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preme Court are more complex than those for congressional redistricting, and so are the redistricting mechanisms used by the states. Population equality, although important, is not the only consideration the states can use in drawing districts, and single-member districts are not required.

In addition, the states may choose to use less than the total U.S. census figures or not use the federal census figures at all. Kansas and Massachusetts use a state census as the basis for their redistricting, although Kansas plans to switch to the federal census in 1990. Hawaii uses registered voters, and Alaska has exempted transient military personnel from its population base.

States may choose other criteria such as maintaining political jurisdictional lines if they apply the policy uniformly and have a rational and justifiable reason, and if it does not violate the provisions of the Voting Rights Act.

Of the 39 new chamber redistricting plans—including Kansas and excluding the voided Texas and Virginia house plans—the overall population range between the largest and smallest district in 12 chambers is less than 5 percent. In another 19, the overall range is between 5 and 10 percent. One chamber has a range of 10 to 15 percent, and seven chamber plans have an overall range of over 15 percent between the largest and smallest district. The plans were drawn by the legislature in 17 states and by boards in the remaining four states.

The use of a board or commission to redistrict state legislatures has grown. Spurred by the efforts of such organizations as Common Cause, 15 states have a formal agency or advisory mechanism for redistricting. Another 11 states designate an agency to redistrict if the legislature fails to perform in a specified period of time. So far, this backup mechanism has been used by Connecticut for congressional districting and Illinois and Texas for legislative districting. In addition, petitions are circulating in South Dakota and Ohio for this fall's ballot to alter the apportionment process. The proposed constitutional

1981 REAPPORTIONMENT PLANS, MAXIMUM POPULATION DEVIATIONS

(CSG Reapportionment Service, September 1981)

State or other jurisdiction	Senate: Percent deviation in actual vs. average population per seat — Greatest +	Senate: Percent deviation in actual vs. average population per seat — Greatest -	Senate: Average population each seat(a)	House: Percent deviation in actual vs. average population per seat — Greatest +	House: Percent deviation in actual vs. average population per seat — Greatest -	House: Average population each seat(a)	Congress: Percent deviation in actual vs. average population per seat — Greatest +	Congress: Percent deviation in actual vs. average population per seat — Greatest -	Congress: Average population each seat(a)
Alabama	...	...	...	...	...	...	1.33	1.12	555,723
Alaska	5.80	3.97	18,456(b)	5.81	4.18	9,228(b)	One Congressman		400,481
Arkansas	4.78	4.37	65,300	4.98	4.17	22,855	0.72	0.01	571,378
Connecticut	2.40	1.52	86,322	4.42	3.92	20,580	...	...	...
Delaware	+/- 9.80		28,544	+/- 3.80		14,518	One Congressman		595,225
Georgia	4.99	5.00	97,576	4.95	4.97	30,357	...	...	...
Idaho	...	...	...	...	...	...	0.02	0.02	471,968
Indiana	2.07	1.97	109,803	5.30	14.63	54,901	0.99	0.91	549,010
Iowa	0.32	0.39	58,268	0.99	0.79	29,134	0.03	0.02	485,564
Kansas	3.10	3.40	58,982(c)	5.00	4.90	18,874(c)	...	...	...
Mississippi	...	...	...	...	...	...	0.02	0.02	509,128
Nebraska	4.76	4.67	32,041	----------	Unicameral	----------	0.08	0.15	523,335
Nevada	4.16	4.02	38,056	4.73	4.97	19,028	> +/- 1.0		399,592
New Jersey	5.13	2.57	184,104	5.13	2.57	184,104(d)	...	...	...
North Carolina	12.67	10.02	117,489	12.94	10.68	48,954	1.31	1.40	534,039
North Dakota	...	...	...	...	...	...	One Congressman		652,695
Oklahoma	2.94	2.66	63,026	5.07	5.91	29,953	0.33	0.25	504,211(a)
Oregon	2.62	1.11	87,700(f)	2.75	2.59	43,600	0.08	0.03	526,533
Pennsylvania	1.04	0.95	237,334(g)	1.27	1.13	58,456(g)	...	...	...
South Carolina	...	...	...	4.95	4.88	25,155	...	...	...
South Dakota	5.99	6.50	19,663(e)	5.90	6.50	9,832(d,e,f)	One Congressman		690,178
Tennessee	0.73	0.93	139,114	1.42	1.72	46,371	1.29	1.14	510,083
Texas	...	...	458,908	4.82	4.60	94,856(h)	0.16	0.12	526,977
Vermont	...	...	...	...	...	...	One Congressman		511,456
Virginia	4.35	6.30	133,657	12.47	14.16	56,763(h)	0.79	1.02	534,628
Washington	2.40	2.10	84,289(f)	2.40	2.10	84,289(f)	...	...	(f)
Wyoming	39.50	24.20	15,694	29.10	60.30	7,357	One Congressman		470,816

(a) Population figures in most instances are based on the 1980 federal census.

(b) Excludes transient military population.

(c) Legislative redistricting was based on state conducted census.

(d) More than one legislator runs for office from a senate district.

(e) A constitutional referendum petition is being circulated to invalidate the current plan. South Dakota: The referendum would create single-member senate districts with one senator and two house members elected from each district.

(f) Court suit filed challenging validity of existing or new plan.

(g) Preliminary plan. Pennsylvania: Challenges to the plan have been filed. Hearings were scheduled for September 24-25.

(h) This plan was declared unconstitutional.

Reapportionment
(continued)

amendment in South Dakota would establish single-member senate districts and other criteria for redistricting.

Republicans are threatening to circulate legislative referendum petitions to repeal redistricting laws which they believe are unfair in Oklahoma (congressional) and California (legislative and congressional).

The state political stories of legislative and congressional redistricting will continue to unfold for at least the coming year. So far the courts have barely been involved, but they will undoubtedly make a contribution before the process is over.

CSG will continue to follow and report on state activities. More detailed information on individual plans or current activities can be obtained by contacting the Council's Reapportionment Information Service.

Redistricting Snag Delays New York City Primary Election

The New York City primary was delayed in September when a federal court ruled the city had failed to comply with the federal Voting Rights Act in redrawing council district lines.

The court's action, which was upheld by the U.S. Supreme Court, held that the city had failed to obtain the necessary pre-clearance from the U.S. Justice Department for any changes in voting procedure. It did not go so far as to uphold the plaintiff's contention that the new district lines discriminated against minorities.

The city reached an agreement with the Justice Department to allow all but city council elections to be held Sept. 22.

Suit Filed over Kentucky Education Budget Cuts

The Kentucky Education Association has filed suit asking that education spending cuts ordered by Gov. John Y. Brown Jr. be declared unconstitutional. The suit in circuit court charges that the legislature should decide on cuts and that the reductions are "inequitable, discriminatory, and arbitrary."

Gov. Brown ordered the cuts, rather than calling the legislature into special session. Recent reductions affecting education amount to more than $70 million.

Stated Briefly

Louisiana Transfers Local Prisoners

Louisiana Gov. David C. Treen has announced that eligible prisoners have been transferred from parish jails to the Department of Corrections as of Sept. 1. Reassessment of the state prisons resulted in room to house 1,348 more prisoners, an 18 percent increase, in fiscal 1981-82.

Accounting Manual Offered by Iowa

The Iowa Department of Substance Abuse (IDSA) has developed a Project Level Accounting Manual which tells how to establish and maintain a basic bookkeeping system that meets audit requirements and how to provide separate accounting for various funding sources. It also provides management information. The manual is used by substance abuse programs within and outside of Iowa. Copies can be obtained for $12 from the IDSA, Suite 202, 505 Fifth Ave., Des Moines, Iowa 50319, or call Allen Vander Linden, (515) 281-3641.

College Tuition Rates Rise

Average tuition rates at public four-year colleges and universities shot up 16 percent the past year, according to a survey by the College Board. The rise is the largest in a decade and does not reflect increases announced since May. Many schools have raised rates since then due to lower than anticipated appropriations from state legislatures. Average tuition rates are up 13 percent at private colleges.

Costs to Be Shared in Three Mile Island Cleanup

Pennsylvania Gov. Dick Thornburgh's cost-sharing proposal for cleanup of the disabled Three Mile Island nuclear power plant won support recently. The Edison Electric Institute, an electric utilities' trade association, pledged its members to paying $192 million over six years.

The owners of the plant, General Public Utilities, have agreed to pay $335 million. The U.S. General Accounting Office in August recommended a national cost-sharing approach to Congress, but no federal action has been taken.

Wisconsin Budget Increases Transit Aid

Wisconsin's 1981-83 budget, signed by Gov. Lee S. Dreyfus July 29, includes $58.6 million for urban mass transportation programs and ridesharing (S. 85-24). Beginning in 1982, state aid will be available to cover up to 30 percent of the total operating costs of the state's urban transit systems.

Two States and U.S. Reach Desegregation Agreement for Colleges

Missouri and Louisiana have reached agreement with the U.S. Justice Department on plans to desegregate public colleges. A consent decree filed in federal court in New Orleans, if approved by the court, would end a lawsuit filed by the department in 1974.

Legislators Hold Off on Funding Decision for Higher Education

A special session of the Texas Legislature has adjourned without resolving the controversy over the future of state construction funds for public higher education.

The lawmakers will watch for the results of a pending lawsuit to restore a state property tax of 10 cents per $100 valuation. The tax had provided funds for 17 colleges and universities. The House did pass a proposal to repeal the tax; the Senate voted for a new rate of 3 cents per $100.

States' Tax Base Reflects Shifting Wealth

Alaska has the largest tax base per capita of the states—more than twice (213 percent) the nation's average.

The top five states in per capita tax wealth are Alaska, Wyoming (190 percent), Nevada (164 percent), Texas (121 percent) and California (116 percent), according to the Advisory Commission on Intergovernmental Relations' (ACIR) preliminary estimates of 1979 tax capacity. The estimates account for tax bases available to states including property, income, sales, motor fuels and the value of extracted natural resources.

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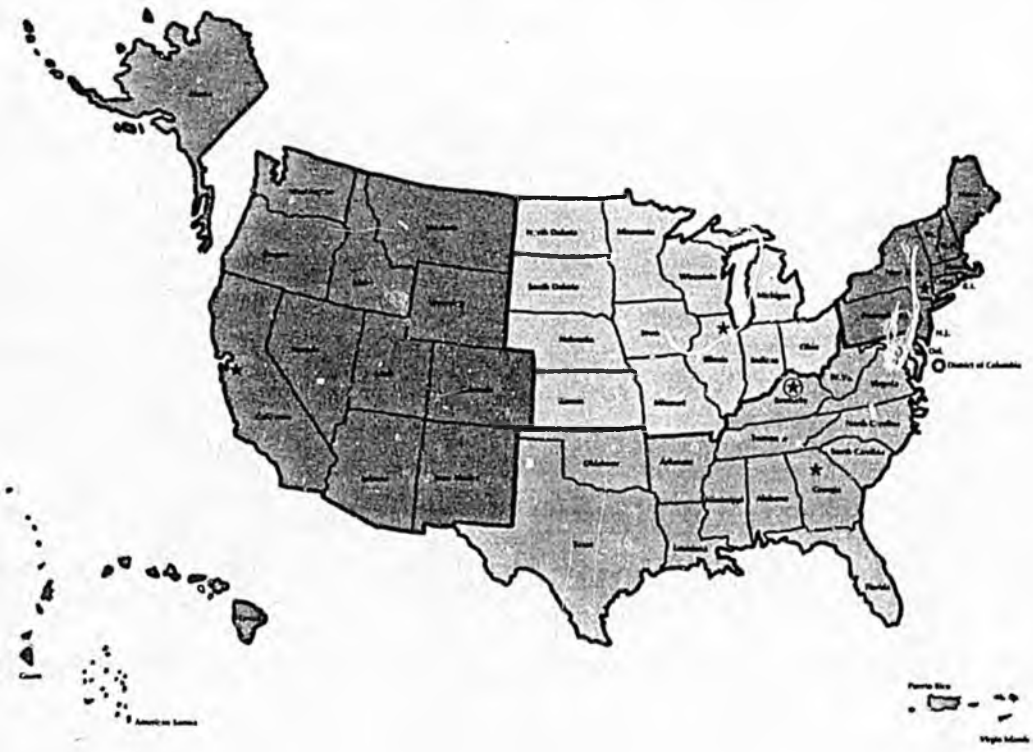

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Affiliated and Cooperating Organizations

The Articles of Organization of the Council of State Governments recognize two forms of association with the Council by groups of state officials—affiliated and cooperating. The Council presently recognizes 33 such groups—seven affiliated and 26 cooperating.

For organizations affiliated with the Council, the state services agency is authorized to provide financial assistance and secretariat and other staff services.

The seven affiliated organizations of the Council are the:

- National Conference of State Legislatures,
- Conference of Chief Justices,
- National Association of Attorneys General,
- National Conference of Lieutenant Governors,
- National Association of State Purchasing Officials,
- Conference of State Court Administrators, and
- National Association of State Auditors, Comptrollers and Treasurers.

The Council's Articles of Organization also permit its executive committee to recognize other groups and associations of state officials as cooperating organizations and maintain continuing cooperative arrangements with such organizations.

The cooperating organizations include the:

- National Conference of Commissioners on Uniform State Laws,
- Parole and Probation Compact Administrators' Association,
- Association of Juvenile Compact Administrators,
- Interstate Conference on Water Problems,
- National Association of State Mental Health Program Directors,
- Adjutants General Association of the United States,
- National Conference on Uniform Reciprocal Enforcement of Support,
- Association of State and Interstate Water Pollution Control Administrators,
- National Association of State Boating Law Administrators,
- National Association of State Civil Defense Directors,
- Association of State Correctional Administrators,
- National Association of State Units on Aging,
- National Association of Extradition Officials,
- National Association of State Juvenile Delinquency Program Administrators,
- State Personnel Administrators Association,
- Council of State Administrators of Vocational Rehabilitation,
- National Association for State Information Systems,
- National Association of Regulatory Utility Commissioners,
- Coastal States Organization,
- Federation of Tax Administrators,
- National Association of Tax Administrators,
- Conference of State Sanitary Engineers,
- National Conference of States on Building Codes and Standards,
- National Association of State Departments of Agriculture,
- National Conference of State Criminal Justice Planning Administrators, and
- National Conference of State General Services Officers.

BIBLIOGRAPHY

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FOREWORD

This Bibliography is the second in a series of resource materials to be released by the Reapportionment Information Service of The Council of State Governments. The first document released in December 1980, was a Directory of people and organizations actively involved in reapportionment.

The Bibliography includes published and unpublished materials on reapportionment, legislative districts, elections and representation. It covers the years from the early 1970's to the present comprehensively. Citations to earlier documents reflect their long term relevance to the understanding of the current reapportionment process.

The Bibliography is organized into two parts. The first part is a numbered, alphabetical listing of all entries. The second part is a brief index dividing entries into broad subject areas.

For additional information on the 1981 Reapportionment process, interested persons should contact Carolyn L. Kenton, Director, Reapportionment Information Service, The Council of State Governments, P. O. Box 11910, Lexington, Kentucky, 40578 (606) 252-2291.

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LEGISLATURES
APPORTIONMENT

Reapportionment Information Update

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July 28, 1983

U.S. SUPREME COURT DECIDES NEW JERSEY AND PENNSYLVANIA REDISTRICTING CASES

In a landmark decision, the U.S. Supreme Court has tightened the "one-person, one-vote" criterion for assessing congressional redistricting being challenged in the courts. While the High Court found the New Jersey congressional redistricting plan unconstitutional on the issue of population deviation, it upheld the Pennsylvania congressional districts without comment.

