodine, 53 N.J. 585, 252 A.2d 209, cert. den. 396 U.S. 822, 90 S.Ct. 63, 24 L.Ed.2d 73 [Oct. 14, 1969].)" (25 N.Y.2d at 315.)

(b)On Multi-Member vs. Single Member Districts:

"It is also contended that the plan's incorporation of multimember districts necessarily indicates a constitutional defect. However, the [[Orig. Op. Page 40]] contention flies in the face of the decision in Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 in which the court held that multimember districts, drawn substantially along existing county lines, are constitutionally permissible so long as the vote of each voter is 'approximately equal in weight to that of any other citizen in the State.' (379 U.S., at p. 438, 85 S.Ct., at p. 501). As with Fulton County, Georgia, in Fortson, the population of the Ramapo district in this case is approximately 6 times larger than that of Stony Point, a single member constituency, and for that reason Ramapo elects 6 representatives. According to the reasoning of that opinion, such a multimember district device is permissible since each voter in Ramapo votes for 6 representatives to represent his interests in the County Legislature and, if the weight of the vote of any voter in Ramapo, when he votes for 6 representatives, is not theexact equivalent of that of a resident of a single member district, we cannot say that his vote is not approximately equal in weight to that of any other citizen in the county (379 U.S., at pp. 437-438, 85 S.Ct. 498). That conclusion also adequately disposes of any claimed deficiency in such a plan based upon speculative mathematical analysis of such things as the 'effectiveness' of actual representation. Indeed, as long as the basic population requirements of Reynolds v. Sims are met, and we hold that the Rockland County plan does meet those fundamental requirements, the use of multimember districts 'will constitute an invidious discrimination only if it can be shown 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."' (Burns v. Richardson, 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376,supra). No such showing has been made as to the plan under attack in this case. We, therefore, hold that the Rockland County apportionment plan is constitutional." [[Orig. Op. Page 41]]

The next of these pending cases to be noted is Whitcomb v. Chavis. This case involves legislative redistricting in Indiana. On July 28, 1969, the federal district court invalidated the legislative apportionment statute for that state which had been enacted by the 1965 session of the Indiana legislature largely because of its use of multi-member districts in certain areas of the state. See,Chavis v. Whitcomb, 305 F.Supp. 1364 (U.S. D.C., S.D., Ind.) where, in substance, the district court held as follows:

(1) A legislative apportionment plan utilizing multi-member districts which, purposely or otherwise, operates to minimize and cancel out the voting strength of a racial minority is unconstitutional as being in violation of the equal protection clause; and

(2) That this was, in fact, the effect of the Indiana legislative apportionment plan with respect to Marion County (Indianapolis) a multi-member legislative district electing 8 (out of 50) state senators and 15 (out of 100) state representatives.

In addition to so holding, the district court retained jurisdiction and directed the Indiana legislature to enact a new legislative apportionment plan by October 1, 1969. Petitions for certiorari seeking review of this decision were then filed with the United States Supreme Court. See, Whitcomb v. Chavis, No. 735; and Ruckelshaus v. Chavis, No. 761. However, while these petitions were still pending the October 1 deadline arrived without any action having been taken by the legislature, and so the district court went about drawing up its own plan which it ordered be followed for the 1970 Indiana legislative elections.20/ See, 307 F.Supp. 1362 (December 15, 1969).

Certiorari was also then sought in order to obtain review of this order and, on March 24, 1970, the supreme court noted probable jurisdiction and placed the case on its summary calendar. See,Whitcomb v. Chavis, No. 1198, 38 U.S. L.W. 3359, 3364 and 3369. A hearing on this case was held earlier this month.

[[Orig. Op. Page 42]]

No hearing has yet been set on the third and most recent of the redistricting cases presently pending before the supreme court, Ely v. Klahr, No. 548. This case involves an appeal from a three judge district court decision in Klahr v. Williams, 303 F.Supp. 224, 313 F.Supp. 148 (U.S. D.C., Ariz. 1970), invalidating a recently enacted legislative redistricting plan for Arizona. The primary significance of this case arises from the fact that the district court, in its decision, freely and without any apparent doubts as to the correctness of this approach, applied the congressional redistricting precepts of Kirkpatrick v. Preisler and Wells v. Rockefeller,supra, to a legislative redistricting situation contra, the attitude displayed by the New York state court of appeals inAbate v. Mundt, supra, with respect to local governmental apportionments.

II.Guidelines for Future Redistricting in Washington

Most certainly the rules laid down in the Kirkpatrick and Rockefeller cases will govern future congressional redistricting in this state; and subject to the rather remote possibility that the cases presently pending before the supreme court might reflect a different point of view with respect to legislative or local governmental redistricting when they are finally decided, it is our present view that these same rules will also apply to our forthcominglegislative redistricting.21/ With this in mind, and because the subject of legislative redistricting perhaps places more sharply in focus the various issues which you have asked us to consider and discuss in laying down redistricting guidelines, we will concern ourselves principally with this subject in the remainder of this opinion. However, the points which we will make with respect to legislative redistricting, to the extent that they are based upon principles to be derived from the federal constitution and such cases as Kirkpatrick,Rockefeller, and, of course, [[Orig. Op. Page 43]] Wesberry v. Sanders, supra (the original "post-Baker v. Carr" congressional redistricting case) should also be regarded as applying to future congressional redistricting in this state.

A.State Constitutional Requirements:

Legislative redistricting under our state Constitution, is governed by Article II, § 3 which provides:

"The legislature shall provide by law for an enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five and every ten years thereafter; and at the first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and house of representatives, according to the number of inhabitants, excluding Indians not taxed, soldiers, sailors and officers of the United States army and navy in active service."

Thus, in other words,both of the houses of our state legislature must, as a matter ofstate constitutional law independent of anyfederal requirements, be apportioned on a population basis. Accordingly, this aspect ofReynolds v. Sims, supra, has had little impact upon legislative apportionment in this state.

The composition of our state legislature is established and limited by Article II, § 2 of our Constitution, which provides:

"The house of representatives shall be composed of not less than sixty-three nor more than ninety-nine members. The number of senators shall not be more than one half nor less than one third of the number of members of the house of

representatives. The first legislature shall be composed of seventy members of the house of representatives, and thirty-five senators."