On June 22, the U.S. Supreme Court struck down the New Jersey congressional redistricting plan finding that an overall population range just under .70 percent does not conform to the constitutional requirement for equal representation. In a five-to-four vote, the court ruled in Karcher, et al. v. Daggett, et al. (No. 81-2057 and formerly Forsythe, et al. v. Kean, et al.) that there are no de minimis population variations that can stand constitutional muster, and the states must adhere as closely as possible to the "one-person, one-vote" standard of reapportionment. In challenging congressional redistricting plans, the plaintiffs must prove that population differences among districts can be reduced or eliminated in a conscientious effort to design districts of equal population. If the plaintiff's arguments are satisfactory to the court, the states have the burden of proving that deviations from equality are necessary to achieve a legitimate state goal.

In defense of the New Jersey redistricting plan, the legislature argued that the deviation of the plan was justified to protect black urban neighborhoods from being divided into different districts. In addition, the legislature contended that the deviation was less than the predictable undercount in the census figures. In answer to the first assertion, the plaintiffs failed to convince the Court that the population differences were essential to preserve minority voting strength in the congressional plan. The Court further identified legislative policies which, when applied in a nondiscriminatory manner, might have been successfully used in defense of the New Jersey congressional plan, including: compactness, respect for municipal boundaries, preserving the core of prior districts, and avoiding contests between incumbents.

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With regard to the margin of error in the census data, the Court held that the census count "provides the only reliable--albeit less than perfect--indication of the districts' 'real' relative population levels, and furnishes the only basis for good faith attempts to achieve population equality." In the Court's opinion, Justice Brennan wrote: "Adopting any standard other than population equality, using the best census data available would subtly erode the Constitution's ideal of equal representation."

In a dissenting opinion, Justice White objected to the Court's rule of absolute equality on the basis that such a strict standard may be used to justify gerrymandered congressional districts. In addition, Justice White argued that the lack of a de minimis rule encourages the intrusion of federal courts into state legislative affairs. Other dissenters argued that even a miniscule population deviation is now vulnerable to constitutional attack.

Eleven states currently have congressional district maps with an overall population range greater than that of New Jersey: Alabama (2.45%), Arkansas (0.78%), Georgia (2.00%), Indiana (2.96%), Kentucky (1.39%), Massachusetts (1.09%), New Mexico (0.87%), New York (1.64%), North Carolina (1.76%), Tennessee (2.40%),and Virginia (1.81%). Although the Court's decision has no effect on the validity of these 11 plans, one state is currently involved in litigation to resolve the constitutionality of population deviation. In Ohio, a three-judge federal panel has been awaiting a decision on the New Jersey case before making a final decision in Flanagan, et al. v. Gillmor, et al..

On July 6, just two weeks after the New Jersey decision, the Pennsylvania congressional redistricting case, In Re: Pennsylvania Congressional Districts Reapportionment Cases, was decided by the U.S. Supreme Court. In a six-to-three vote, the Supreme Court affirmed the three-judge federal panel which had upheld the congressional plan drawn by the Pennsylvania legislature last year. The plaintiffs challenged the plan's overall population range of .24 percent.

WYOMING LEGISLATIVE REAPPORTIONMENT PLAN UPHELD BY U.S. SUPREME COURT

The U.S. Supreme Court has always held the states to less stringent standards of population equality in legislative reapportionment than congressional redistricting. The decisions made by the U.S. Supreme Court on June 22 prove to be no exception. On the same day the New Jersey congressional case was decided, the High Court ruled in Brown v. Thomson that the Wyoming legislative reapportionment plan, with an overall population range of 89 percent, was constitutional in light of the state's policy of allowing every county its own representation. Under the state constitution, Wyoming's 23 counties are required to have a senator and a representative in each district "apportioned among the counties as nearly as may be according to the number of their inhabitants." The plan included one small county with a population less than one-half the state's ideal district size.

The ultimate question before the Court was the state policy of granting a representative to each county. The Court held that the policy was rational and even "well-suited to the special needs" of the sparsely populated state. Justice O'Connor, in a concurring opinion, emphasized that ensuring equal representation is not simply a mathematical problem. The Court's decision rested on the narrow appeal which was brought before it. If the entire legislative plan had been challenged, rather than the representation of one county, the Court's decision might have been very different.

STATE NOTES

In ALABAMA, new state legislative elections will be held this fall as a result of the April 11th federal court decision in Burton, et al. v. Hobbie, et al. On June 21, a suit was filed petitioning the federal court for an order to require the governor to call the primary election. The Alabama Democratic Party Executive Committee will nominate all 140 state legislative candidates if the governor does not call for a primary. The plaintiffs in the suit, Boggard, et al. v. Hobbie, et al. (C.A. 83-I-604-N), claim that the executive committee is malapportioned by population and by race. They also question whether Section 5 preclearance provisions under the Voting Rights Act apply to the special elections as mandated by the Burton decision.

CALIFORNIA Governor Deukmejian has called a special election for December 13 on an initiative which recently qualified for the ballot and which would repeal the existing reapportionment and redistricting plans in favor of one drawn by an independent contractor for Assemblyman Sebastiani. Controversy over this proposal reportedly crosses party lines. However, if adopted, the Sebastiani plans could change dramatically the political makeup of both the congressional delegation and the California legislature.

In addition, the California legislature has intervened in the Wadham v. Eu case which was filed in federal court this spring. The suit contests the congressional plan signed into law on January 2, by Governor Jerry Brown, on the basis that it violates constitutional requirements of one-person, one-vote. A dispute has arisen over the authority of the secretary of state to make technical adjustments to the plan to compensate for an 8,000-person census correction. California and several states have reapportionment statutes which allow the secretary of state to make necessary corrections as a result of final population figures provided by the U.S. Bureau of the Census or as a result of minor local election district problems. The plaintiffs contend that the secretary of state does not have the constitutional authority to make these corrections and that the congressional plan must be judged as originally drawn by the legislature. The legislature argues that under state law the plan must be judged as corrected. The Ninth Circuit Court of Appeals has remanded the case back to district court for a trial on its merits. The legislature has been asked to respond.

The HAWAII congressional redistricting and legislative reapportionment plans were reviewed by the federal court on June 17. At the request of the League of Women Voters, the court, which maintained jurisdiction over the plans under the case Travis, et al. v. King, et al., reviewed the master plan and

decided that the districting plans were merely interim. Consequently, the state now has the responsibility to devise a new plan. The same commission has been reformulated with many of the same staff people available to assist. New plans should be complete by December of this year.

On June 7, the IDAHO State Supreme Court remanded Hellar, et al. v. Cenarrusa, et al. back to state district court for trial on the issue of county boundary splits. Last year the case was appealed to the state supreme court after the district court upheld the legislature's reapportionment plan as an interim plan for the 1982 elections. The plaintiffs filed the case based on the fact that the state constitution forbids county boundary lines from being split in reapportionment. Defendants argue that the splits were necessary to comply with federal constitutional requirements. The trial is scheduled to begin July 26, but a delay in the proceedings is expected. An election this year under a new legislative reapportionment plan is highly unlikely.

The LOUISIANA case of Major v. Treen is still undecided. On March 7, the three-judge federal panel heard the case which challenges the plan on the issue of minority representation.

In MONTANA, a hearing is scheduled for August 10 and 11 in the case of McBride, et al. v. Waltermire (Docket No. CZ-83-25-BU) filed in the U.S. District Court of Montana, Butte Division. The case challenges the state's legislative reapportionment plan on the issues of population equality and violation by the reapportionment commission of its own criteria including: communities of interest, county boundary splits, compactness, and contiguity. The Manning v. Montana Districting and Apportionment Commission has been dismissed. The suit was originally brought to prevent filing of the redistricting and reapportionment plans with the secretary of state. Since the plans have been filed, the federal court dismissed the case as moot.

In SOUTH CAROLINA, the new Senate redistricting plan has been in conference committee for the last several weeks. The legislature is expected to end its session sine die on July 27 and a resolution will be required for a special session to continue work on the Senate plan. The overall population range of the plan is 9.8 percent.

The TEXAS legislature has redrawn the congressional and legislative reapportionment plans. The overall population range for the congressional plan is .28 percent. The population deviation in the House plan is 9.95 percent and in the Senate is 1.81 percent. All three plans are pending approval from the Department of Justice and from the federal court under the case of Terrazas v. Clements. During this session, the Senate passed a resolution authorizing the attorney general to make changes in the Senate plan if the Department of Justice does not drop its objections. The Senate basically accepted the interim Senate plan ordered by the federal court after initial department objections coincided with court action.

WISCONSIN Governor Anthony Earl signed the new legislative redistricting plan into law on July 15, after having vetoed a similar plan passed with the Wisconsin budget bill just two weeks earlier. The overall population range of the Assembly is 1.73 percent, and the population deviation for the Senate

is 1.05 percent. There are rumors of possible court challenges to this latest reapportionment plan, but nothing has been filed to date.

Material for this edition prepared by Candace L. Romig, NCSL

SUMMARY OF STATE LITIGATION ON
CONGRESSIONAL REDISTRICTING AND LEGISLATIVE REAPPORTIONMENT

State	Court Case	Issues	Status
Alabama	Burton v. Hobbie Federal Court (L - 11/5/81)	• Malapportionment • Population equality • Dilution of minority voting strength	U.S. Supreme Court affirmed plan drawn by legislature. (4/11/83)
	Boozard v. Hobbie Federal Court (L - 6/21/83)	• Petition to require governor to call primary • Determine if election subject to Sec. 5 preclearance of Voting Rights Act	Pending trial
Alaska	None		
Arizona	Hamilton v. Babbitt Federal Court (C, L - 12/13/81)	• Gerrymandering • Violation of due process • Dilution of minority voting strength	Federal court approved corrected legislative plan per settlement agreement. (4/12/82)
Arkansas	Doulin v. White Federal Court (C)	• Population equality and deviation	Federal court ordered court plan. (2/25/82)
	Bizzell v. White Wells v. White State Supreme Court (L - 10/5/81)	• Gerrymandering	State Supreme Court dismissed. (11/2/81)
California	Brown v. Deukmejian State Supreme Court (C, L - 10/26/81)	• Challenges 3 initiatives to prevent plans from going into effect	State Supreme Court upholds all 3 initiatives. (1/28/82)
	Vadham v. Eu Federal Court (C - 2/83)	• Population deviation • Authority of Secretary of State to make technical corrections to plan	Court of Appeals orders federal court to proceed on the merits of the case. (7/11/83)
	Richardson v. Eu Federal Court (L - 2/82)	• Numbering of Senate districts with regard to staggered terms	Federal Court dismissed case (10/15/82)
	Chavez v. Eu Federal Court (L)	• Numbering of Senate districts with regard to staggered terms	Federal Court dismissed case. (5/82)
	Mallowell v. Eu Federal Court (L - 2/82)	• Malapportionment	Pending trial
Colorado	Carstens v. Lamm Federal Court (C - 10/8/81)	• Proposed to break stalemate through judicial intervention	Federal court ordered court plan. (1/25/82)
	Kallenburger v. Buchanan State District Court (L - 6/82)	• Vacancy election • Deferred vote of electorate	State Supreme Court orders election to be held using 1981 senatorial boundary. (9/82)

State	Court Case	Issues	Status
Connecticut	Logan v. O'Neill State Superior Court (C, L - 10/81)	• Municipal boundary splits • Constitutionality of backup commission • Method of devising districts	State Supreme Court upheld plans. (8/3/82)
Delaware	None		
Florida	Buoniconti v. Firestone Federal Court (C)	• To stop Secretary of State from conducting elections • Sought redistricting deadline of 3/29, after which court to enact plan	Federal Court dismissed case. (6/28/82)
	Clem v. Haben Federal Court (C - 6/23/82)	• County and municipal boundary splits	Federal Court upheld plan. (9/3/82)
	In re Apportionment Law (SJR 1E) 414 So. 2d 1040 (1982) (L)		State Supreme Court reviewed plan as provided by law.
Georgia	Busbee v. Smith Federal Court (C)	• Contested objection by Department of Justice	Federal Court upheld Justice objection (7/22/82); approves plan (8/24/82).
Hawaii	Travis v. King Federal Court (C, L)	• Malapportionment • Gerrymandering • Registered voter population base used as formula	Federal Court approves masters' plan (6/4/82); state directed to draw new plan (6/17/82).
Idaho	Evans v. Cenarrusa Federal Court (L - 3/82)	• Proposed to break stalemate through judicial intervention	Federal Court dismisses after legislature and governor agree on plan.
	Miller v. Cenarrusa State District Court (L - 5/82)	• County boundary splits • Request to enjoin general election	Supreme Court remands case to district court to try case on merits. (6/7/83)
Illinois	In Re Illinois Congressional Districts Reapportionment Cases Federal Court (C - 7/1/81)	• Congressional redistricting not complete	U.S. Supreme Court affirmed court plan (1/11/82)
	Schrage and Wolf v. State Board of Elections State Supreme Court (L - 10/19/81)	• Violation of compactness criteria of state constitution • Petition court to approve plan	State Supreme Court upheld map with changes to conform to compactness criteria
	Rybicki v. State Board of Elections State Supreme Court (L - 10/27/81)	• Dilution of minority voting strength • Municipal and county boundary splits	State Supreme Court approves commission plan as amended with regard to population variance (1/12/82); amended to conform to 1982 amendments to Voting Rights Act (1/21/83).
Indiana	Orr v. Baldridge Federal Court (C - 5/6/81)	• Challenges census procedures resulting in the loss of one congressional seat	Pending decision

State	Court Case	Issues	Status
Indiana	Sandemer v. Davis Federal Court (L - 1/12/82)	• Political gerrymandering • Request injunction to prevent plan from going into effect • Dilution of minority voting strength in multimember districts • Incongruent legislative and congressional districts • Districts inconsistent with communities of interest	Pending trial
	Garton v. O'Bannon Federal Court (L)		Federal Court dismissed case. (8/24/81)
Iowa	None		
Kansas	O'Sullivan v. Brier Federal Court (C - 4/23/82)	• Requests court to draw plan	Federal Court ordered court plan.
Kentucky	None		
Louisiana	Major v. Treen Federal Court (C, L - 3/25/82)	• Dilution of minority voting strength	Pending decision
Maine	None		
Maryland	Wiser v. Hughes State Court of Appeals (L - 3/3/82)	• Communities of interest • Natural boundaries • Political boundaries • Compactness • Dilution of minority voting strength • Partisan gerrymandering	State Court of Appeals upheld enacted plan (6/4/82) U.S. Supreme Court refused to hear case for want of substantial federal question.
Massachusetts	None		
Michigan	Koerstrand v. Austin Federal Court (C)	• Violation of one-person, one-vote because new districts not drawn	Federal Court ordered court plan. (5/24/82)
	In Re Apportionment of State Legislatures State Supreme Court (L - 1/82)	• Requests court to assume jurisdiction for reapportionment	State Supreme Court declared reapportionment statutes unconstitutional (3/25/82); interim plan approved as drawn by special master (5/21/82); U.S. Supreme Court refuses to hear case (10/12/82).
Minnesota	Orwoll v. Lacomb and Growe U.S. Supreme Court (C)	• Challenge to court plan on basis lower court exceeded its authority in drawing plans ignoring overriding state policy	U.S. Supreme Court affirms court plan (5/13/82)
	Lacomb v. Growe Federal Court (C, L - 3/25/81)	• Requests deadlines for redistricting and reapportionment	Federal Court ordered court plans. (3/11/82)
Mississippi	Mississippi v. Smith Federal Court (C - 4/7/82)	• Contested objection by Department of Justice	Federal Court upheld department's objection. (5/28/82)