[[Orig. Op. Page 44]]

Thus, the ninety-nine representatives and forty-nine senators who make up our present legislature under the provisions of the current apportionment law, chapter 6, Laws of 1965 (chapter 44.07 RCW), represent the maximum number of representatives and senators which we are permitted to have without a state constitutional amendment.

Lastly, Article II, § 6 of our state Constitution establishes certain relatively minimal physical limitations upon the boundaries of legislative districts in this state, as follows:

"After the first election the senators shall be elected by single districts of convenient and contiguous territory, at the same time and in the same manner as members of the house of representatives are required to be elected; and no representative district shall be divided in the formation of a senatorial district. . . ."

Notably, no mention is here made of such things as county or other political subdivision lines; all that is required is that (a) all senate (but not house) districts shall be single-member districts; and (b) no house district shall encompass the territory of more than onesenate district.

B. Must Redistricting Be Accomplished Prior to The 1972 Elections?

Article II, § 3, supra, requires legislative reapportionment and redistricting ". . . after each enumeration made by the authority of the United States. . . ." Under federal law, a census is taken at the beginning of each new decade (13 U.S.C. § 141) so, of course, one is under way at the present time. The official date of this census, when it is completed, will be April 1, 1970 pursuant to 13 U.S.C. § 145;22/ however, it is not anticipated that all of the population data to be included in the census will be official and readily available for redistricting or any other purpose until early in 1971.

[[Orig. Op. Page 45]]

Since no litigation is presently pending regarding the subject of legislative redistricting in this state, no court order relating to the time for redistricting is currently in effect unlike the situation which existed during the 1963 and 1965 legislative sessions. 23/ Thus, unless this situation should change before commencement of the 1971 legislative session, the legislature at that session will remain free to schedule its redistricting activities without regard to any court imposed timetable.

In the past, the usual, simplest and most effective judicial sanction to force a legislature to redistrict has been the injunction against conducting any further elections under an apportionment plan which has been declared to be unconstitutional. Thus, since the first legislative election after the completion of the 1970 census and its presentation to the legislature will not occur until November, 1972, the probabilities at this time appear to be that so long as the job of redistricting has been accomplished prior to the commencement of this electoral cycle (i.e., filings, in July 1972), it will have been [[Orig. Op. Page 46]] done on time.

In this connection, it appears to be well settled that malapportionment does not offset the power of a legislature to enact valid legislation. See, 82 C.J.S., Statutes, § 9, and cases cited. Nevertheless, it is, of course, possible for a court to employ the device of enjoining the passage of general legislation as a device to induce the enactment of a valid apportionment plan within a particular period of time as was done by the federal district court in Thigpen v. Meyers,supra, prior to and during the 1965 session of the Washington legislature. However, unless this relief is sought and granted in some case not now even pending, the 1971 legislature will not be compelled to operate under this sort of political-legal pressure in going about the task of redistricting either during 1971 or even in early 1972, in advance of the 1972 election.

On the other hand, any failure of the legislature to do this job in a constitutionally acceptable manner before the 1972 electoral cycle begins would undoubtedly precipitate judicial intervention at that point. What would follow, in all probability, would be either a state wide [[statewide]]at large legislative election or an election conducted in accordance with some sort of a court-drawn redistricting plan. Therefore, our direct answer to the question of whether redistricting must be accomplished prior to the 1972 elections is in the affirmative.

C. Redistricting by Referendum Bill By-passing Governor

InState ex rel. Lofgren v. Kramer, 69 Wn.2d 219, 417 P.2d 837 (1966), the Washington court held that a bill relating to congressional redistricting, passed by both houses of the legislature and referred to the people by legislative direction under Article II, § 1 (Amendment 7) of our state Constitution, was not subject to the provisions of Article II, § 12, relating to the gubernatorial veto. Undoubtedly, this holding is of equal applicability to the subject of legislative redistricting; cf., State ex rel. Miller v. Hinkle, supra.

However, a caveat on the use of this approach would appear to be in order. Article II, § 1 (Amendment 7) provides that

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"... All elections on measures referred to the people of the state shall be had at the biennial regular elections, except when the legislature shall order a special election. ..."

Under our present statutes governing elections, it is clear that any referendum bill which the legislature in either 1971 or 1972 might enact and refer to the people would not go onto the ballot until the biennial state election of November, 1972 at the same time as legislators must be elected under a new apportionment plan geared to the 1970 federal census.24/ Therefore, if redistricting is to be accomplished by a referendum bill effective prior to this election, the legislature will have to amend the election laws and/or "order a special election" designed to accommodate its redistricting referendum bill. Accord, AGO 1967 No. 2 [[to Office of Governor on January 18, 1967]], copy attached. And this legislative action would appear to be subject to the governor's veto, under the reasoning of State ex rel. Swan v. Kozer, 115 Ore. 638, 239 Pac. 805 (1925). In that case, the Oregon court, in considering provisions of the Oregon Constitution which are in all material respects similar to our own, held that the secretary of state was without authority to conduct a special election on a referendum bill where the separate bill providing for this election had been vetoed by the governor.

D. Ingredients of a Constitutionally Defensible Redistricting Plan

Irrespective of whether any sort of litigation is commenced to compel the legislature to redistrict following completion of the 1970 federal census, it must be assumed that a challenge to any plan enacted by the legislature will ultimately be made; thus, any plan enacted must be designed for constitutional defensibility in any event. With this in mind the obvious initial reference point is an identification of that which would unquestionably be constitutionally defensible approaches; namely:

(1) Forty-nine single member senate districts, each divided into two single member house districts; electing [[Orig. Op. Page 48]] a total of 49 senators and 98 representatives; all senate districts of precisely equal population and, likewise, all house districts of precisely equal population;or

(2) Forty-nine precisely equally populated legislative districts, each electing one senator and two representatives again for a total of 49 senators and 98 representatives.

From this reference point, we will next discuss the possibilities of deviations from either of these two "perfect" plans with a mind toward attempting to identify the extent to which each deviation discussed will impair the possibilities of successfully defending the plan in court if and when it is challenged. Our organizational approach will be one of "question" and "answer" as to each point to be considered.

Question:

May the number of members of the house of representatives be increased to 99 (as under the present apportionment scheme) by allotting an extra representative to one over-populated senatorial or legislative district?