State	Court Case	Issues	Status
Mississippi	Brooks v. Winter Federal Court (C)	• Requests judicial intervention in redistricting • Delay of primary election • Dilution of minority voting strength	Federal Court ordered court plan (6/9/82); U.S. Supreme Court remanded case to federal court for reconsideration under Sec. 2 of the Voting Rights Act (5/16/83).
Missouri	Schatzle v. Kirkpatrick Federal Court (C)	• Requests court to assume jurisdiction over redistricting process	U.S. Supreme Court affirmed court plan (5/17/82)
Montana	Manning v. Montana Districting and Apportionment Commission State Supreme Court (C, L - 12/22/82)	• Requests injunction on commission plan • Challenges the constitutionality of the commission: reapportionment should be done by legislators	State Supreme Court dismissed case as moot. (4/7/83)
	McBride v. Waltermire Federal Court (L - 3/11/83)	• Population deviation • Violation by commission of its own criteria, i.e. maintenance of communities of interest, county boundaries, compactness, contiguity	Pending trial August 10, 1983
Nebraska	None		
Nevada	None		
New Hampshire	Gover v. Gardner Federal Court (L - 5/17/82)	• Challenge to House plan	Federal Court upheld enacted House plan and appeal dismissed. (5/27/82)
New Jersey	Kircher v. Tarlett Federal Court (C)	• Population deviation • Legislative procedure	U.S. Supreme Court declares plan unconstitutional. (6/22/83)
New Mexico	Sanchez v. King Federal Court (L - 1/82)	• Dilution of minority voting strength • Compactness • Contiguity • Court to assume jurisdiction	Federal panel declares eligible voter population base unconstitutional and postpones primary (4/8/82); U.S. Supreme Court reinstates primary for nonlegislative candidates (4/23/82 Pending hearing by federal panel on unresolved issues.
	Apodaca v. King State Supreme Court (L - 7/6/82)	• One senator's term regarding 1982 elections	State Supreme Court ruled senator didn't have to run. (8/82)
New York	Flateau v. Anderson Federal Court (C, L - 2/82)	• Population deviation • Dilution of minority voting strength • Violation of the Voting Rights Act	Federal Court approves plans adopted by the legislature. (7/5/82)
	Bay Ridge Community Council v. Carey State Supreme Court (L - 5/25/82)	• Violation of state constitution on basis of compactness, contiguity, and convenience. • Request to enjoin state from holding elections	State Supreme Court declares plan unconstitutional (6/21/83); case appealed to the Court of Appeals

State	Court Case	Issues	Status
New York	Bay Ridge (cont.)	• County boundary splits • Dilution of minority voting strength • Violation of communities of interest • Political gerrymandering	case transferred to the Appellate Division (1/13/83).
	Montano v. Carey Federal Court (L - 6/17/82)	• Incorporated allegations set out in Plateau • Improper interference with election schedule • Violation of the Voting Rights Act	Federal Court upheld plan (7/7/82); U.S. Supreme Court denied stay of order (7/23/82); Federal Court ordered action discontinued because moot (1/13/83).
	Mirrione v. Anderson Federal Court (L - 11/12/82)	• Dilution of minority voting strength • Violation of Voting Rights Act • Alleged that legislators acted contrary to their responsibility to constituents costing taxpayers under expense • Protection of communities of interest	Federal Court dismissed case (12/3/82); pending decision of U.S. Court of Appeals (4/27/83).
North Carolina	Gingles v. Edmisten Federal Court (C, L)	• Population deviation • Dilution of minority voting strength • County boundary splits • Single-member districts	Federal Court cross congressional charges (5/82); pending trial in summer of 1983.
North Dakota	None		
Ohio	Flanagan v. Gillmor Federal Court (C)	• Requests court to assume jurisdiction for redistricting • Population deviation • Dilution of minority voting strength • Political gerrymandering	Federal panel: all charges dismissed except population deviation pending decision in New Jersey case (8/25/82); case still pending.
	Laurence v. Rhodes Federal Court (L - 9/10/81)	• Requests injunction for plan because it gerrymandered against Republicans	Federal Court: suit dropped.
Oklahoma	None		
Oregon	Cargo v. Paulus State Supreme Court (L - 10/80)	• All senators to be elected in 1982 • Municipal boundary splits • Authority of Secretary of State to assign senators to specific districts challenged	State Supreme Court declares plan unconstitutional (9/23/81); court upholds Secretary of State's plan (10/27/81).
Pennsylvania	In Re: Pennsylvania Congressional Districts Reapportionment Cases Federal Court (C - 2/15/82)	• Alleges congressional plan is unconstitutional • Requests court to delay primary • Population deviation • Requests court to assume jurisdiction	U.S. Supreme Court affirms 3-judge federal panel which affirmed plan drawn by legislature. (1 6/83)
	Hispanic Coalition on Reapportionment v. Legislative Reapportionment Commission Federal Court (L - 1/28/82)	• Dilution of minority voting strength	U.S. Supreme Court upheld commission plan. (3/1/83)

State	Court Case	Issues	Status
Rhode Island	Licht v. State of Rhode Island and Providence Plantations State Superior Court (L - 4/82)	• Challenges validity of Senate plan	State Superior Court ordered legislature to redraw plan. (6/3/82)
	Holmes v. State of Rhode Island State Superior Court (L - 4/82)	• Challenges validity of House plan	State Superior Court upheld House plan. (10/29/82)
	Farnum v. State of Rhode Island Federal Court (L - 8/7/82)	• Challenges 1974 Senate District lines imposed for 1982 elections by legislature	Federal Court declares 1974 Senate districts invalid. (1/10/83)
South Carolina	NAACP v. Riley Federal Court (C - 10/14/81)	• Denial of equal protection under the law • Dilution of minority voting strength • Violation of Voting Rights Act • Population deviation • Failure of legislature to complete redistricting	Federal court ordered plan proposed by the House implemented with minor change (3/8/82); U.S. Supreme Court upheld the court plan (11/23/82).
South Dakota	O'Connor v. Kundert Federal Court (L - 7/2/81)	• Multi-member districts	Federal Court dismissed case as moot due to adoption of single-member district plan. (11/82)
	Twinnereim v. Kundert State Supreme Court (L - 7/29/81)	• County boundary splits	State Supreme Court refused to hear the case. (8/12/81)
Tennessee	Lockert v. Crowell State District Court (L)	• County boundary splits in Senate plan	State Supreme Court overturned lower court decision and upheld Senate plan. (3/30/82)
Texas	Seamon v. Clements Federal Court (C)	• Dilution of minority voting strength	Federal Court ordered an interim plan for 1982 elections. (2/27/82)
	Terrazas v. Clements Federal Court (L)	• Dilution of minority voting strength • Population deviation • Disruption of the election process • Violation of Voting Rights Act	Federal Court redrew legislative plan for 1982 elections. (3/5/82)
Utah	Dmitrich v. Monson State Supreme Court (L - 1/29/82)	• Representation in districts with holdover senators	State Supreme Court rejected motion.
	Rawson and Wiese v. State of Utah State District Court (L)	• Provisions regarding holdover senators	District court granted summary judgment and dismissed case. (4/82)
Vermont	Petition for Review of Apportionment Bill State Supreme Court (L)	• County and municipal boundary splits	State Supreme Court dismissed cases. (6/17/82)

State	Court Case	Issues	Status
Virginia	Cosner v. Dalton Federal Court (L)	• Contest House plan in nine cases • Dilution of minority voting strength • County boundary splits • Population deviation	Federal Court declared House plan unconstitutional, orders elections to be held 1981, 1982, 1983 (8/28/81); court upheld House plan as redrawn (6/21/82).
	Cline v. Robb Federal Court (L)	• Suit brought on behalf of counties who objected to being split into single-member districts in the House	Federal Court upheld House plan. (9/10/82)
Washington	Doth v. Munro Federal Court (C)	• Population deviation • Violation of criterion of communities of interest	Federal Court declared plan unconstitutional because of population deviation. (11/82)
	Republican State Committee and Dunn v. Munro Federal Court (C, L - 5/13/81)	• Plaintiffs asked for advisory opinion issuing a declaratory judgment upholding the constitutionality of the legislative plan	Case settled out of court. (1/82)
West Virginia	Brookover v. Mancnin Federal Court (C)	• Requests court to compel legislature to complete redistricting	Federal Court approved plan drawn by legislature. (2/22/82)
	Moses v. Rockefeller Federal Court (L - 2/4/82)	• Requested court to require legislature to draw plan • Violation of population equality requirements	Federal Court accepted enacted plan. (3/25/82)
Wisconsin	AFL-CIO v. State Elections Board Federal Court (C, L)	• Present apportionment is unconstitutional • Request that court enjoin elections until valid plans are in effect	Federal Court ordered a court plan with minor corrections until valid constitutional plan enacted by law. (6/17/82) Congressional plan challenge dismissed April 2, 1982.
Wyoming	Brown v. Thomson Federal Court (L - 10/2/81)	• Dilution of voter strength • Population deviation	U.S. Supreme Court upheld legislative plan. (6/22/83)

C - Challenge to congressional plan.
L - Challenge to legislative plan.

Dates in parentheses with challenge designation signifies when case was initially filed.

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CONGRESSIONAL REDISTRICTING

A Public Information Monograph

AMERICAN BAR ASSOCIATION
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PREFACE

The American Bar Association Special Committee on Election Law and Voter Participation is now entering its second decade of service as one of the Association's major public service undertakings. Its work has been marked by a dual tradition of policy leadership and guidance to the ABA and of education for the bar and public on contemporary issues in election system improvement. The former is reflected in a number of formal ABA policy positions (popular election of the president, vice-presidential selection, voter registration by mail, amendment of the Federal Communications Act's "equal time" provisions, campaign financing reform, an independent federal election commission, and a presidential study commission on declining voter participation) by which the bar has contributed to the national dialogue and endorsed specific proposals for election law reform. The latter has borne fruit in a variety of conferences, symposia, and publications on current electoral system problems.

This monograph is a new addition to our public education tradition. It explores the important issues of congressional reapportionment theory and practice which still face the nation notwithstanding the "one person, one vote" giant step of the early 1960s. The message is particularly timely with our federal system on the brink of the major redistricting initiative that comes with each decennial census, and will be an important determinant of the fairness and equity accorded in the decade ahead of all citizens and all segments of society in their representation within the Congress of the United States.

The monograph was designed with a non-technical approach in mind. Despite its character as a "primer," informational appendices and literature references will be found to direct readers to relevant case and statutory law, analytical studies, and historic evolution and thereby permit more intensive study of the problem.

Fair redistricting is not just a priority of our Special Committee. It is a commitment of the entire American Bar Association. In 1979, the Association's governing body, its House of Delegates, in considering a variety of voter participation initiatives, formally supported the enactment of legislation that "provides for fair redistricting pursuant to the 1980 census without regard to partisan advantage." While no specific method of reapportionment was endorsed at the time, the concept itself was engraved in formal Association policy. Specific measures were weighed and explored at a conference cosponsored by the Committee in June 1980 with the National Science Foundation and a distinguished group of academics and practitioners at San Diego, California.*

*See conference volume, *Representation and Redistricting in the 1980s*, Grofman, Lijphart, McKay, Scarrow, eds. (1981, forthcoming)

The Committee would, therefore, welcome views, reactions, and suggestions from all readers of this handbook, whether or not Association members, on how best to ensure implementation of the "fair redistricting" concept. If the pamphlet stimulates and informs this kind of dialogue—in bar, civic, and other forums of concerned citizen activity—it will have well served its purpose and the cause of good government.

Washington, D.C.
June 1981

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I. Introduction

Fair and equal representation, a cornerstone of the American political system, depends largely on the fairness of the process for selecting representatives. One of the most important factors in this process is the drawing of congressional districts from which members of the United States House of Representatives are chosen.* State legislatures traditionally have been responsible for establishing district lines.

Alterations in congressional district lines after the 1980 census promise to be extensive. According to its 1980 figures, the Census Bureau estimates that population movement among states will cause about 14 states to gain or lose seats in the House of Representatives. This shift, combined with population movement within states, may force virtually all of the 435 existing district lines to be redrawn. Even though redistricting inequities have been reduced in the past two decades, under the 'one person, one vote' mandate, many citizens are dissatisfied with current methods of reapportionment.

How Congressional Seats are Now Allocated

No matter how small its population, each state must have at least one representative in the House of Representatives. The remaining 385 seats are to be allotted so that each representative speaks for approximately the same number of people, thus attempting to provide each person with an equal share of representation in the nation's lawmaking processes.**

The population figures used are those provided by the decennial U.S. census. The President transmits these figures to Congress during the first week of the first regular congressional session after the census. Within fifteen days after receiving these figures, the Clerk of the House sends the chief executive of each state a certification of the number of representatives to which the state is entitled. Each state, according to rules in its state constitution or statutes, then creates the same number of districts as the number or representatives to which it is entitled. While states are required to redistrict every ten years, no formal time limit exists for the completion of the redistricting plan.

A Brief History of Redistricting***

While state legislatures traditionally have been the main bodies responsible for redistricting, the Congress and the courts have played varying roles in the line-

*The drawing of *legislative* districts (those from which representatives to a State House or Senate are chosen) is also central to fair representation, yet entails certain issues separate from those involved in congressional redistricting. For a more detailed discussion of legislative redistricting, see *Toward a System of Fair and Effective Representation*, Common Cause (Washington, D.C., 1977). Unless otherwise indicated, "redistricting" will refer only to congressional linedrawing.

**U.S. Constitution, Article I, Section 2, clause 3; 2 U.S.C. § 2a.

***"Reapportionment" refers specifically to distributing seats to established units of government, while "redistricting" signifies line drawing to establish districts within these units. States receive an apportionment of congressional seats, after which districts are drawn. Both terms will be used interchangeably throughout this monograph to discuss how congressional seats are distributed within each state.

drawing process. Congress was silent on the issue before 1841. However, since that time, it has enacted several pieces of legislation to alter the congressional reapportionment system, with congressional involvement peaking in the early twentieth century. The current congressional redistricting law was passed in 1929. It contains very few directives but does mandate that representatives be apportioned every ten years according to the then most recent U.S. decennial census, based on the principle of equal representation (see Appendix A). Except for an act passed in 1976 which banned at-large elections *(i.e.,* those where the entire state votes for all seats to which the state is entitled), Congress has not recently imposed any redistricting rules on the state legislatures.*

Until 1962, in the landmark case of *Baker v. Carr,* 369 U.S. 186, the courts trailed far behind state legislatures and Congress in their involvement with reapportionment.** Indeed, in the 1946 case, *Colegrove v. Green,* 328 U.S. 549, the Supreme Court asserted that it had neither a judicial responsibility nor a right to address the redistricting question, on the grounds that it was a political issue. *Baker v. Carr,* however, offered a dramatic departure from the previous stance of judicial "laissez-faire," in ruling that federal courts do have authority to judge whether districts are apportioned fairly. Some controversy, however, still exists concerning the appropriate roles of Congress and the courts in this area.

*2 U.S.C. § 2c.

**See Appendix A for summaries of major cases affecting redistricting.

II. The Current Redistricting System

Gross Population Inequality: Past Injuries Healed

Despite the requirement that congressional districts be redrawn every ten years so that each district has approximately the same population size, many states have had congressional districts whose populations varied dramatically. A study by the Brookings Institution revealed that in 1962 half of the states with more than one congressional district (21 states out of 42) had constituencies in which the smallest district contained less than fifty per cent of the population of the largest district.*

In the 1964 case of *Wesberry v. Sanders,* 376 U.S. 1, the Supreme Court condemned this gross inequity. It voided Georgia's redistricting plan, deciding that the population disparities among congressional districts violated the spirit of Article I, Section 2 of the Constitution. Articulating what is frequently referred to as the "one person, one vote" or "as nearly as practicable" standard, the Court wrote that "as nearly as practicable, one [person's] vote in a congressional election is to be worth as much as another's." Following the 1970 redistricting, most districts adjusted to this mandate: 402 of the 435 congressional districts were within 1 per cent of the district population average for their state.

Current Redistricting Problems: The Gerrymander

Even though major inequities in the area of population disparity have been greatly reduced, redistricting reformers contend that substantial and avoidable injustices remain. These defects result largely from the practice of "gerrymandering."

What is "Gerrymandering?" In 1812, the Massachusetts state legislature created a dragonlike district to benefit the Democratic party over which then Governor Elbridge Gerry had tremendous influence (see *Figure 1*). Drawing a head, claws and wings on a picture of the district, painter Gilbert Stuart exclaimed that it looked like a salamander. Editor Benjamin Russell, however, noted that "gerrymander" would be a more appropriate name, in "honor" of the governor. Since then, the term has generally referred to the drawing of district boundary lines for the purpose of giving some individual or group a political advantage. It is important to note that gerrymandering is detectable in terms of its *impact,* not necessarily by the *shape* of the district.**

Gerrymandering typically involves the use of one of two techniques to dilute the influence of "minorities" in the electoral process.*** It may concentrate minority

*A. Hacker, *Congressional Districting: The Issue of Equal Representation,* (Brookings Institution: Washington, D.C. 1961).

**A strangely shaped district may, for example, merely be following natural topographical features. *See* B. Grofman and H. Scarrow, "Representation and Redistricting in the 1980s", *Policy Studies Journal* (1981, forthcoming).

***In this discussion, "minority" refers generally to any group whose influence the line-drawers are attempting to reduce. Thus, it can include racial and ethnic minorities, challengers, members of minority factions within the party that is in control of the state legislature, and minority parties.

Figure 1
The Original Gerrymander

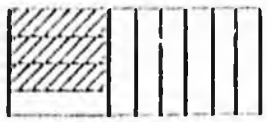
Reprinted from *Congressional Districts in the 1970s* (2nd Ed.) with permission of *Congressional Quarterly*.

strength in a few districts, thus wasting minority votes. To illustrate, a state with ten districts and a minority comprising 30 per cent of the state's population distributed as shown in *Figure 2* could draw district lines in at least two ways. One of these would be less beneficial for minorities. For example, instead of the minority comprising 75 per cent of the constituency in four districts (as in *Figure 3*), gerrymandered districts might be drawn so that minorities would constitute 100 per cent of the population in three districts (as in *Figure 4*), thus reducing the changes of a minority candidate being elected in other districts. It should be noted, however, that the courts have rarely concluded that this minority-concentrating technique violates minorities' constitutional rights.

Figure 2

Figure 3

Figure 4



Note: ▨ denotes minority

A second technique is the conscious dilution of minority strength. By this strategy, a minority group that is concentrated in one geographic area (and which thus would comprise a majority if that area were a congressional district) would be split among many districts, losing a majority voice in any.

Why Gerrymandering Harms. Many individuals denounce any type of gerrymandering. Indeed, a former director of the National Municipal League's legislative redistricting information service contends that the evils which are meant to be alleviated by requiring population equality are simply accomplished through gerrymandering:

> It was inevitable that this gerrymandering problem would become worse, not better, as a direct result of the Supreme Court's rulings regarding population equity during the '60s and '70s. The incentive for resort to the gerrymander was much less when the legislature could easily accomplish the same thing by simply making districts of wildly different populations.*

In addition to general condemnation, however, the following specific charges have been leveled at gerrymandering practices:

It reduces the opportunity for ethnic minorities to be elected: the previously described techniques have often contributed to minority underrepresentation in Congress. While blacks comprise approximately 13 per cent of the nation's population, less than 3 per cent of congressional representatives were black at the beginning of the 1980s. Hispanics constitute approximately 9 per cent of the population, but make up only 1 per cent of the House of Representatives.

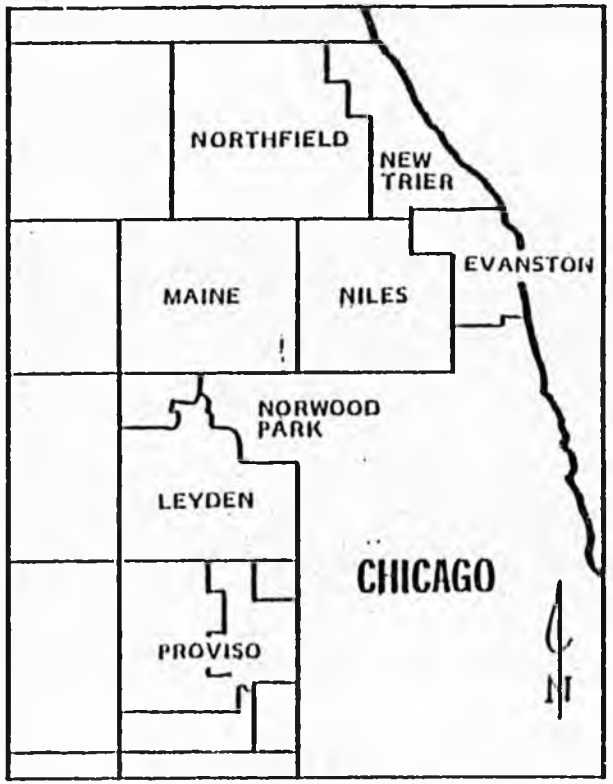
It reduces the opportunity for political minorities to be elected: members of parties not controlling the state legislatures, or members of the majority party who break with prevailing party views, also have fallen victim to the gerrymandering sword. Florida's 1972 reapportionment plan, for example, resulted in Democrats winning 75 per cent of the 15 congressional seats, while receiving only 53 per cent of the statewide vote.** And at least two recent political mavericks have been the target of their own party's gerrymandering initiatives. In 1975, Chicago's Democratic boss, the late Mayor Richard Daley, proposed an odd-shaped district plan, remarkably similar to the original Massachusetts gerrymander, which was narrowly rejected by the Democratic-controlled state legislature, and which many observers felt was designed to weaken an outspoken Daley opponent (Democrat Abner Mikva) who went on to win the contested congressional seat (see *Figure 5*). The 1972 California reapportionment apparently was designed, among other reasons, to protect incumbents of both parties. Yet, it was not designed to benefit a minority among incumbents, a liberal, anti-war Republican (Paul McCloskey) who nevertheless was reelected.

It unduly protects incumbent seats: this reduces competition and enables parties to field weak candidates. If potential candidates perceive that incumbents are drawing district lines to ensure their own reelection, challengers may be less likely to enter the race. In 1978, 11 per cent of the winners in congressional races ran unopposed. Moreover, even new-

*Congressional Anti Gerrymandering Act of 1979: Hearings on S.596 Before the Senate Committee on Governmental Affairs, 96th Congress, 1st Sess. 286 (1979) (statement of William Boyd (hereinafter cited as 1979 Hearings).

**1979 Hearings at 50 (statement of David Cohen, President, Common Cause).

Figure 5
Reapportionment Plan
(Illinois Tenth Congressional District)



comers who enter may confront additional barriers where lines have been consciously rearranged in an incumbent-protecting fashion. Plans designed to protect incumbent seats usually achieve their goals. In 1978, over 95 per cent of congressional incumbents seeking reelection were reelected.*

3. discourages voter participation: redistricting reformers argue that gerrymandering disenfranchises voters not only directly, by discouraging challengers from entering congressional races, but also indirectly, by discouraging other campaign involvement. For example, odd-shaped districts covering broad geographical areas increase the difficulty for both candidates and canvassers of undertaking neighborhood and door-to-door campaigning. Perhaps more importantly, gerrymandering may be contributing to the unfortunate decline in voter participation.* While voter turnout in House of Representatives races was about 44% in 1970, it fell to approximately 35% in 1978. Voters may reason that since gerrymandering has predetermined election results, their individual ballots hardly count. Furthermore, voters may become confused when they reside in a "strategic location" which is relocated for each major election, depending on the line-drawer's goals. A former Congressman from New York complained:

> I was redistricted in the sort of ongoing flow that occurred sufficiently often that I found that I ran for Congress three times from the same house but each time I was in a different congressional district. And the third time it was impossible for me to get from my house to the rest of my district without paying a toll.**

In addition, once candidates are elected, they might show more responsiveness to the needs of the line-drawers who created districts favoring their candidacies than to those of the citizens who elected them.

An Overview of Reform Proposals

While there exist defenders of the current system,*** advocates for improving reapportionment see the significant injustices just discussed and demand a more equitable system. The call for reform is bipartisan and nationwide.

Various groups and opinion-leaders in the nation are demanding that the redistricting system be improved. The *Washington Post*, the *Wall Street Journal*, and the *Boston Globe* all have run strong editorial messages stressing the need for change in reapportionment procedures. Some states have adopted modifications on their own in recent years. California, Colorado, Hawaii, Iowa, and Oregon have adopted strict redistricting standards, and Colorado, Hawaii and Montana have established redistricting commissions. Organizations expressing support for redistricting reform include the American Bar Association, the National Association for the Advancement of Colored People (NAACP), the Mexican American Legal Defense and Educational Fund (MALDEF), and the National Municipal League. The League of Women Voters has mounted a public education campaign on reapportionment issues and options and has left its individual state leagues free to consider and support corrective options that best meet local needs. An estimated ten to fifteen state leagues have endorsed reapportionment commissions. A Common Cause questionnaire sent to congressional candidates in the 1978 elections showed that 271 representatives favored federal redistricting standards, with only 41 opposed.

*This is not to imply that preservation of existing district lines is necessarily undesirable or harmful. From the *incumbent* legislator's perspective, a familiar constituency may be valuable if he or she is to represent constituents' views accurately.

*See ABA Special Committee on Election Reform, *The Disappearance of the American Voter* (Washington, D.C., 1979).

**1979 Hearings at 312 (statement of the late Allard Lowenstein, Representative from New York's 5th Congressional District, 1968-70).

***E.g., the National Conference of State Legislatures, (NCSL) a national organization of approximately 7000 state legislators and their staffs.

Examples of the major national initiatives are:

The Common Cause Proposal—A Model for State Self-Improvement. This public interest group, a grass-roots "good government" organization with more than 225,000 individual members and offices in over 45 states, has developed a model amendment to state constitutions with an accompanying act which states can choose to adopt. The two enactments (constitutional amendment and statute) apply to both legislative and congressional districts and are designed to balance stability with flexibility. The Common Cause plan proposes among other things:

- a commission to draw district lines. Commissioners (five in number) must meet certain qualifications for "impartiality;" Four are appointed by specific members of the state legislature, and the four select a fifth to serve as Chair;
- redistricting standards. These are rules which the initial apportioning authority must follow in its plans. It is suggested that districts embrace approximately the same size population, respect political subdivisions, be composed of contiguous territory, be compact, be drawn so as to avoid giving any group or individual political advantage, and be drawn so as to avoid diluting minority voting strength;*
- accountability provisions. In addition to requiring public hearings on redistricting proposals, the plan provides the opportunity for qualified voters to challenge the plans, and for federal courts to adjudicate these claims.

Federal Guidelines with Redistricting Commission Requirement. Senate Bill 596 and its House companion H.R. 2653 (96th Congress, 1st Session) embody this approach. Although the bills differ slightly from each other, both support the tripartite Common Cause approach: commission-standards-accountability. The primary difference lies in the Common Cause models' presumption of state action which gives the individual states a choice on implementation, unlike the congressional bills, which, once enacted, require states to adhere to their provisions. On the other hand, because the Common Cause Act is meant to be a state statute, it contains many specific provisions which the congressional options omit. The congressional bills afford states the opportunity to decide individually on a number of "specifics" in the way in which they will adhere to the more general federal mandates.

Federal Guidelines without Commission Requirement. H.R. 1516 and its companion in the Senate, Amendment 237 (96th Congress, 1st Session) offer another reform approach. Although the two bills vary slightly, both are based on suggestions from the House Wednesday Group.** The major differences between these bills and the previously mentioned congressional proposals is that H.R. 1516 and S. Amendment 237 do not recommend the establishment of commissions, as the sponsors feel that the choice of approach in ensuring equitable application of federal standards should be left to the states.

• • • •

Rather than address the totality of strengths and weaknesses of each major proposal, it may be more valuable to review individually major components or concepts. As might be expected, many proposals share some provisions and differ on others. The following discussion, therefore, takes up the key remedial options and touches on the significant arguments from various perspectives in an attempt both to foster a better understanding of the issues and to facilitate informed decisionmaking. The discussion treats two major issues: who should make the decisions, and what role might standards play in this process. Our intent is to illuminate rather than to advocate particular stances on specific provisions.

*For further discussion of standards, see Part III.

**Comprised of thirty-two moderate to liberal Republican members of the U.S. House of Representatives.

III. The Issues: Are Standards Needed?

In examining the redistricting process, several basic issues must be addressed. One fundamental set of questions revolves around the need for and character of standards to guide and order the development of reapportionment plans.

To What Extent Should Standards be Articulated?

Some groups claim that the most important aspect of redistricting reform is the establishment of specific rules which must be followed when drawing congressional district boundaries. Indeed, if fair redistricting standards are made so explicit that line-drawers cannot abuse their discretion in interpreting them, the matter of who has the responsibility for applying the standards may well become less important. Yet, even those endorsing clear standards may disagree about the extent to which certain standards should be defined by the law. The narrower the definition, the less flexibility is available to accommodate factors affecting the fairness and soundness of plans which are not yet in existence when the definition is formulated. Moreover, as might be expected, some electoral experts are opposed to explicit standards, particularly federal ones.

In Defense of Standards. A 1979 editorial in the *Washington Post* stressing the need for standards (particularly to provide courts with reviewing guidelines) emphasized one of the common rationales for this approach: "Since the federal courts are already deeply into this 'political thicket,' [of judging the fairness of redistricting plans] it might be useful to them—as well as to the cause of ending the more indefensible forms of the gerrymander—for Congress to spell out how it believes congressional district lines should be drawn."* Indeed, many have viewed standards as perhaps the most important agenda items in the fair redistricting "portfolio." As a former AFL-CIO advisor on reapportionment matters and the plaintiff in *Wells v. Rockefeller* has stated:

> The most effective way to prevent gerrymandering is not to . . . vest special power in some judicial umpire or even in a nonpartisan authority. Rather it is to make sure that whoever draws the district lines cannot do so in a manner calculated to bestow special advantages on any . . . group . . . And the best way to do this is to establish firm, explicit . . . ground rules.**

*Washington Post, June 21, 1979.

**Wells, *'Affirmative Gerrymandering' Compounds Districting Problems,* National Civic Review (January 1978) at 17.

Equity, uniformity, visibility and accountability—at first blush, all appear to make the case for articulate standards. Few seem to quarrel with the idea, at least in principle. Yet, there is a significant measure of opposition.

In Opposition to Standards—Encroachment on States' Rights. The National Conference of State Legislatures has expressed concern that if Congress mandates that commissions draw plans according to specific federal standards, the state legislatures will be accorded little voice in the redistricting process. The standard response to this objection is that state legislatures would retain a significant influence in appointing commission members. Of course, this influence would be limited by reform proposal restrictions on who could be appointed.

Absence of Standards throughout the Nation's History. It is true that federal redistricting standards have not been employed throughout most of U.S. history and that many states have set no standards for either legislative or congressional redistricting. Standards supporters, however, assert that (i) perhaps the federal standards which were renewed and embellished from 1842 to 1911 ultimately expired simply because they were not judicially enforced, and not because they were unnecessary or because Congress did not have the authority to impose them, and (ii) states are now increasingly adopting standards. These observations cast doubt on the argument that the relative absence of standards in the past implies that they are unnecessary to fair and effective operation of our redistricting apparatus.

Effect on Volume of Litigation. Some have expressed wariness of standards without commissions, suggesting that such a combination may "open the floodgates to litigation" and entail lengthy bureaucratic red tape. An underlying premise is that many plans will be unable to satisfy fully the variety of standards being proposed, and dissatisfied parties may be encouraged to find some inconsistency worthy of court contest. Yet others have speculated that the articulation of standards could reduce frivolous litigation, since challengers would use standards as guidelines to determine the types of deficiencies the courts will recognize and would assess their prospects with greater care.