Answer:

The underlying theory here is one of balancing over-representation in one house against under-representation in the other. In discussing the impact of its decision inReynolds v. Sims,supra, upon the concept of bicameralism, it will be recalled that the supreme court said,inter alia, that

". . . apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house . . ."25/

Likewise, upon remand of this case to the federal district court it was stated by the latter court, in its summary of [[Orig. Op. Page 49]] the guidelines it found fromReynolds, that:

"III. The apportionment in the two houses should be composed and arranged so as to help balance off inequities and to assure that in the legislature as a whole, so far as is practicable, one man's vote is worth as much as another's."26/

Thus, as was indicated by this office as long ago as March 7, 1963, 27 / - before either of these Sims cases were decided a balancing approach such as this would appear to be acceptable from a federal constitutional standpoint, at least on the small scale involved in using it as a justification for having an odd number of members of our house of representatives which would otherwise not be practicable because of the geographic relationship between senatorial and house districts which is spelled out in Article II, § 6 of the Washington Constitution, supra.

The problem, if any seriously exists regarding this plan, arises instead from the requirement of Article II, § 3 of our state Constitution that (as stated in our March 7, 1963, opinion, supra):

". . . each house, as a separate unit, and not merely, the legislature as a whole, be apportioned . . . according to the number of inhabitants, . . ."

In defending the constitutionality of chapter 6, Laws of 1965,supra, before the federal district court inThigpen, we justified the 99th house member (i.e., the third house member from legislative district No. 42, comprising all of Whatcom county) on the ground that an odd total number of members of the house of representatives was necessary in order to avoid the possibility of a tie vote. However, the [[Orig. Op. Page 50]] weakness in this argument is that under our Constitution a "tie breaker" is not a legal necessity in the legislative process except, perhaps, at the organizational stage of a session. Article II, § 22 provides that in order for a bill to pass either house, "a majority of the members elected to each [the particular] house be recorded . . . as voting in its favor." A "majority" is simply one more than half of the total membership. 28/ so in a 98-member house, a bill having 49 ayes and 49 nayes is simply defeated; the result is not a deadlock.

Furthermore, of course, it is readily apparent that Article II, § 2, supra, does not require an odd number of members of the house of representatives, for it permits the number of members of this body to total anywhere from 63 to 99. In point of fact, it was not until 1907 that the Washington house was for the first time actually composed of an odd number (95) of members; prior to this time it was composed of:

(a) 1889-90 (first session) 70 29/ (b) 1891-1899 78 30/ (c) 1901-1903 8031/

Since 1905, the total membership of the house has been:

(a) 1905-1909 95 32/ (b) 1911 96 33/ (c) 1913-1929 97 34/ (d) 1931 to date 99 35/

[[Orig. Op. Page 51]]

By way of evaluation of this idea, on balance we would think that if the most serious thing wrong with the apportionment plan adopted by the 1971 or 1972 legislature is that it includes a 99th house member representing the area contained in a somewhat overpopulated senate district, 36/ the plan will nevertheless be sustained.

Question:

May some house districts be multi-member districts while others are made single member districts?

Answer:

Ifall of the districts in this state from which members of our house of representatives are elected are two-member districts, as under the second of the two "clearly defensible" plans described above, it seems fairly evident that no voter residing in any particular district could be heard to complain that, in comparison with voters in other districts, he was being

discriminated against in terms of the quantity of his proportionment representation in that house. However, if some districts are made single member districts while others are made two-member districts, a voter residing in a single member district could, conceivably, be heard to argue that he is being discriminated against becausehe has only one member of the house representing him while his neighbor in a nearby two-member district is, in theory, represented by two house members. 37/ Yet, by way of response to this argument it should follow that if the concept of one man one vote is merely one of equal quantitative representation the man with two legislators who he must share with, say 100,000 other people, is neither any better nor any worse off than is his neighbor who, although having only one representative, is compensated by having to share him with only half as many other people.

[[Orig. Op. Page 52]]

In any event, the supreme court has spoken on the general issue of multi-member versus single member districts; inBurns v. Richardson, supra (at p. 88), quoting with approval fromFortson v. Dorsey, supra, it has said that an apportionment scheme including some multi-member districts

". . . will constitute an invidious discrimination only if it can be shown 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.' . . ."

In considering the ramifications of this rule, it should be noted that its particular thrust is toward those plans under which single member districts are the norm and multi-member districts are the exception; in other words, where most of the districts in the state are single member districts, but a few are made into multi-member (and not merely two but more as many as seven or eight) districts with a resultant tendency to diminish the ability of racial or political minorities living within a small, concentrated geographic portion of the district to elect even one representative "of their own."

On the other hand where, as in Washington under our present apportionment plan, 38 / multi-member house districts are (at least historically) the norm and single member districts the exception, the consequence (and, perhaps, purpose) of the exception is to protect the voting strength of certain geographically concentrated racial or political minorities rather than to minimize it or cancel it out. Thus, it would appear somewhat easier to defend a multi-member versus single member scheme under this circumstance than under the converse circumstance i.e., a plan with mostly single member districts and only a few multi-member districts.

Beyond this, the remaining obvious caveat is that of [[Orig. Op. Page 53]] consistency in approach the avoidance of a "crazy-quilt." 39 / In Washington, of state constitutional necessity, 40/ single member house districts can only be created through the process of subdividing senate districts. Thus, the point to be observed is that whatever considerations of policy are deemed by the legislature to dictate the subdivision of certain senate districts into single member house districts these considerations should, once formulated, be uniformly adhered to throughout the entire state. For example, if geographic vastness is taken to be a reason for subdividing a certain district, then all other districts of similar physical characteristics should also be subdivided and, conversely, if this is the only reason for subdividing which is enunciated by the legislature as a matter of general policy, then those districts which are not geographically vast should not be subdivided, etc.

So long as this is done, and so long as a population-representation relationship as close to mathematical perfection as possible is maintained, it would, in summary, be our opinion that the mere existence of some single member house districts, based upon consistently applied policy considerations, should not unduly weaken the defensibility of the legislature's apportionment plan.

Question:

Will any particular percentages of deviation from perfect equality in the population of legislative districts be allowable on a "de minimis" basis?