Standards: Conflicts or Priorities. Focusing on the dilemmas of definition and differing social and political values that underlie many of the standards proposals, some authorities suggest that the task of reconciling and ordering meaningful standards may be unmanageable. For example, drawing districts with the same size population in order to fulfill the "population equality" standard may require odd-shaped districts which fail to meet the frequently asserted "compactness" requirement. NCSL has complained, in this vein, that many congressional bills "impose a litany of substantive and inconsistent standards to govern redistricting plans."*

Proponents of standards generally respond to such assertions not by disagreeing that standards may conflict, but by arranging them according to priorities which can operate to mitigate the problem: the less important standards need only be met to the extent that the plan they affect is also faithful to the more important standards. Indeed, several experts suggest that priorities should be

*1979 Hearings at 400 (statement on behalf of NCSL of State Senators S.H. Runyan, Arizona, Ross Doyen, Kansas, and Charles Vickery, North Carolina).

made explicit in any reform proposals which espouse redistricting standards. The Supreme Court seemed to advocate this priority approach at least with respect to legislative districts, in *Reynolds v. Sims*, 377 U.S. 533 (1964) where the Court wrote that although the state must attempt to construct districts in both houses of its state legislature as nearly equal in population as practicable, some population deviations were permissible if "based on legitimate considerations incident to the effectuation of rational state policy" such as a desire to respect political boundaries. It should be noted that placing standards in order of importance does not eliminate all difficulties. Additional questions which need to be answered include what the precise order should be among any given set of standards, whether there should be a range within which some standards can be modified to accommodate others and, if so, what these ranges might be.

Examination of Specific Standards

Against this backdrop, it is appropriate now to examine individual standards which have been proposed, where on the priority scale each might be placed, how clearly these can and should be defined in law, and how much a given standard should be modified to accommodate other standards.

Population Equality. Past congressional statutes, Supreme Court decisions, and virtually all major reform proposals agree that congressional districts should strive for equal population size. According to the Congressional Quarterly, 385 of the existing 435 congressional districts are within 1 per cent of the average district population within their states, thus confirming the efforts of states to adhere to this requirement.* Nevertheless, many issues with regard to this standard remain unresolved and a good number turn on definitions of "population equality." Most definitions set forth a percentage of population deviation allowable from a state's average population in a congressional district. Various advantages and disadvantages are claimed for this approach. The "deviation range" concept is meant to eradicate gross population since any deviation outside the stipulated range would be impermissible. This approach seems to offer a better solution than precise mathematical equality since it allows other relevant considerations to be taken into account in a way that mathematical equality may not. Thus, districts would be presumed to be within constitutional tolerances if the maximum deviation were within the permitted range. Yet this presumption might be overcome by showing that a given plan, nevertheless, "operated unreasonably to minimize the voting population," see *Kirkpatrick v. Preisler*, 394 U.S. 526, at 531 (1969).

Among those standards defining "population equality" according to range, there exist alternatives concerning the amount of deviation allowed. One 1979 Senate proposal, for example, (S. 596**) allows the largest district to be 4 per cent greater than the smaller district (*i.e.* permits deviations from the average district of up to 2 per cent). Advocates defending the broader ranges assert that they provide a greater opportunity to accommodate other relevant standards and, that in any event, small ranges may require census figures to be more accurate than is now the case. Indeed, the Census Bureau admits to a margin of error of

*Congressional Quarterly, "Congressional Districts in the 1970s" (2d ed. 1974) at 1.
**96th Congress, 1st Session.

approximately 2 per cent in its estimates, and a census authority testified in mid-1979 before a House subcommittee that many state representatives had encountered problems using census figures to draw redistricting lines.*

Thus, although debate continues concerning the precise definition of "population equality," there seems to be a consensus that some standard of this kind is a necessary (albeit not alone sufficient) requirement for fair redistricting. It appears that a range of standards would pass constitutional muster although Supreme Court decisions are not fully clear on the extent to which states must at least strive for strict mathematical equality.

Political Subdivisions. Over 200 counties are split up among congressional districts more than is required by their state's population average. Many of those concerned with improving the redistricting process feel that the boundaries of political subdivisions (counties, municipalities, and other units of local government) should be respected in the line-drawing processes, although not all of them agree on whether the term "political subdivision" should be defined in the federal law or left up to the states to define. They propose that political subdivisions remain undivided whenever possible not only because unnecessary fragmentation undermines the ability of constituencies to organize effectively, but also because it increases the likelihood of voter confusion regarding other elections based on political subdivision geographies. Furthermore, preserving political subdivisions tends to foster a sense of community.

Still not settled, however, is the priority this standard should be assigned. While it is generally agreed that boundaries should only be respected to the extent that they are consistent with the "equal population" standard, the issue becomes more controversial when this standard conflicts with the "compactness" standard which discourages odd-shaped districts. Many political subdivisions are odd-shaped; if the compactness standard is given a high priority, the political subdivisions should only be respected when both "population equality" and the "compactness" requirement are fulfilled. Most groups place preservation of political subdivisions second only in importance to "population equality."

Other criticisms of the high priority accorded preservation of political subdivisions boundaries cut more deeply than those just mentioned. It is charged that honoring subdivisions preserves the "status quo," a change in which may sometimes be needed in order to eliminate undue incumbent power in fair districting situations. Representatives from MALDEF, for example, have expressed concern that this standard may jeopardize minority voters: "[T]he standard which requires maintaining the boundaries of political subdivisions is unwarranted. In order to maximize the voting strength and enhance the opportunity for minorities to be elected, it is often necessary to split cities or counties which have large concentrations of minority citizens."**

Contiguous Territory. Rarely has it been suggested that congressional districts not be composed of contiguous territory. Generally, a district is considered contiguous if none of the territory included within it is entirely separated from the remainder of the district by intervening territory assigned to another district. Indeed, even though not required by the Constitution or by federal law, contiguity is almost always observed in congressional districts.* Perhaps this practice is common because, like compactness, it seems inherent to the system of representation upon which the U.S. House of Representatives system is based. Although there has been questioning of the incorporation of contiguity into federal legislative standards because of difficulty of definition, the almost self-evident character of the concept suggests that detailed definition may not be needed.

There are, nevertheless, problematic situations for assessing contiguity. For example, the question might be raised whether districts are necessarily contiguous if they are comprised of territories joining only at one point or connected only by bridges or tunnels, or separated by unconnected waterways. Some plans, therefore, propose "convenient contiguous" territory, a concept that is designed to permit searching scrutiny of these marginal situations and to afford some recognition to travel and communication barriers.

Compactness. The "compactness" requirement is designed to prevent gerrymandering districts into odd shapes. One measure of compactness is to determine the smallest circle in which the district can be circumscribed and to compare the ratio of the area of the district inside the circle to the area of the circle itself, with the closer to 1-1 the better. Like contiguity, compactness is required neither by the Constitution nor by federal law, but scholars and politicians alike have acknowledged its value and many states have established compactness provisions.

Defenders of the compactness requirement maintain that it is central to the theory of geographical representation upon which U.S. House of Representatives selection is based. Geographically compact districts also tend to reduce electoral costs in time and money, since candidates and campaign workers can more readily cover smaller districts. Nevertheless, a compactness standard which would be logical for one district might be quite inapplicable to another. Thus, general language requiring the aggregate lengths of district boundaries in the state to be as short as possible might be more appropriate in federal standards than more detailed or narrow definitions. States, however, could choose to define the term more narrowly in their own constitutions or codes. This level of generality is seen as preventing the arbitrary shifting of lines for political advantage while permitting minor departures from compactness to accommodate important companion standards. Virtually all proposals suggesting this standard place it below the three previously mentioned in terms of priority.

"Antigerrymandering" Standards. Some endorsers of standards believe that even if the previously mentioned requirements are carefully articulated and enforced, there should also be explicit "antigerrymandering" standards. These generally prohibit the drawing of lines for the purpose of gaining political advantage, and currently exist under the laws of Colorado, Delaware, Hawaii, and Oregon. Such requirements serve as an added safeguard against line-drawers who, while devising a means of fulfilling the previous requirements, still intentionally manage to structure district lines which establish an undue political advantage.**

*Remarks by Marshall L. Turner, Jr., U.S. Bureau of the Census, testifying before the House Subcommittee on Census and Population, May 4, 1979.

**Letter dated September 27, 1972, Abelardo Perez, then Associate Counsel for MALDEF, to Senator Danforth (R-Illinois) sponsor of S. 596.

*In fact, a federal court, in *Kopald v. Carr*, 343 F. Supp. 51 (M.D. Tenn. 1972) imposed a requirement of contiguity where that requirement was not mandated by state statutes. In addition, redistricting expert Bruce Adams has noted that, ". . . two state statutes and twenty seven constitutions require contiguity." ("A Model Reapportionment Process: The Continuing Quest for 'Fair and Effective Representation'," 14 *Harvard J. on Legislation*, June 1977 at 874).

**See Backstrom, Robins and Eller, "Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota," 62 *Minn. L. Rev.* No. 6, July 1978, which points out that

The "political advantage" type of standard has encountered some opposition. It is seen by some as an attempt to make the line-drawing process politically neutral, an impossibility since every district line favors some political party, person or group. Proponents respond, however, that the standard is not meant to void a plan merely because it favors some group or individual. The Common Cause model, for example, does not void a plan merely because it *results* in favoritism. Rather, it requires that challengers demonstrate that districts were drawn for the *purpose* of favoring some person or group.*

In addition, problems may arise under an antigerrymandering standard with regard to determining which entities should explicitly be prohibited from gaining political advantage. Among those suggested by various proposals are: political parties, incumbents, economic groups, certain racial minorities, certain language groups, and specific individuals. While it seems laudable to attempt to eliminate the possibility of any entity gaining political advantage, an effective standard may be so difficult to articulate that the resulting attempt could create more problems than it would solve. Indeed, Common Cause redistricting expert Bruce Adams has advanced this criticism with respect to the protection of certain socio-economic communities (as has been attempted in Alaska, Colorado, Hawaii, and Oklahoma). In a 1977 article, he wrote:

> The notion of "socio-economic communities of interest" is so broad that a reapportionment authority could knowingly demark geographically overlapping communities. As a result, the reapportionment authority would have to favor some communities of interest over others. It is possible, therefore, that under the broad provisions those communities of interest that have been the traditional victims of discrimination will gain no additional protection.**

Another frequent criticism of the antigerrymandering standard is that it weakens the theory of geographical representation. If a "fair system" is defined as one which guarantees that groups receiving a certain percentage of the total vote are awarded a similar percentage of seats in Congress, the United States would have to adopt a mechanism for proportional rather than geographical representation.*** Many political scientists assert that the U.S. electoral system could not readily make this change because it would entail political conditions (*e.g.*, the growth of a multi-party system) which are foreign to the nation's political system and traditions. Yet, it is possible to focus only on geographic information in the *initial* formulation of redistricting plans and then to apply a "political influence" concept in checking a plan to ensure that it does not unduly benefit some specific group or individual. An antigerrymandering standard might decree that such a check is desirable although the type of data to be used in making this test and its manner of application would have to be carefully worked out.

one can measure the extent of gerrymandering by looking at any proposed districting in terms of statistical calculations on how likely the expected seats votes relationship it would give rise to could have occurred by chance.

*Common Cause, "Toward a System of 'Fair and Effective Representation'," (Washington, D.C., 1977) at 55.

**Adams, "A Model Reapportionment Process" *supra*, at 879.

***See* Backstrom, "Issues in Gerrymandering," *supra*. As measured in Backstrom's terms, fair representation is *not* proportional representation.

Some groups oppose any express prohibition of political gerrymandering, arguing that the Supreme Court has never found it unconstitutional to take certain considerations into account when drawing initial redistricting plans.* However, advocates of this standard, in addition to questioning the validity of case precedent here, suggest that it is precisely for the reason that constitutional strictures may permit some accommodation of political considerations that federal standards must be articulated in this area in order to prevent abuse.

Other Considerations: "Affirmative Gerrymandering" Practices

Most authorities and organizations advocating antigerrymandering standards disapprove of the use of statistics about a district's racial or linguistic composition to dilute the voting strength of certain racial or language minorities. Indeed, both Supreme Court decisions (*e.g. Gomillion v. Lightfoot*) and federal legislation (the Voting Rights Act of 1965) prohibit such practices.**

A more controversial question, however, is whether such information should be taken into account to afford minorities an advantage so as to compensate for past redistricting injustices (hence the name "affirmative gerrymandering"). In this vein, an expert on the effect of redistricting on black voters has suggested the following language for inclusion in redistricting proposals:

> There shall be an affirmative duty on the part of the [initial reapportionment authority] to insure that there is no discrimination on the basis of race or color in the drawing of congressional district lines.***

This approach seems to be supported by Supreme Court pronouncements [*United Jewish Organizations v. Carey*, 430 U.S. 144, (1977)]; the NAACP has also gone on record in support of "affirmative gerrymandering":

> Whereas, courts, including the Supreme Court, have recognized that it is sometimes necessary to take race into consideration in the shaping of voting districts to correct violations of the Constitution and of the Voting Rights Act; . . .[T]he NAACP opposes any law that would restrict legislatures or other entities in their efforts to correct the underrepresentation of blacks in Congress.****

Some minority interests (*e.g.* MALDEF) suggest that a diluting effect in a redistricting proposal (with or without proven intent) should be sufficient proof of discrimination to invalidate it or, at least, to create a presumption of defectiveness in any state and not merely in those jurisdictions with a history of discrimination. The rationale, drawing on experience with respect to efforts to establish discriminatory intent in matters of minority employment and education, is that proving such intent is difficult if not impossible.

In *City of Mobile v. Bolden* the U.S. Supreme Court dealt with the intent issue in the context of a redistricting challenge based on Section 2 of the Voting Rights

*NCSL; *See Gaffney v. Cummings*, 412 U.S. 735 (1973) and *White v. Regester*, 412 U.S. 755 (1973) in support of Supreme Court neutrality in this area.

**42 U.S.C. §§ 1971, 1973 *et seq.*

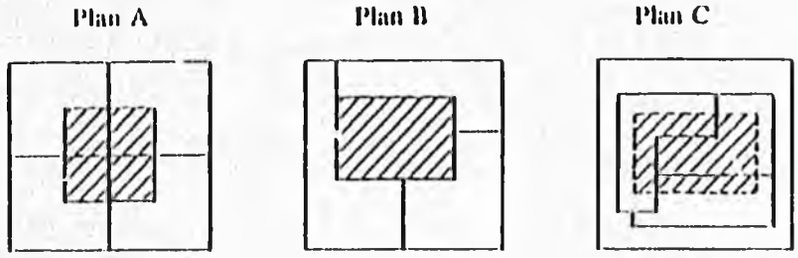
***1979 Hearings at 342 (statement of George Brandy Smith).

****Althea Simmons, Director, Washington bureau, NAACP, quoting statement of the Association enunciated during NAACP's 70th annual convention.

Act.* Mobile's at-large system of elections was alleged to cause discrimination against minority groups. The Supreme Court ruled against plaintiffs, finding that the intent to discriminate had not been proved as required in a Section 2 challenge.** This particular election system had been established in 1911, before the date of applicability of Section 5 of the Voting Rights Act. Had Section 5 applied, the system when proposed might not have passed muster during the statutorily mandated preclearance procedure which requires that a covered jurisdiction must prove that a proposed change has neither the intent *nor* the effect of discriminating against minority groups. Thus, a paradox exists with respect to the relationship between the Voting Rights Act and electoral systems. While Section 5 jurisdictions generally may not establish at-large systems, such existing systems and systems adopted by non-Section 5 jurisdictions may be imposed and perpetuated regardless of their effect on voting strength.

While a requirement which prohibits dilution of minority voting strength would lean toward Plan B instead of Plan A in an illustrative four-district urban area such as graphically portrayed in *Figure 6*, the "affirmative gerrymandering" approach might favor Plan C (at the cost, it is noted, of some geographic gerrymandering).