Answer:

In Swann v. Adams, supra, involving legislative redistricting in Florida, the supreme court's opinion (written by White, J.) stated that:

". . . Reynolds v. Sims, supra, recognized that mathematical exactness is not required in state apportionment plans. Deminimisdeviations are unavoidable, . . ." (Emphasis supplied.)

[[Orig. Op. Page 54]]

However, two years later, in Kirkpatrick v. Preisler,supra, the Missouri congressional redistricting case, the court said:

"We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considereddе minimis and to satisfy without question the 'as nearly as practicable' standard. . . . the 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. See Reynolds v. Sims, 377 U.S. 533, 577 (1964). Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.

". . . We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly becomedeminimis. Moreover, to consider a certain range of variances de minimis would encourage legislators to strive for that range rather than for equality as nearly as practicable. . . ."41/

Also pertinent here is the notion stated in Reynolds itself that

". . . What is marginally permissible in one state may be unsatisfactory in another, depending on the particular circumstances of the case . . ."

a point of view which (as we have seen) was even more explicitly stated in the companion case of Roman v. Sincock, supra, as follows:

". . . In our view the problem does not lend itself to any such uniform formula, and it is [[Orig. Op. Page 55]] neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

What all of this means, as we see it, is that the Washington legislature, in redistricting pursuant to the 1970 census, is not going to be able to operate, willy-nilly, within some particular preordained maximum range of percentage deviations from population equality among districts; i.e., an arbitrary rule that no district shall deviate from perfect population equality by more than 10% or 8%, or 5%, or even 3%. Instead, the basic task which will be facing the legislature when it goes about redistricting and reapportioning itself after the 1970 census figures are formalized will be to

". . . make a good-faith effort to achieve precise mathematical equality." (Emphasis supplied.)

for this is what the supreme court, in Kirkpatrick, has told us that the "as nearly as practicable" standard ofReynolds v. Sims,supra, must now be taken to mean. Any population disparities, "no matter how small," must be justified, according to the court inKirkpatrick. Furthermore, it is clear from this case and from the legislative redistricting cases of Swann v. Adams, and Kilgarlin v. Hill, supra that when our new post-1970 redistricting plan goes before the court, it will be the burden of the state "to present . . . acceptable reasons for the variations among the populations of the various . . . districts."42 /

Question:

How can this burden of justifying limited population variations best be met?

[[Orig. Op. Page 56]]

Answer:

In considering this question, let us first segregate the various degrees of deviation from perfect population equality into two categories: (1) Those very minor deviations which must be regarded as being "purely unavoidable" because of the bare physical mechanics of drawing legislative district boundaries around population dots on a census tract map, or of utilizing census units as districting units in such a manner as to preclude, for example, the division of any enumeration unit

(or, perhaps, block in those areas where block counts are available) by any legislative district boundaries; and (2) those deviations which go beyond such "purely unavoidable" variations from perfect equality.

Although not justifiable on the basis of de minimis alone, we believe that such minor deviations as fall within the first of the two categories will be implicitly justifiable solely on the basis of mechanical necessities. In effect, as evidenced by the supreme court's per curiam order of May 14, 1970, in the New York congressional redistricting case, once a state's redistricting plan reaches as close a degree of population equality as was finally reached in this case all forty-one New York congressional districts having been brought within a population range of from 409,011 to 409,814 (with a mean average of 409,324) the court is going to accept the plan without asking for any extended arguments on the subject of justifications, if, indeed, such a nearly perfect plan is ever challenged.

However, whenever the line is crossed between such extremely minor, mechanically unavoidable deviations and those deviations which cannot be justified on this basis alone, a danger point of some degree will have been reached; and at this point, "good" reasons will have to be shown for, e.g., the placement of more people in a certain district than was necessary merely in order to avoid a division of census units. Furthermore, we believe most strongly that the task of enumerating these "good" reasons should be regarded as one for the legislature itself to perform instead of being a task to be attempted by us, as lawyers for the state in "after the fact" arguments to the court.43/ See, again, Kirkpatrick v. Preisler, supra.

[[Orig. Op. Page 57]]

This point is critical, as we see it. Nowhere in any of the many, many redistricting plans which have been reviewed and rejected by the supreme court has there ever appeared any statement of explanatory reasons for population deviations by the legislature (which enacted the plan) itself; thus, in every case the court has had to judge the merits of the plan on the basis of what counsel has suggested may have been the legislature's guidelines in a particular area, rather than on the basis of the legislature's own explanation of its policy reason or reasons for doing what it did.

Therefore, in order best to meet the state's burden of justifying limited population deviations in our new, post-1970 redistricting plan, we would very definitely recommend to the legislature that before it undertakes to draw any lines on its redistricting map, it first should lay out and enumerate its own set of guidelines to be followed in establishing the boundaries of all legislative districts to be covered by the plan. These guidelines could either be enacted prior to the redistricting act itself, by a separate bill or, of course, they could be included in the redistricting legislation itself. And, obviously, they should initially cover such mechanical matters as designating census units (tracts, enumeration units or blocks) as the basic component units of legislative districts, etc.;44/ however, in addition, they should also spell out legislative policies regarding the rules to be followed in the larger area of utilizing or ignoring [[Orig. Op. Page 58]] county or other political subdivision boundaries, or natural or man-made boundaries such as rivers, lakes, or freeways, in drawing legislative district boundaries. And finally, these predetermined guidelines should, as well, cover the criteria for establishing single versus multi-member house districts, as described in the preceding section of this opinion and similarly, they should spell out the rules to be followed with respect to the apportionment base itself, if some base other than pure census population is to be used (as discussed below).

To pass constitutional muster, these guidelines first should meet the basic test of rationality, and be consistent with such standards as may be gleaned as general propositions from the various existing supreme court decisions discussed at length earlier in this opinion; and secondly but of equal importance having been thus adopted, these guidelines should then be uniformly adhered to by the legislature in going about the actual physical job of redistricting so as (again) to avoid the "crazy-quilt" type of result; i.e., the obviously embarrassing and difficult to explain lack of any uniform pattern as to "over" or "under" populated districts, etc.

Question:

In establishing its guidelines, may the legislature constitutionally justify limited population deviations on the basis of a policy of adhering to county boundary lines wherever it is possible to do so while at the same time maintaining population equality within a predetermined minimal range?

Answer:

Of all of the various commonly asserted justifications for limited population variations as between legislative (or congressional) districts, most of which were considered and at least partially rejected by the supreme court in Kirkpatrick v. Preisler, supra, the one which seems to have the most "staying power" is that of adherence to county lines. Probably the

reasons for this are as much traditional and emotional as they are practical; we (like most other states) simply have always used the county as a unit of representation in the legislature going back to the original apportionment scheme set forth in Article XXII, §§ 1 and 2 of our state Constitution. And, of course, unlike any other political subdivisions [[Orig. Op. Page 59]] in this state our counties have an essential permanency of boundaries which renders them of greater utility than even cities or towns in serving as component units of a legislative apportionment plan which, once adopted, is designed to remain in effect for ten years at a time.

Yet in a state such as ours which is divided into a comparatively small number of counties covering fairly large areas and having extreme variations as to population, it is patently impossible, consistent with the requirements of the "one man one vote" rule, to insure representation in either house of our legislature to every county in the state at least so long as we adhere to the maximum numbers of senators and representatives for which our state Constitution presently makes provision. And moreover, the notion that every county in Washington encompasses a distinct economic, political or sociological territory presents a strain to credulity when one thinks, for example, of such counties as Jefferson or Wahkiakum, or Asotin, Columbia and Garfield or, for that matter, of any of the counties comprising the Puget Sound Basin when that area is considered as a whole.

With this in mind, the easiest answer for us to give to this question would be in the negative simply dismissing the use of county lines as having been considered and found wanting by the supreme court in Kirkpatrick, where it said:

"Similarly, we do not find legally acceptable the argument that 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. The State's interest in constructing congressional districts in this manner, it is suggested, is to minimize the opportunities for partisan gerrymandering. But an argument that deviations from equality are justified in order to inhibit legislators from engaging in partisan gerrymandering is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities." (Emphasis supplied.)

However, viewed critically, this statement by the court is [[Orig. Op. Page 60]] not a rejection of a policy of adhering to county linesperse; rather, it is simply a rejection of the particular reasons which Missouri argued as its justification for using county lines in the formation of its congressional districts i.e., to minimize the opportunities for political gerrymandering. Compare, Wells v. Rockefeller,supra. Thus the question is not so much whether adherence to county lines is a justification for limited population variations as between legislative or congressional districts; instead, it is more a question of whether a "good" reason exists for using the boundaries of counties as district boundaries in a given state or, even more specifically, with respect to certain areas in a given state.

Two such "good" reasons were suggested by the supreme court inReynolds v. Sims, supra at least according to the analysis of that decision which was expressed by the New Jersey Supreme Court in Jackman v. Bodine, 55 N.J. 371, 262 A.2d 389 (1970),supra, as follows:

"Reynolds v. Sims said there may be departures from mathematical equality in drawing district lines in order to maintain the integrity of political subdivisions because (1) adherence to such political lines may deter gerrymandering and (2) local governmental entities are frequently charged with various responsibilities incident to the operation of state government, and hence it is appropriate to provide a voice for that political community.

"'* * * Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.' 377 U.S. at 578-579, 84 S.Ct., at 1390, 12 L.Ed.2d, at 537.

"'* * * Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions.' 377 U.S., at 580-581, 84 S.Ct., at 1391, 12 L.Ed.2d, at 538."

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While the supreme court's opinion in Kirkpatrick appears to have refuted the validity of thefirst of these two reasons or justifications for the use of county lines, 45/ the second of them may still have some validity ifreduced to a formal legislative finding as a foundation for an expressly enunciated and uniformly adhered to standard. However, we would doubt that even such an expression of legislative policy as this could be expected to clear the road for a degree of population deviation as great as that countenanced by the New Jersey court in theJackman case; i.e., a population ratio of 1.5 to 1 within

a deviation range of 120% 80%. 46/ At the very most, a deviation range of somewhere in the neighborhood of 105% 95% is about all we would think could conceivably be coupled with a "county line" standard and even this very limited degree of variance, if for county line purposes only, should be viewed with some apprehension.

Of course, there will undoubtedly be some instances in which one or more entire counties will be populated either by a number of persons very closely equaling the population of an "ideal" legislative district or by a number of persons totaling less than this ideal; and in either of these cases it certainly will be permissible for the legislature to describe the boundaries of the district either comprising or including such county or counties in terms of the area [[Orig. Op. Page 62]] covered by e.g., all of Chelan county, or all of Chelan county and the following census tracts from Douglas county.

Our point, though, is that we see only a very limited possibility of establishing legislative districts which deviate from this ideal in population simply in order to avoid adding or subtracting territory to or from a given county in the formation of a district and then, only on a uniform and consistent basis within the confines of predetermined state wide guidelines where only very minor population variations will result.

Question:

In ascertaining the population for redistricting purposes of all military (army, navy, air force, etc.) bases or reservations within the state, may the legislature disregard the total census population of such areas as shown in the federal census report, and use, instead, a multiple of the number of registered voters residing within these areas which would reflect the total number of true Washington state residents thereof?

Answer:

This question has been raised primarily because of the circumstances involving the large Fort Lewis Military Reservation in Pierce county; however we have phrased it and will respond in more general terms because it seems apparent that any differing treatment which is given to this military establishment in our future redistricting plans (both congressional and legislative) should also, from the standpoint of rationality, be given to all other military bases or reservations within this state upon which any of its inhabitants reside, insofar as is mechanically practicable.

Although we have not been able to determine, with certainty, when the practice originated, it is at least clear that under our legislative redistricting acts of 1957 47 / and 1965,48/ both the area and the population of this military base have been excluded from the plans contained therein. However, at the same time, all of the other albeit much smaller [[Orig. Op. Page 63]] military establishments in this state have been included in these plans, without qualification, since the legislature's approach in the past has been to use pure census population data for its apportionment base in all areas except this one.

Furthermore, just as we are uncertain as to the origin of excluding Fort Lewis from our legislative redistricting plans, we have not with any degree of certainty been able to identify the legislature's rationale for this practice. Conceivably, it could be an implementation of the provision in Article II, § 3 of our state Constitution,supra, that apportionment is to be based upon ". . . the number of inhabitants, excluding Indians not taxed,soldiers, sailors and officers of the United States army and navy in active service." (Emphasis supplied.) Yet if this is the correct explanation, all of the various other military bases should have been treated similarly.