*Figure 6****



Note: ▨ denotes minority

These points of view have been criticized on several grounds. First, there has been questioning of one assumption upon which affirmative gerrymandering rests, namely, that minorities make up an essentially unified voting block that will rally behind a minority candidate. It can be argued, of course, that even though minority constituencies will not necessarily elect minority representatives, the larger the percentage of a minority population in a district, the more likely it is that the district will elect a minority candidate. More intensive studies of minority voting behavior may shed light on this issue. However, regardless of

*42 U.S.C. 1973, Section 2: "No voting qualifications or prerequisite to voting, or standard or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in the contravention of the guarantees set forth in Section 1973b(f)2 of this title." Section 2 is interpreted as a restatement of the Fifteenth Amendment which requires a showing of purposeful discrimination.

**64 L. Ed. 2d 119 (1980).

***Each box represents a state; divisions denote districts. Equal population distribution is assumed.

the practical impact of such "affirmative gerrymandering," some political analysts seriously question its theoretical foundation, maintaining that while redistricting should not contribute to discrimination, neither should it carry the burden of compensating for past discriminatory practices. In the words of one expert:

> [A] racial quota [affirmative gerrymandering] could easily be superimposed on a legislative body which is elected by a system of proportional representation. It could simply be required that a particular group's proportion of the total population be reflected in the membership of the legislative body. But to attempt to apply a quota to a legislative body which is geographically based (as are the U.S. Congress and every one of the state legislatures) is to mix two fundamentally incompatible concepts.*

Time Provisions. Throughout the redistricting process, there exist steps which may become obstacles to timely action if time limits are not imposed. These include:

- completion of a proposed redistricting plan;
- voter challenge;
- initial court review;
- formulation of an acceptable plan if the initial plan is rejected;
- final judicial decision on acceptance of the plan.

Some improvement advocates believe that there should be few, if any, specifications of time limits since they may be unenforceable if emergencies arise which preclude attention to redistricting matters. These individuals endorse the "as soon as practicable" approach. Others believe that a maximum time limit should be set for some, if not all, major steps. This would help avoid the problem of ultimate plan acceptance after census figures have become outdated or after crucial elections have passed.

Perhaps the most crucial time problems arise in connection with drafting of initial and final plans. Some experts suggest that a time limit be set only for the final product. Interim time limits are unnecessary, they assert, if the final plan is accepted before political interests can predominate. The voter challenge time period is also a subject of controversy. Some proposals allow voters to challenge plans up to 60 days after they have been made public, while others allow up to nine months after establishment of the last district after a decennial census (*e.g.*, S. 596 and Amendment 237 plans, respectively). The shorter period attempts to ensure that litigation will conclude before the next major congressional election takes place. The longer time provision, on the other hand, offers citizens a greater opportunity to participate in the apportionment process and to hold line-drawers accountable. Generally speaking, some articulated time limits, perhaps more as a target than as a rigid goal, would seem desirable in reapportionment standard-setting.

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*Wells, "'Affirmative Gerrymandering' Compounds District Problems," *National Civic Review* (Jan. 1978) at 16.

This discussion has explored the major options under consideration with respect to standards for congressional redistricting. While the options remain open to debate, it appears that virtually all reform interests view mandated redistricting standards as an important element for improving the electoral process.

IV. The Issues: Who Should Make the Redistricting Decisions?

In addition to a determination of the need for and character of standards, the reapportionment "rulemakers" must be identified, *i.e.*, the body or governmental entity which determines where responsibilities lie for making subsequent decisions. This body possesses the authority to determine whether commissions, state legislatures, or other governmental officials draw district boundaries. If the rulemakers decide that specific processes and specific protections should be included in initial plans, such reviewing responsibility must be allocated. The main candidates for these key duties in the reapportionment process will be discussed separately.

Who Should be the Redistricting Rulemakers?

The ultimate authority to decide how subsequent redistricting decisions should be made lies with either Congress or the state legislatures.

Contentions as to Congressional Authority. It can be readily argued that the Constitution grants Congress this ultimate authority. Article I, Sections 4 and 8 are cited in support of this view. Article I, Section 4 declares that Congress "may at any time by law make or alter" [regulations about the] "times, places and manner of holding . . . [congressional] elections" and Section 8 grants Congress the power "To make all laws which shall be necessary and proper . . ." for carrying out its constitutional powers. This basic authority as well as subsequent judicial interpretations suggest that regulation of redistricting is within Congress' constitutional prerogatives. Indeed, the Supreme Court, on several occasions, has interpreted the Constitution as giving Congress authority over rules affecting congressional elections.* Another argument supporting this view is the pragmatic contention that Congress has exercised such authority in the past on several occasions without encountering serious objections.

Contentions as to State Legislative Authority. The National Conference of State Legislatures (NCSL) is perhaps the leading advocate of preeminent authority in state legislatures over reapportionment, and has officially opposed any federally mandated procedures, structures, or substantive standards on redistricting. Those, like NCSL, who favor the current system (which accords state legislatures an essentially free hand, subject, of course, to Supreme Court constitutional interpretations) advance several arguments. First, they maintain that the framers of the Constitution intended that state legislatures have ultimate control, noting that Article I, Section 4, provides that "the times, places and manner of holding Congressional elections shall be prescribed in each State by the Legislature thereof." Testifying before the Senate in 1979, NCSL spokespersons contended that congressional power in Article I, Section 4 to "make or alter" such rules is misinterpreted when applied beyond the most compelling emergency situations:

> Congressional authority to oversee national elections was controversial and was accepted only as an extraordinary device to be used in extraordinary circumstances. It was not intended to grant the national legislature plenary power over elections or to permit that body to interpose its notion of political fairness.*

Although Congress has legislated some standards, state legislatures historically have been responsible for making redistricting decisions. This relative congressional inactivity on redistricting stems largely from a history of lack of enforcement of congressional mandates rather than from any irrelevancy of the rules to improving the process or from an absence of congressional authority to make the rules in the first place.**

The debate about "ultimate rulemaking" authority is of greatest moment where the U.S. Congress and state legislatures would assign subsequent responsibilities in a different manner. Perhaps, then, the most crucial question to be answered is who should have responsibility for drawing district boundaries.

Who Should be the Initial Apportioning Authority?

This is perhaps the most controversial issue in the reapportionment debate, for it affects a power exercised by state legislatures since the inception of our republic. The two major candidates for the responsibility are commissions and state legislatures. The "commission" concept has generally attracted the "reform" label, yet even some "reformers" hesitate to support it.

Advocates of the "commission" approach feel it has appeal because the "legislated" system allows a great degree of self-interest to operate in the redistricting process. A former Illinois Congressman testified in 1979 that taking redistricting out of legislative hands "greatly reduces the inherent conflict of interest which now exists when the same people who draw a new map and vote on it also have a personal stake in its outcome."*** State politicians have occasionally admitted to this self-interested motivation; many legislators dislike the redistricting responsibility, but use it in "self-defense," with knowledge that if they do not succumb to the temptation of drawing lines favorable to their political interests, their opponents will certainly seek to do so.

Those groups skeptical about commissions suggest that commissioners might be just as subject to political pressures from congresspersons as are state legislators. If the commissioners are political appointees, they may even be more vul-

*See Appendix A, *Baker v. Carr, Ex Parte Siebold, Oregon v. Mitchell.*

*1979 Hearings at 401 (statement on behalf of NSCL of State Senators S. H. Rayan, Arizona, Ross Doyen, Kansas, and Charles Vickery, North Carolina).

**E.g., see discussion of Standards, at page 10.

***1979 Hearings at 302 (statement of Abner Mikva, formerly 10th Congressional District, Illinois, presently a member of the Circuit Court of Appeals for the District of Columbia).

nerable to political pressures than a legislature elected by the public. Commission supporters respond by endorsing the introduction of safeguards into the appointment process to eliminate "special interest" commission members. In a 1977 article, one redistricting expert pointed to the Arkansas legislative commission (composed mostly of legislative leaders) as a biased body that could not "exercise the independence sought by the advocates of reapportionment reform." He strongly commended, therefore, the "impartiality" restrictions incorporated in the Common Cause proposal.*

Critics of the commission approach also assert that creating commissions unrealistically attempts to remove politics from an inherently political process. It is impossible, the argument holds, to apportion political power by a non-political process. Further, the fact that citizens can vote directly for legislators but not for commissioners may cause voters to feel disenfranchised and removed from the electoral process. Pro-commission authorities concede the importance of a sensitivity to the danger of removing the redistricting process too far from the legislature. They typically stress, however, that the reform is designed not to deny the legislature its interest in reapportionment, but rather to buffer the process from conflict of interest.**

Some experts contend that entrusting redistricting to a commission may bring the process closer to the voter, as many plans implemented in the recent past were drawn by the courts, a body over which voters have even less control than over commissioners. However, proponents of the current system assert that commissions boast no better "track record" than do legislatures in terms of producing plans acceptable to the courts. While there exist few statistics relating to commissions drawing congressional lines, the information about state legislative commissions and reapportionment commissions in other countries may shed light on the issue. According to NCSL, only a "handful" of states have seen their congressional plans redrawn by the courts, and one recent study of redistricting practices suggests that the overall record of some bipartisan commissions has thus far been shown to benefit the party controlling the state legislature more than have the other methods.*** Furthermore, according to 1974 data, about a third of the plans initially proposed by both state legislatures and the courts were rejected initially by appellate courts.

While these statistics offer meager support, if any, for the commission concept, commission proponents point to other data that tend to corroborate the improved commission track record. First, many reformers take issue with the "handful of states" estimate. In fact, most estimates are that between 25 percent and 35 percent of current house district lines were drawn by the courts. A 1973 study by the Council of State Governments concluded, moreover, that commissions seemed to establish better track records than state legislatures.**** Other analysts point to commissions in other countries (*e.g.*, Australia, Canada, and

*Adams, "A Model Reapportionment Process: The Continuing Quest for 'Fair and Effective Representation,'" *supra* at 868. Adams is a principal architect of the Common Cause models.

**It is worth noting that the most direct conflict of interest concerns legislative districts. While state representatives may run for congressional seats (and thus benefit directly from congressional lines), they more often run for reelection in their state house and senate.

***1979 Hearings at 424 (statement of Eric Uslaner).

****Council of State Governments, *Reapportionment in the Seventies* 11 (1974).

Great Britain), suggesting that their record of electoral equity is better than that of those in the United States. Although the controversy about actual performance may be resolvable only with further study, it does seem clear that more than a "handful" of congressional redistricting plans initially drawn by state legislatures have been found unacceptable in the courts.

A collateral consideration in assessing performances is economy, *i.e.*, whether commissions can save time and money. Because commissions would be created for the specific purpose of efficiently and equitably preparing redistricting plans, their entire organization could be shaped toward that end. Such specialization is, of course, extremely difficult in a state legislature with numerous and diverse responsibilities. Unfortunately, reliable estimates of the comparative costs of commission versus state legislature formulation of plans are not readily available. Yet, there are some figures which provide an initial framework. From 1971 to 1973, the California legislature invested approximately $1 million developing a redistricting plan (which was ultimately replaced by a court-appointed Special Masters' Committee plan) and in 1971 there were over 26 full-time legislative staff members working on the California redistricting. Hawaii's reapportionment commission spent about $200,000; Montana's spent approximately $20,000.* These figures suggest that the dollar dimension of the debate, even if not an overriding consideration, merits some study.

In addition to criticism of the "commission" approach, advocates of state legislature line-drawing advance several positive claims. It is commonly asserted that state legislatures have not abused their discretionary powers. It is argued that since forty-two states have a population deviation of less than 1 per cent (*i.e.*, in these states, the population of the greatest district does not exceed by more than 1 per cent that of the smallest district),** this demonstrates that legislatures have made a concerted effort to draw fair districts. Thus, since the only constitutional requirement of fairness articulated by the Supreme Court is population equality, and since the legislatures are adhering to that rule, they have made a "good faith" (and largely successful) effort to establish fair district lines. As noted earlier, reformers caution that although population equality is necessary for fair redistricting, it is not alone sufficient.

Even if the commission concept is accepted, controversies can arise concerning both the method of selecting commission members and their number. The greater the number, the more likely it is that the commission will take into account minority views. However, a large membership may increase financial costs while reducing the likelihood of a consensus. An equally troublesome question is, who should mandate the commissions—Congress or the states? Those supporting the congressional approach maintain that it will ensure that all states establish commissions whose members are selected in the most impartial and uniform way possible. Critics, however, question both the political and constitutional advisability of federally mandated commissions. They voice the view that the redistricting mechanism should be left in state hands, where it can be held accountable to the citizens. They also express concern that members of a federally mandated com-

*Adams, "A Model Reapportionment Process: The Continuing Quest for 'Fair and Effective Representation'," *supra* at 856, n. 115.

**1979 Hearings at 101 (statement of North Carolina State Senator Charles Vickery, citing *Congressional Quarterly*).

mission may view themselves as ultimately accountable to the federal government, to the detriment of viable state government.

Constitutional questions also have been raised in this area, especially with respect to congressional authority to specify the method of commissioner selection. Plans requiring certain state legislators to appoint commission members, for example, might violate the "appointments clause" of the Constitution which requires that certain "Officers of the United States" be nominated by the President and confirmed by the Senate.*

Three congressmen advanced this argument in 1979 before a House Subcommittee, pointing out that it was their understanding that (i) commission proposals do not specifically define whether a commission would be a state or federal agency, (ii) if a federal agency has more than investigatory and informatory powers, its members must be selected in conformity with the "appointments clause," and (iii) since the commissions would be responsible for making reapportionment decisions (clearly more than investigatory and informatory powers), the constitutionality of their selection by party members in the state legislatures would clearly be put into question.** They also suggested that congressional specifications as to commission selection and membership might violate states' rights under the Tenth Amendment, by requiring rather than authorizing state officials to perform federal duties. These views are questioned by legal experts for groups espousing redistricting commissions who see no "appointments clause" issue where purely legislative functions are involved (as in preparing district plans) and discern in the broad federal authority recognized by the courts over congressional elections the legitimate power to specify redistricting procedures such as commission mechanisms.*** Thus, it appears that the issue of congressionally mandated reapportionment commissions must await judicial interpretation for final constitutional validation (although little constitutional question exists that the states may proceed with this technique on their own initiative).

A further line of thinking in this vein merely dismisses commissions as lacking relevancy and meaning with respect to the problems of fair apportionment. On the one hand, it is claimed that if there are fair and clearly defined redistricting standards and if there are "accountability" provisions serving as a check on the redistricting authority, it makes little difference what body holds the redistricting responsibility. Thus, each individual state should choose whatever method of

*Article II, Section 2, cl. 2: "He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of the law, or in the heads of departments."

**1979 Hearings at 35-36 (statements of Representatives James Leach, Robert Kastenmeier, and William Frenzel relying on *Buckley v. Valeo*, 424 U.S. 1 (1976), interpreting the case as holding in part that if a federal agency has more than investigatory and informatory powers, member selection must conform to the "appointments clause.").

***See, e.g., 1979 Hearings at 67-75 (statement of Common Cause General Counsel K. Gindo, *The Constitutionality of the Antigerrymandering Act of 1979*, relying on *Ex Parte Seibold* (1880), *Smiley v. Holm* (1932), and *Oregon v. Mitchell* (1970), as establishing Congress's clear power to divest states of all control over redistricting and, therefore, also to exercise more limited prerogatives of specifying procedural rules and methods for that function.).

reapportionment would, in its political context, be consistent with fulfilling these other major requirements. On the other hand, there are those who remain skeptical about articulating any reform measures, feeling that those who wish to exploit the redistricting process for reasons of political self-interest will find a way to circumvent even the most clearly defined rules.

Accountability Provisions: Who Should Judge the Plan?

Even if the initial reapportioning authority has built-in fairness safeguards in terms of character, independence, representativeness, and procedural standards, it must be recognized that unforeseen injustices may still result. Thus, the major reform proposals all incorporate some accountability provisions. These include:

- providing for open hearings when the line-drawers are considering redistricting options;
- requiring public notice of redistricting hearings;
- making the record of any hearings publicly available (perhaps by publication in legislative journals);
- affording the opportunity to qualified voters to challenge a proposed plan within a reasonable period (affording sufficient time to become acquainted with the line-drawing proposals and to prepare necessary information for the challenge, but not so long as to delay unduly final determinations) and, possibly, with waiver or reimbursement of attorney's fees for successful challenges;
- placing authority in federal courts for expeditious review of plans, either through challenge initiatives or automatically; and
- allocating responsibility for replacing inadequate or objectionable plans—the redrawing to be accomplished by initial redistricting body, new group, or the courts.

With respect to judicial review measures, questions arise concerning what specific time provisions should be included in the authorizing bills, and whether there should be automatic judicial review as opposed to review only of those cases which are challenged. Automatic review now occurs for legislative reapportionment plans in Colorado, Florida and Kansas. It offers the advantage of a routine and more thorough check on initial plans, as courts may catch improprieties which public scrutiny misses. However, automatic review also raises questions. In particular, it is interpreted as permitting the courts too great a role in the redistricting process.* The underlying argument stresses that the legislative and not the judicial branch of government should possess the primary authority over redistricting; the courts should not operate as the ultimate arbiter and approver of electoral system arrangements of this kind. An additional problem identified with respect to automatic judicial review is that the courts must make a judgment without the benefit of the adversarial process, a role for which they are not optimally suited.

*See, e.g., *White v. Weiser*, 412 U.S. 783 (1973) where the Court rejected a Texas redistricting plan on the basis of "avoidable" deviations. Four justices dissented, asserting that the ruling in effect established a *de minimus* rule for state legislatures where the state was not even required to justify population variances.

The problem of revision or redrafting where initial plans are rejected has also generated some differences of approach. One option dictates that courts redraw plans themselves or appoint other apportioning authorities if they reject the first plan proposed. Others follow this course only when the initial apportioning authority fails twice; such a "second-try" approach is usually defended for plans which call for redistricting commissions. An underlying rationale reflects the concern that members of a nonpartisan commission, knowing that a court of their political persuasion will take over the reapportionment process should the commission fail to act, might be inclined to force a deadlock. Moreover, the commission would likely have at its disposal staff, resources, and experience not readily available to the court, which it could employ in formulating a new plan.

Although many of the accountability provisions remain subject to debate, particularly in their detailed content, most redistricting reformers agree that this is a crucial component for improvement. Similarly, while influential groups may differ as to who should make redistricting decisions and how critical these decisional bodies are, most seem to join forces in recognizing the importance of accountability factors to an equitable reapportionment process.

V. Concluding Observations

This monograph has attempted to identify problems associated with the current congressional redistricting system and to review the various proposals for improvement along with major arguments which have been advanced in favor of and against them. It is hoped that this analysis will enhance understanding of the important issues involved, and that it will motivate groups and individuals both within and outside the legal profession to formulate their own views, consider remedial action and resist deterrence to change by traditional obstacles in this field.

The improvement proposals under consideration and debate fall into two broad categories—structural change (largely focused on the use of special commissions for developing reapportionment plans) and promulgation of standards to help ensure fairness and equity in line-drawing (based on a handful of principles running from population equality through encouragement of minority influence). Concurrently, two levels of legislative initiative for such reforms are under consideration and debate—federal and state.

It is not the intent or function of this pamphlet to advocate specific reform positions. However, redistricting equity remains a problem for the nation and optimal solutions and conditions do not yet appear to have been devised, no less incorporated in existing processes. Thus, a measure of experimentation with the new reform concepts seems desirable; the American Bar Association has formally endorsed such a posture in relation to the 1980 census redistricting process.*

The nation's experience with redistricting commissions has not been sufficiently widespread or intensively evaluated to draw final conclusions as to universal value or the most desirable subfeatures and characteristics. Thus, it would seem that those who call for state initiatives in jurisdictions so inclined, rather than for a mandate that all states establish commissions, would offer the most promise and the best opportunity to evolve optimal structures for reapportionment.

*See Appendix B.

Federal rules governing redistricting standards, rather than governing methods to apply these standards, however, may be beneficial, although existing uncertainties as to the best "mix" and order of priority among the most commonly cited standards (e.g., population equality, compactness, contiguity, avoidance of intentional political preference) suggest that such formulations might do well to leave some room for state flexibility and experimentation in detailed definition and ordering of any standards articulated.

Whatever the case, carefully studied and soundly conceived redistricting reform promises to aid many sectors of society:

- voters in general whose voice will be heard more clearly when election results are not predetermined by gerrymandering, when competition for congressional seats is maximized, and when representatives must focus their responsiveness on voters rather than on line-drawers;
- racial and ethnic minorities whose interests have often been subordinated in past redistricting practices;
- congressional candidates from minority parties and challenger groups who no longer need hurdle undue barriers of self-protection constructed by incumbent politicians;
- state legislators who will be liberated from political pressures which may influence them to manipulate the line-drawing process;
- courts which will have clearer guidelines concerning the acceptability of redistricting plans; and
- rural and suburban communities (when gerrymandering has been used to strengthen unduly the urban voice) and urban residents (when line-drawers have attempted to increase unduly rural representation).

Indeed, virtually all sectors of society can benefit from congressional redistricting improvement which aids the American electoral machinery in functioning according to our highest ideals of representative government. The time is right—for thought, for decision, and for new levels of achievement.

APPENDIX A

IMPORTANT DATES IN REDISTRICTING HISTORY

DATE	ACTOR	EVENT	DESCRIPTION	STATE LEGISLATIVE/ CONGRESSIONAL
1842	U.S. Congress	5 Stat. 491	First federal statute requiring states to establish congressional districts. First congressional attempt to impose standards in congressional redistricting: compactness, contiguity, single-member districts.	C
1872	U.S. Congress	17 Stat. 28	Reiterated 1842 standards; set forth population equality standard. Reiterated in 1882, 1891, 1901.	C
1880	U.S. Supreme Court	*Ex Parte Siebold*	Congress has supreme authority over congressional election rules.	C
1911	U.S. Congress	1,2,37 Stat. 13,14	Reiterated 1872 requirements. Fixed number of U.S. House members at 435.	C
1929	U.S. Congress	46 Stat. 21	Required automatic reapportionment on basis of population after each decennial census.	C
1932	U.S. Supreme Court	*Ex. Rel. Smiley v. Holm* (Minnesota)	Congress has "authority to provide a complete code for congressional elections."	C
1946	U.S. Supreme Court	*Colegrove v. Green* (Illinois)	Courts lack authority, to judge fairness of a political matter such as redistricting plans.	C
1960	U.S. Supreme Court	*Gomillion v. Lightfoot* (Alabama)	Gerrymandering of city boundaries with a clearly defined racial motive is unconstitutional.	L
1962	U.S. Supreme Court	*Baker v. Carr* (Tennessee)	Federal courts have authority to judge fairness of legislative redistricting plans.	L
1964	U.S. Supreme Court	*Wesberry v. Sanders* (Georgia)	"One man, one vote" ("as nearly as practicable") standard: strict numerical equality among populations in congressional districts.	C

DATE	ACTOR	EVENT	DESCRIPTION	LEGISLATIVE/ CONGRESSIONAL
1964	U.S. Supreme Court	*Reynolds v. Sims* (Alabama)	Both houses in state legislature must meet the "as nearly as practicable" standard; some deviation is allowed to accommodate other relevant considerations. (e.g., preserving political subdivisions).	L
1964	U.S. Supreme Court	*Wright v. Rockefeller* (New York)	To prove gerrymandering unconstitutional on grounds of discrimination, challenger must show evidence of discriminatory effect and purpose.	C
1965	U.S. Congress	Voting Rights Act, 42 U.S.C., 1971, 1973 et seq.	States with past history of discrimination must submit electoral changes to Department of Justice for preclearance. State plan may be rejected if either intent or effect is to dilute minority power. Protected language minorities include Alaskan natives, American Indians, Asian Americans, persons of Spanish heritage.	C,L
1966	U.S. Supreme Court	*Burns v. Richardson* (Hawaii)	Redistricting plans are not necessarily unconstitutional if merely designed to reduce competition among incumbent legislators.	L
1967	U.S. Congress	2 U.S.C. § 2c	Banned at-large congressional elections.	C
1967	U.S. Supreme Court	*Swann v. Adams* (Florida)	Although rejecting legislative apportionment plan, the court recognized that *de minimus* numerical deviations are unavoidable in state legislative apportionment.	L
1969	U.S. Supreme Court	*Kirkpatrick v. Preisler* (Missouri)	States must make "good faith effort" to achieve "precise mathematical equality" and must justify all population deviations.	C
1969	U.S. Supreme Court	*Wells v. Rockefeller* (New York)	Strict mathematical equality is required. Invalidated plan which set up a New York congressional district with maximum deviation of 6.6%.	C
1970	U.S. Supreme Court	*Oregon v. Mitchell* (Oregon)	Reiterated Congress's ultimate authority over congressional elections.	C

DATE	ACTOR	EVENT	DESCRIPTION	LEGISLATIVE/ CONGRESSIONAL
1971	U.S. Supreme Court	*Whitcomb v. Chavis* (Indiana)	Multimember state legislative districts are not unconstitutional *per se*; challengers must prove unconstitutional dilution of voting strength.	L
1971	U.S. Supreme Court	*Connor v. Johnson* (Mississippi)	Where a federal court fashions a redistricting plan, single-member districts are preferable to multi-member districts.	L
1973	U.S. Supreme Court	*White v. Regester* (Texas)	Certain population deviations are permissible in legislative redistricting plans if effected to accommodate rational state policies (e.g., preserving political subdivisions). Multi-member districting is unconstitutional if it dilutes the votes of a racial minority.	L
1973	U.S. Supreme Court	*White v. Weiser* (Texas)	Deviations of 2.43% above average and 1.7% below average in Texas congressional districting plan deemed unacceptable, since districts were not as mathematically equal as practicable.	C
1973	U.S. Supreme Court	*Gaffney v. Cummings* (Connecticut)	States not required to justify minor population deviation in legislative districts; a legislative district plan may constitutionally be drawn with intent to reflect political make-up of state.	L
1973	U.S. Supreme Court	*Mahan v. Powell* (Virginia)	Upheld a Virginia legislative plan which produced a maximum population deviation of 16.4%, deeming the plan a rational means to preserve political subdivisions.	L
1977	U.S. Supreme Court	*United Jewish Organizations v. Carey* New York	Racial criteria may be used in drawing legislative district lines if designed to comply with Voting Rights Act.	L
1980	U.S. Supreme Court	*City of Mobile v. Bolden* (Alabama)	Public officials may be elected at-large even though preclusion of election of minorities may thereby result, where plaintiffs in non-Voting Rights Act jurisdiction fail to show intent to discriminate in the election mechanism or procedure.	L

APPENDIX B

AMERICAN BAR ASSOCIATION RESOLUTION ON FAIR REDISTRICTING

(House of Delegates: February 1979)

Note: The following resolution relates to voter participation initiatives extending well beyond legislative reapportionment. While the complete resolution is set forth, only that commentary from the underlying report which relates to redistricting has been excerpted.

RECOMMENDATIONS

BE IT RESOLVED, that the American Bar Association urges the President of the United States to appoint a commission of distinguished persons from various walks of life to study the decline in voter participation in the electoral process and to make appropriate recommendations, such study to culminate in a White House conference on the subject of declining voter participation; and

BE IT FURTHER RESOLVED, that the American Bar Association supports the enactment of legislation that encourages voter participation, eliminates mechanical barriers to voting and provides for fair redistricting pursuant to the 1980 census without regard to partisan advantage; and

BE IT FURTHER RESOLVED, that the state and local bar associations be urged to support and join with the American Bar Association in this program to improve and enhance voter participation.

REPORT (Excerpts)

3. *Redistricting Pursuant to the 1980 Census*

Many of the participants in the Palo Alto conference* stated that persons frequently do not vote because politically motivated manipulation of the borders of legislative districts has prevented citizens from developing a sense of community identity with the area in which they vote. Also, such districting practices actively skew the voting power that does exist, such as when cohesive communities are broken into several legislative districts. Such gerrymandering was said to have resulted to a large extent from the judicial prescription of "one man, one vote." The sense of the conferees was that legislative districts can comply with that principle and still represent cohesive communities. Accordingly, they suggested that, at the next chance for redistricting, the ABA take an active role in supporting fair and representative legislative districts, drawn without regard to partisan advantage.

Among our recommendations for action is that the Association support the concept of fair redistricting pursuant to the 1980 census. We believe that there should be a statement of principle at this time because of the proximity of the census, following which virtually every state will be required to redraw the boundaries of congressional and state legislative districts. We believe that well in advance of the required redistricting the Association should be on record in support of the goal of fair representation for all citizens without regard to partisan advantage. In this regard, we should note that one of the recurrent themes at the Palo Alto conference was that one of the side effects of gerrymandering was a lack of competition in electoral politics, thereby decreasing the level of participation. Our redistricting recommendation does not endorse any specific method of reapportionment. Toward that end we plan to sponsor a future conference on the subject of redistricting.*

*Symposium on Citizen Participation in Government, sponsored by the Special Committee on Election Law and Voter Participation, June 1978. See proceedings published in *The Disappearance of the American Voter* (1979).

*Held in San Diego, California, June 1980. Attended by approximately forty election law experts, state legislators, attorneys, citizen groups and mathematicians, the three day session has been transcribed for publication. See *Representation and Redistricting in the 1980s*, ed. by Grofman, Lijphart, McKay, and Scarrow (Lexington Books, 1981, forthcoming).

APPENDIX C

ABA SPECIAL COMMITTEE REPORT ON REDISTRICTING

(Excerpts, August 1980)

Since its last report to the House of Delegates in February 1980, the Special ommittee has focused its attention on three major areas of election law: edistricting, absentee voting, and campaign finance.

REDISTRICTING: Introduction

In February 1979 the House of Delegates of the American Bar Association dopted, on the recommendation of our Committee, a series of resolutions on ie subject of voter participation, among which was a resolution calling for "fair edistricting pursuant to the 1980 census without regard to partisan advantage." n launching a program to encourage voter participation, the Association uthorized our Committee to co-sponsor, with the National Science Foundation, conference on representation and apportionment issues in the 1980s.

This conference was held in San Diego, California, June 11-15, 1980. It was at-ended by distinguished political scientists, mathematicians, reapportionment nd election law experts, representatives of congressional and state legislative ommittee staffs, lawyers, and representatives of various public interest groups ncluding the League of Women Voters, Common Cause and the Mexican merican Legal Defense and Educational Fund. The conference discussions ocused on such districting subjects as the use of single-member districts, the gal criteria for determining the fairness of single-member districts, electoral echanisms other than single-member districts, the policy consequences of reap-ortionment, representation within the political party system, and theories of epresentation. A number of scholarly papers were prepared for the conference, hich, along with commentaries on the proceedings, will be published in a eparate volume.* We believe this volume will be an invaluable aid to members f legislative bodies, lawyers and judges, as they grapple with the important epresentation and apportionment issues of the 1980s. How these issues are andled will be of critical importance to our nation and to the integrity, vitality nd effectiveness of our electoral system and government for the next ten years.

For that reason, we believe it of great importance that a national dialogue be pened at this time on the mixed legal and political issues of redistricting and apportionment. Although our examination of these issues will continue into 981, we felt it valuable to set forth in this informational report some of the reliminary conclusions we have reached as a result of our study of this area.

General Observations

We feel that the entire problem of reapportionment and redistricting is exceedingly complex, and quite possibly does not permit a national solution that

*One paper presented at the conference, by Professor Michel Balinski, raised questions about the formula that should apply in allocating congressional seats among the states. Another paper, by Professor Steven Brams, suggested the introduction of a new voting system called "approval voting."

is either appropriate or realistic in all fifty states. Of fundamental concern is the fact that reapportionment and redistricting are important aspects of deciding the allocation of political power within an electorate.