A second possible explanation for the legislature's historical exclusion of Fort Lewis from its redistricting plans rests with the traditional voting status of persons living upon this military reservation. Prior to 1966, when we wrote AGO 65-66 No. 107 upholding the residential voting qualifications of persons living on the Fort Lewis Reservation, it was apparently felt that this area was not truly a part of the state of Washington for voting purposes. See, e.g., AGO 5153 No. 337 [[to Prosecuting Attorney, Clark County]](June 30, 1952); also, AGO 51-53 No. 343 [[to Prosecuting Attorney, Spokane County]](June 8, 1952).

However, it seems apparent from the views expressed in this 1966 attorney general's opinion, which have since been implemented through the establishment of a voting precinct covering Fort Lewis, that this treatment of the military reservation, whether for voting or for legislative apportionment purposes, can no longer be sustained. Fort Lewis must now be regarded as being a part of the state of Washington for electoral purposes49/ and, accordingly, the fact of a person's residence on this military reservation can no longer be validly asserted as a justification for excluding him from any future legislative or congressional redistricting plans.

Of course, this necessarily means that if pure census population data is to be used on a state wide [[statewide]]basis as the base for legislative (or congressional) apportionment, then all of the little census dots appearing on the census map which [[Orig. Op. Page 64]] covers the Fort Lewis area will have to be considered for districting purposes to the same extent as they are elsewhere notwithstanding the largely transient status of most of the people represented by those dots; therefore, the question posed at the outset of this section of our opinion involving the use of a multiple of the number of registered voters residing on the various military establishments as a means of ascertaining their population for redistricting purposes.

The use of an apportionment base of other than pure census population was, as we have seen, expressly sanctioned by the supreme court in the Hawaii legislative redistricting case ofBurns v. Richardson,supra as well as being implicitly approved in WMCA, Inc. v. Lomenzo, supra, from New York. InBurns, the court stated that:

". . . Neither inReynolds v. Sims nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., e.g., Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby." (384 U.S. at 92.)

Furthermore, it is to be noted that the term used in Article II, § 3 of our own state Constitution,supra in describing the apportionment base in this state is "inhabitants," not persons; and, of course, the term "inhabitant" has ordinarily been construed to be the equivalent of "resident." See, 21 Words and Phrases, p. 692. For example, a typical definition is that appearing inState ex rel. Jeffries v. Kilroy, 86 Ind. 118, 120 (1882), as follows:

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"'. . . one who dwells or resides permanently in a place, or who has a fixed residence, as distinguished from an occasional lodger or visitor. . . .'" 50 /

Thus, a state policy of apportioning the legislature in accordance with a population base which excludes transient (nonresident) military personnel may, in truth, be what is enunciated by the provisions of our state Constitution even though this policy has not been fully implemented or uniformly applied in connection with past redistricting plans. And, if we read theBurns v. Richardson decision correctly, it is a policy which is acceptable under the federal Constitution, as being "rational."

This essential rationality would seem particularly demonstrable, it may be suggested, under a circumstance such as that presented by Fort Lewis with so large a military population as to constitute at least a major portion of a legislative district unto itself if all of its census population must be counted in the apportionment base. Yet what real stake in state government deserving of representation can the many thousands of transient military personnel passing through this fort every month or so be said to have? Thus, the effect of including all of these people in our apportionment base would largely be one of dilution of the one man one vote concept from the standpoint of all other members of our state's population; by virtue of this inclusion, all of the rest of the people in the state would receive less per capita representation, for no sound reason, than if only the true state residents of the fort were to be counted.

This leaves us only with the question of measurement. If the federal census report could tell us how many of the people found to be "living" on Fort Lewis and the other military bases on census day were "true residents" and how [[Orig. Op. Page 66]] many were transients, this undoubtedly would be the best gauge to use in measuring the population of these areas for apportionment purposes consistent with the state constitutional criteria. However, the report unfortunately will not disclose this fact; therefore, the approach to be considered is that this population count be made by ascertaining the number of registered voters residing within the subject areas, and then multiplying this number by a figure found to represent the ratio of total population to registered voters throughout the remainder of the state.

Predicated upon the proposition that only those occupants of the various military bases who have become residents of the state will have been registered to vote,51/ this approach would theoretically lead to an exclusion from the population base of only those census day "occupants" of those bases who were in a transient status when the census count was made which would be in accordance with the "rational" state policy, the achievement of which is being sought. On the other hand,

this particular measuring device must be recognized as suffering from certain disabilities which were noted by the supreme court in Burns v. Richardson, supra, when it said:

"Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of prior malapportionment.'" 52/

[[Orig. Op. Page 67]]

In view of this attitude of the court regarding the use of registered voters as a measuring device, some risks must be said to be involved in the approach contemplated by your immediate question. However, in the absence of any other practical and readily available means of ascertaining the resident population of the military bases (and we would suggest that the legislature so find in its "guidelines" legislation) we would say, on balance, that a fairly presentable set of arguments would seem to exist to support this approach contemplated by this question. 53/

III. Conclusion and Summary

We have prepared this opinion for the purpose of providing the legislature with as total a picture as possible of the shape and dimensions of the "ball park" in which the legislative (and congressional) redistricting "games" will have to be played during the forthcoming (post-1970 census) legislative sessions from the standpoint of thoselegal rules by which these activities will be governed. And without a doubt, the principal theme of this opinion has been its demonstration that these legal rules as enunciated by the United States Supreme Court in its decisions since Baker v. Carr and Reynolds v. Sims (i.e., since the era of our 1963 and 1965 redistricting activities) have grown progressively tougher with each ensuing post-Reynolds decision.

As in the past, our basic goal in guiding the legislature in its deliberations in this area will be to induce it to enact a set of plans for both congressional and legislative redistricting which may readily be defended in court, if and when they are challenged. To this end, our advice and counsel here, and in the future, will be affirmative in nature with emphasis upon the objective to be aimed for rather than in terms of what the legislature might be able to "get away with" and still meet the minimum requirements of a "constitutionally defensible" redistricting plan.

In simplest and most basic terms and we say this as forcefully and as earnestly as possible what the legislature is going to have to do in order to pass constitutional muster [[Orig. Op. Page 68]] with its congressional and legislative redistricting plans, is two-fold, as follows:

(1) It must ". . . make a good faith effort to achieve precise mathematical equality . . ." in the populations of the various legislative districts (i.e., in terms of the ratio between population and representation); and

(2) it must also articulate, in a form appropriate for presentation to the courts, ". . . acceptable reasons . . ." for such variations among the populations of the various districts as are involved in the particular plan actually adopted by the legislature.

We cannot overemphasize our feeling, earlier expressed, that the job of selling the courts on any redistricting plan which departs from "precise mathematical equality" would be greatly facilitated by accompanying legislation which lays out the rules to be followed with respect to such things as multi versus single member districts, the use of census units as basic redistricting units, adherence to county lines where possible within minimal population ranges, departures from census population data, etc. provided, of course, that the rules thus laid out, in addition to being constitutionally sound perse, are then consistently adhered to in the actual drawing of district boundaries. Given this sort of approach, it should follow that in order to invalidate the redistricting plan itself the court would have to hold that the underlying, legislatively enunciated state policies were irrational and hence, invidiously discriminatory.

On the other hand, if the legislature were to be guided again only by the rules of 1963-65; if it were again simply to draw its lines without any rhyme or reason, and with only a goal of having all districts fall within some predetermined over-underpopulation range of 15% or 10% or 5%, or even 3%, we believe it would be courting disaster in so far as the production of a constitutionally defensible redistricting plan (congressional or legislative) is concerned. The end product of

this approach, we fear, would be an indefensible crazy-quilt in any event, and furthermore, would probably not come totally within whatever population limits the legislature thus attempted to meet. These deviations could not be satisfied on the basis of deminimis, and this [[Orig. Op. Page 69]] office would then be left with the task of attempting to dream up our own justifications not those of the legislature completely after the fact, so to speak.

We trust the foregoing will be of some assistance to you.

Very truly yours,

SLADE GORTON
Attorney General

PHILIP H. AUSTIN
Assistant Attorney General

*** **FOOTNOTES** ***

1/Laws of 1890, Ex. Sess., p. 1.

2/Laws of 1901, chapter 60, p. 79.

3/As more fully detailed in State ex rel. O'Connell v. Meyers,supra.

4/I.e., a congress comprised of a house of representatives apportionment on a population basis compared with a senate apportionment on a geographic basis of two senators per state regardless of population. If any aspect of these legislative redistricting decisions could not have been readily anticipated from the court's approach towardcongressional redistricting inWesberry, it would have been this extension of "one man one vote" to both houses of a bicameral legislature.

5/Cf., State ex rel. Miller v. Hinkle,supra.

6/See, Burns v. Richardson, 384 U.S. 73, 92 (1966), discussed in detail below.

7/Notably, however, the concept of "one man one vote" has been held to be inapplicable to apportionments within thejudicial branch of government. See, Buchanan v. Rhodes, 249 F.Supp. 876 (U.S. D.C., Ohio, 1966), 385 U.S. 3 (appeal dismissed);Stokes v. Fortson, 234 F.Supp. 57 (U.S. D.C., Ga., 1964); andNew York State Ass'n of Trial Lawyers v. Rockefeller, 267 F.Supp. 148 (U.S. D.C., S.D. New York, 1967), all of which were noted and discussed in our opinion of March 12, 1969, to then State Senator Wesley C. Uhlman.

8/Once the threshold question of justiciability was resolved, the theme in each of these local government cases was essentially the same as with congressional and legislative districting one man one vote; or as most recently stated by the supreme court in theHadley case, supra, at 56:

". . . whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. . . ."

However, it is worth noting that in this case the court reaffirmed its earlier holding inDusch v. Davis, supra, that it is constitutionally permissible to require candidates for election to a multi-member body to be residents of unequally populated residential districts where the election is held on a county or city-wide "at large" basis. Accord, RCW 28.57.350 relating to common school districts in this state (see opinion dated January 13, 1969, to Representative Leonard A. Sawyer); and RCW 36.32.020 relating to county commissioner districts (see opinion dated July 15, 1969, to Representative F. Pat Wanamaker);

but contrast, RCW 28.19.510, regarding intermediate school districts (see opinion dated January 5, 1970, to Representative Arthur C. Brown).

9/See, also, the following per curiam opinions: Toombs v. Fortson, 384 U.S. 210 (1966);Connor v. Johnson, 386 U.S. 483 (1967);Alton v. Tawes, 384 U.S. 315 (1966); Martin v. Bush, 376 U.S. 222 (1964); and Scott v. Germano, 381 U.S. 407 (1965).

10/Thereupon, the supreme court remanded the case to the district court with a direction that the plan in question be utilized as an interim apportionment plan for the 1966 election in Hawaii. On the use of citizen population as an apportionment base, see, also, WMCA, Inc. v. Lomenzo, 238 F.Supp. 916 (U.S. D.C., S.D. New York, 1965).

11/See, 258 F.Supp. 819, 827.

12/April 7, 1969.

13/394 U.S. 526 at p. 529.

14/Ibid.

15/See the Opinion of Justice Frankfurter in Colgrove v. Green, supra.

16/394 U.S. 542, 544.

17/An approach which was reluctantly and somewhat caustically accepted by the district court on the ground that ". . . there are no other meaningful figures available for use in a state wide [[statewide]]scheme . . . until the 1970 census is announced . . ." (311 F.Supp. at 50.)

18/CompareJackman v. Bodine, 55 N.J. 371, 262 A.2d 389 (March 2, 1970); cert. den. 39 U.S.L.W. 3188 (October 12, 1970). In this case the New Jersey Supreme Court had upheld, as an abstract proposition unimplemented by any specific redistricting plan, certain population standards set forth in a recent amendment to the New Jersey Constitution. Under these standards, a maximum population ratio of 1.5 to 1 between the most and the least populous legislative districts would be permissible. However, we do not regard the United States Supreme Court's denial of certiorari as being any sort of an affirmance of this degree of population deviation. See, Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). Instead we would think it most probable that the court declined to act here simply because no specific plan was presented to it for its review a view, we might add, which is shared by the New Jersey attorney general's office.

19/See, 38 U.S.L.W. 3319.

20/A remedial approach which, notably, has been expressly sanctioned and even encouraged by the supreme court. See, Scott v. Germano, 381 U.S. 407 (1965), supra, and cases cited therein.

21/In other words our best guess and in any event the safest assumption to follow until the supreme court holds otherwise is that the approach taken by the district court inKlahr v. Williams, supra, is more probably correct than was the approach of the New York state court in Abate v. Mundt, supra.

22/See, State ex rel. Jordan v. DeHart, 15 Wn.2d 551, 131 P.2d 156 (1942).

23/See, Thigpen, et al. v. Meyers, et al., 211 F.Supp. 826 (U.S. D.C., W.D. Wash. 1962); 378 U.S. 554 (judgment affirmed). The final order entered by the district court in this case, on March 9, 1965, was an order of dismissal based upon the court's approval of our 1965 legislative redistricting act chapter 6, Laws of 1965, supra. In this order, the court made the following statement regarding the timetable for future redistricting:

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that chapter 6, Laws of 1965 of the State of Washington, redistricting and reapportioning the Washington state legislature and providing for the election of legislators from the reapportioned senatorial and legislative districts, is in all respects in compliance with Amendment Fourteen of the United States Constitution and may stand as the lawful legislative redistricting plan of the State of Washington until such

time as it hereafter may be further revised by the legislature following the 1970 federal census in conformity with the admonition of this Court contained in its verbal opinion as aforesaid."

24/See, RCW 29.13.010, et seq.

25/377 U.S. 533, 577.

26/Sims v. Baggett, 247 F.Supp. 96, 105 (U.S. D.C., M.D., Ala. 1965).

27/See opinion dated March 7, 1965, to then State Senator Wilbur Hallauer and then State Representative Slade Gorton.

28/See, e.g., Mills v. Hallgren, 146 Iowa 215, 124 N.W. 1077 (1910).

29/See, Article XXII, § 2 of the Constitution which prescribed the composition of the first legislative session.

30/Laws of 1890, Ex. Sess., p. 1.

31/Section 2, chapter 60, Laws of 1901 (reapportionment).

32/Section 19, chapter 89, Laws of 1905 (creating Benton County).

33/Section 11, chapter 17, Laws of 1909 (creating Grant County).

34/Section 12, chapter 28, Laws of 1911 (creating Pend Oreille County).

35/Section 3, chapter 2, Laws 1931 (Initiative No. 57).

36/Based upon a theory of proportional representation, and correlating the representive value of one senator to that of 2-1/49 representatives (since there would be a total of 49 senators and 99 representatives under the scheme), the correct ratio of population between this single over-populated district and that of a "normal" district would compute out to 246:197 (i.e., a population overage for one single three member district of approximately 20%).

37/Cf., "'One man-one vote' demands near mathematical precision." 19 De Paul Law Rev. 152, 168 (1969).

38/Chapter 6, Laws of 1965, supra.

39/See, Reynolds v. Sims, supra, p. 531-532.

40/Article II, § 6, supra.

41/This opinion, notably, was written by Mr. Justice Brennan, with Mr. Justice White, the author of the majority opinion in Swann, dissenting here.

42/Swann v. Adams, at 443-44.

43/By these, we mean such arguments as we are required to dream up in order to attempt to present the court with acceptable reasons for population deviations resulting from the legislature's redistricting plan but nowhere explained by the legislature which adopted it.

44/In making this recommendation we are fully aware that (with the notable exception of Initiative No. 199 chapter 5, Laws of 1957) the usual practice over the years has been to use voting precincts rather than census units for this purpose. Apparently this practice, which of necessity is productive of certain population errors because of the mechanics of "translating" census units (with known populations) into precincts (with estimated populations), has been predicated upon RCW 29.04.050 under which every voting precinct must be wholly contained within a single senatorial or representative district. However, since the boundaries of these voting precincts may readily be altered to conform to new legislative district

boundaries after redistricting has taken place, neither this statute nor the long-standing practice would appear to present much in the way of a justification for such population errors or deviations as would result from this approach. Better, then, simply to use the census units themselves as the basic redistricting units and thereby avoid this pitfall.

45/Note, here, the supreme court's own footnote to its rejection of county lines as a justification for population variations among Missouri's congressional districts:

"It is dubious in any event that the temptation to gerrymander would be much inhibited, since the legislature would still be free to choose which of several subdivisions, all with their own political complexion, to include in a particular congressional district. Besides, opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts. '[T]he artistry of the political cartographer is put to its highest test when he must work with constituencies of equal population. At such times, his skills can be compared to those of a surgeon, for both work under fixed and arduous rules. However, if the mapmaker is free to allocate varying populations to different districts, then the butcher's cleaver replaces the scalpel; and the results reflect sharply the difference in the method of operation.' Hacker, Congressional Districting, 51 (1963)."

46/See footnote 18, supra.

47/Chapter 289, Laws of 1957.

48/Chapter 6, Laws of 1965.

49/Accord, Evans v. Cornman, 398 U.S. 419 (1970).

50/Other jurisdictions are in agreement: See.Van Tassel Real Estate and Live S. Co. v. City of Cheyenne, 54 P.2d 906, 49 Wyo. 333 (1936); In re Loch Arbour, 135 A.2d 663, 25 N.J. 258 (1957);In re Gaffney's Estate, 252 N.Y.S. 649, 141 Misc. 453; 31 Neb. 682; 4 Ala. 622; 377 Pac. 411. For a similar decision by our own court, see Platt v. Magagnini, 110 Wash. 39, 187 Pac. 716 (1920).

51/See, Washington Constitution Article VI, § 1.

52/Accord, Klahr v. Williams, 313 F.Supp. 148 (U.S. D.C., Ariz., May 19, 1970) now on appeal to the United States Supreme Court in which the court said at p. 150:

". . . it is clear now, also, that apportionment of members of a legislature on the basis of voter registration satisfies the Equal Protection Clause only if it produces a distribution of legislators not substantially different from that which would have resulted had a permissible population basis been used. Burns v. Richardson, 384 U.S. 73, 93, 86 S.Ct. 1286, 16 L.Ed.2d 376."

53/Particularly, again, if all of the rest of the apportionment plan is in good order.