Because the districting process amounts to an allocation of political power and because of the obvious conflicts in having the legislatures control the process, various proposals have been submitted, some of which would create independent commissions to do the actual job of redrawing district lines. While these commission proposals may have merit (a proposition on which we now express no opinion, pro or con), it is probably utopian to expect that many legislatures are now prepared to adopt such proposals.

We do feel, however, that the time is ripe for each state to consider the standards it will apply in its actual redistricting process. Adopting standards before beginning the actual districting process has at least three advantages. First, it would make more open and public the bases upon which political power would be reallocated. Second, it would establish a framework for accomplishing the redistricting itself. And third, it would establish the benchmark against which the eventual districting plan could be evaluated by the public, the press, and (in the event of judicial appeal) the courts.

An underlying assumption is that the redistricting process—both the adoption of standards and the drawing of district lines—should be open and public. It is certainly apparent that the conflicts of interest inherent in the process are reduced by public and media scrutiny.

The Districting Standards

The next, and most fundamental, question is, specifically, what should these standards be? While one scholar has identified at least sixteen standards, not all possible standards will be relevant or appropriate in each state.* Nonetheless, there are certain basic standards which deserve consideration in every state.

The most obvious standard is population equality. Ever since the "apportionment" decisions of the U.S. Supreme Court, very close population equality has been constitutionally required. Many states have set their own standards in this regard, and it is worth noting that some states allow even less population variance from district to district than do the federal court decisions.

Other standards include the extent to which electoral districts should be compact and/or contiguous; follow local political boundaries; and be drawn to concentrate identifiable groups (whether political, ethnic, or economic) in the district.

Two other standards, which have not received the in-depth judicial scrutiny that population equality has, pertain to the functioning of a democratic form of government. The first of these is the principle that the party or faction receiving a state-wide majority of votes should also receive a majority of the seats in the legislature, so that it is able to carry out its mandate to govern. Another standard involves an application of the principle of competitiveness so as to ensure voter interest in district elections.

*The San Diego conference volume will contain an extremely useful section on the criteria for redistricting and reapportionment.

Standards: Conclusions

In considering the adoption of standards, each state will be faced with some very hard choices. This is because, by adopting and following one standard, a state may in certain cases make it impossible to follow another. Therefore, the adoption of standards likely will require their prioritization. The critical point is that because the process is a difficult one, now is the time for the states to begin dealing with the complexities of redistricting before the process is upon us.

Single-Member Districts as a Norm

As a result of its consideration of the consequences of using different types of districting, our Committee believes that a single-member districting system generally is the best and most effective form of district representation.

Single-member districts allow voters in a district to choose one representative, *i.e.*, one legislator or one county commissioner. Multi-member districting permits a citizen to select more than one representative. The geographical area and population of multi-member districts are usually much larger than those of a single-member district. Some states and localities use a combination of single and multi-member districts, including at-large elections, where all voters in a political subdivision vote for several representatives. The impact of districting is fundamentally the same no matter what type of governmental entity (city, county, state) is involved.

In favoring the use of single-member districts, we note that such a districting system has worked well for congressional elections. Authorities who have studied the subject point to a number of advantages to the single-member districting system:* a single-member district is smaller than an at-large or multi-member district, which permits closer contact between the single representative and his or her constituency. The smaller district also provides greater accountability to the electorate, who will be better informed of the activities and voting record of the sole representative. In addition, political and racial minority groups who at times have had their voting power and strength diluted by larger multi-member districts will have greater impact on the elections and a better opportunity for election to office from within the district. Finally, election campaigns would also be affected by the choice of single-member districting. It is likely that campaign costs would be decreased as a result of reducing the size of the area and population of a district and limiting the election to one representative. The nature of campaigning might also change, by reducing the impact and necessity of extensive media advertising. More effort could then be expended on neighborhood and local campaigning, which should allow the electorate to become better acquainted with the candidates. Significantly, by reducing the cost of campaigns, it is likely that more individuals would be able to run for office, thereby making the process more competitive.

While single-member districting is by no means the panacea to representation problems, we believe it would go a long way toward ensuring more effective representation and a greater opportunity to participate in government and the electoral process

The foregoing discussion outlines the intricate nature of the redistricting question. In view of the complex issues which require resolution before "fair districting without regard to partisan advantage" can take place, our Committee urges that legislators, lawyers and all reapportionment experts take up the question at this time.

*The San Diego conference volume will contain an extensive section on this subject.

Respectfully submitted,

John D. Feerick, Chairman

August 1980

APPENDIX D

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ALASKA LEGISLATIVE COUNCIL

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE APPORTIONMENT

IN ALASKA

Historical and Future Considerations

NOVEMBER 1966

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Fifth State Legislature

November 1966

Alaska Legislative Council
Legislative Affairs Agency

Pouch Y, State Capitol
Juneau, Alaska

FOREWORD

Senate Concurrent Resolution No. 39 was passed by the last legislature because the Superior Court, on April 11, 1966, in Nolan et al v. Wade,/1 directed that a constitutional convention be held or constitutional amendments be proposed by the legislature and ratified by the people before December 1, 1967, the amendment to provide for a valid reapportionment of the state Senate in conformity with the rulings of the U.S. Supreme Court. The resolution directed the Legislative Council to gather "information on all facets of the matter of legislative reapportionment to the end that the 1967 session of the legislature may have all the necessary data and alternatives on hand for consideration when preparing amendments to the state constitution regarding legislative apportionment" in conformity with the opinion in Nolan et al v. Wade.

Nolan et al v. Wade was appealed to the state Supreme Court and, as will be discussed in detail in this study, the Supreme Court almost entirely overturned the decision of the Superior Court. The Supreme Court declared the Governor's Proclamation of Reapportionment and Redistricting valid and the 1966 elections have been held under that proclamation. Therefore, the stated purpose for SCR 39 no longer exists since there is no need for a constitutional amendment by December 1, 1967. As a consequence, it was questionable whether the staff should proceed with this study. It was concluded that reapportionment will continue to be of interest to the legislature since the constitution will eventually have to be amended to conform to the federal and state decisions even though it need not be done in 1967.

This study will cover the history of legislative apportionment in Alaska from the Organic Act of 1912 through the November 1966 elections, the federal and state cases on reapportionment, and possibilities for future action on this subject.

John C. Doyle
Executive Director

Juneau, Alaska
November 1967

/1 Memorandum Opinion, Civil Action No. 66-30 Superior Court for the State of Alaska, First Judicial District

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I. HISTORY OF LEGISLATIVE APPORTIONMENT IN ALASKA/1

The Territory of Alaska was first given legislative authority of its own in 1912 in the Organic Act of 1912 (37 Stat. 513). This Act provided for a bicameral legislature consisting of a House of Representatives of sixteen members and a Senate of eight members. For thirty-two years two senators and four representatives were elected at-large from the four judicial divisions into which the territory was divided, and the remaining seats were divided equally among the four divisions. By a 1942 amendment to the Organic Act (56 Stat. 1016), effective for the election of 1944, the Senate was increased to a membership of sixteen and the house to a membership of 24, the latter apportioned on the basis of estimated civilian population. The 1942 Act also provided for reapportionment of seats by the United States Director of the Census after the 1950 decennial census, and the territorial legislature was authorized to provide for legislative districting within the judicial divisions.

In 1951 the director of the census reapportioned the House seats on the basis of the civilian population reported in the 1950 census, with the following results:

Judicial Division	Apportionment 1944 - 1951	Apportionment 1952 - 1958
First	8	6
Second	4	3
Third	7	10
Fourth	5	5
	24	24

The apportionment and districting for the election of fifty-five delegates to the constitutional convention of 1955-1956 anticipated the provisions of the Alaska constitution on that point. The twenty-two election districts were of three types:

(1) The seventeen one-member districts were based on existing districts or combinations of those districts.

(2) Each of the four judicial divisions constituted a multimember district, as follows: First Division 7; Second Division 4; Third Division 12; and Fourth Division 8.

/1 "Reapportionment" by Robert B. McKay, 1965

(3) The territory as a whole constituted one district from which seven delegates-at-large were elected.

Alaska was admitted to statehood by proclamation dated January 3, 1959, on the basis of the constitution drafted in the 1955 constitutional convention. Under the constitution the Alaska legislature was divided into a House of Representatives of forty members and a senate of twenty. /2 Reapportionment is an executive function to be performed by the governor immediately following each United States decennial census. /3 The governor can appoint a reapportionment board of five members to act in an advisory capacity, which must include one member from each of the four senate districts. /4 The board must submit a report to the governor within ninety days following the official reporting of each census, and the governor must, by proclamation, reapportion or redistrict within ninety days thereafter. /5 Any qualified voter may apply to the Superior Court to compel the governor "by mandamus or otherwise" to perform his reapportionment duties. /6

Under the constitution, apportionment of the House is primarily by population. "Reapportionment shall be by the method of equal proportions." /7 Originally the state was divided into twenty-four election districts. /8 Then the total civilian population was divided by forty and "each election district having the major fraction of the quotient obtained" was allotted one representative. /9 If "the total civilian population of any election district falls below one-half of the quotient," provision is made for attaching the district to another election district "within its senate district, and the reapportionment for the new district shall be determined as provided in Section 4 of this article." /10 After publication of the 1960 census results, the governor accepted the recommendations of his advisory board on apportionment and reduced the number of districts to nineteen, thereby meeting more nearly the population standard fixed in Article VI, Section 4.

Apportionment of the Senate is a combination of area and population, with the emphasis on area. The state was

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/2 Alaska Constitution, Art. II, Sec. 1
/3 Ibid., Art. VI, Sec. 3
/4 Ibid., Art. VI, Sec. 8
/5 Ibid., Art. VI, Sec. 10
/6 Ibid., Art. VI, Sec. 11
/7 Ibid., Art. VI, Sec. 4
/8 Ibid., Art. XIV, Sec. 1
/9 Ibid., Art. VI, Sec. 4
/10 Ibid., Art. VI, Sec. 5

originally divided into sixteen senate districts, /11 which were continued in the 1961 reapportionment.

The governor is allowed to change the size and area of election districts, but each district must "be formed of contiguous and compact territory containing as nearly as practical a relatively integrated socio-economic area. Each shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible." /12 Senate districts may be modified to reflect changes in election districts. /13

The report of the commitee on suffrage, elections, and apportionment to the Alaska Constitutional Convention stated in a letter of December 17, 1955, to the president of the convention that "These (election) districts are economic units of the Territory and may be compared in a sense to Swiss cantons. Their boundaries are watersheds wherever possible; waterways and steamship routes are not used as boundaries, but are considered as highways piercing valleys."

In view of the 1964 U.S. Supreme Court decisions discussed later in this study, it was obvious that Alaska must reapportion its state Senate. There was a population disparity of nineteen to one in the Senate and 2.5 to one in the House. In August 1964 the state attorney general advised the governor that he had authority to reapportion the state Senate. The governor then called the Advisory Reapportionment Board into session. That board submitted its report to the governor in September 1964. In March 1965 the governor reconvened the board for additional study and it submitted its second report to the governor on June 4, 1965. /14 On September 3, 1965, the governor issued a "Proclamation of Reapportionment and Redistricting" /15 which reapportioned the state Senate, to be effective for the 1966 election. The new reapportionment plan was designed to satisfy the equal-population principle. Each of the eleven senate districts (composed of one to two election districts) was given one senator except Anchorage (seven)and Fairbanks (four). No change was made in the house districts as promulgated in 1961. On February 21, 1966, fifteen state senators applied to the

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/11 Ibid., Art. XIV, Sec. 2
/12 Ibid., Art. VI, Sec. 6
/13 Ibid., Art. VI, Sec. 7
/14 Appendix "A"
/15 Appendix "B"

Superior Court for the First Judicial District in Juneau for a permanent injunction to prohibit the secretary of state from conducting an election under the governor's proclamation. Both sides eventually moved for a summary judgment and they agreed that Section 2, Article XIV of the Alaska Constitution was invalid under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The basic issue was the validity of the governor's Proclamation of Reapportionment and Redistricting.

On April 18, 1966, the Superior Court declared the governor's proclamation null and void. The court retained jurisdiction, providing that if a valid constitutional amendment modifying the state Senate apportionment was not adopted by December 1, 1967, the court would issue the necessary orders to insure that the 1968 election would be held under an apportionment plan consistent with the decisions of the U.S. Supreme Court.

The case was appealed to the Alaska Supreme Court which held that the governor and the reapportionment board had implied power under the constitution to reapportion the Senate on an interim basis. The validity of the reapportionment plan set out in the proclamation was not questioned with respect to the requirements of the equal protection clause of the Fourteenth Amendment so the court did not discuss that matter. The court delcared the governor's reapportionment plan effective for the 1966 elections and "thereafter until the Alaska Constitution has been amended to provide a valid, permanent reapportionment plan for the Senate."

The 1966 elections have been held under the governor's proclamation as decreed by the state Supreme Court. The legislature may now wish to prepare consitutional amendments relating to reapportionment of the legislature or have a constitutional convention consider this problem. Scheduling factors in proposing and adopting constitutional changes are discussed in part VI of this study.

II. IMPORTANT APPORTIONMENT CASES IN THE U. S. SUPREME COURT

BAKER v. CARR, 369 U.S. 186 (1962)

> "This civil action was brought under 42 U.S.C. secs. 1983 and 1988 to redress the alleged deprivation of federal constitutional rights. The complaint, alleging that by means of a 1901 statute of Tennessee apportioning the members of the General Assembly among the State's 95 counties, 'these plaintiffs and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes' was dismissed by a three-judge court convened under 28 U.S.C. sec. 2281 in the Middle District of Tennessee. The court held it lacked jurisdiction of the subject matter and also that no claim was stated upon which relief could be granted. 179 F.Supp. 824. We noted probable jurisdiction of the appeal. 364 U.S. 898. We hold that the dismissal was error, and remand the cause to the District Court for trial and further proceedings consistent with this opinion." 369 U.S. at 187.

The court held only "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this court, that the appellants have standing to challenge the Tennessee apportionment statutes."

The court goes on to discuss at considerable length the factors which went into the determination of these three matters. In discussing the "justiciability" of the question presented, the court said:

> "We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable 'political question.' The cited cases do not hold the contrary."

WESBERRY v. SANDERS, 376 U.S. 1 (1964)

This case, while dealing with state establishment of districts for the election of representatives to the federal Congress, contains a worthwhile discussion of the history of the Great Compromise, by which agreement was reached on having the population represented in one house and the states represented in the other. This matter is important because of the argument which the Supreme Court subsequently makes that the "Federal analogy" is false as applied to state legislatures.

REYNOLDS v. SIMS, 377 U.S. 533 (1964)

> "On August 26, 1961, the original plaintiffs...filed a complaint in their own behalf and on behalf of all similarly situated Alabama voters, challenging the apportionment of the Alabama legislature.... The complaint alleged a deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment, and asserted that the District Court had jurisdiction under provisions of the Civil Rights Act, 42 U.S.C. secs. 1983, 1988, as well as under 28 U.S.C. sec. 1343(3)." 32 LW at 4535.
>
> "Plaintiffs below alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied 'equal suffrage in free and equal elections...and the equal protection of the laws' in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution." 32 LW at 4536.

They showed that the history of the situation clearly demonstrated that there was no relief available to them except through the District Court. Plaintiffs sought a declaration of the unconstitutionality of the existing apportionment, an injunction against the holding of further elections without reapportionment, and a mandatory injunction requiring that the 1962 elections be held at large.

The District Court initially declined to stay the impending primary election in Alabama, and refrained from acting until the Alabama legislature has been given an opportunity to remedy the admitted discrepancies in the state's legislative apportionment scheme. After the Alabama legislature had failed to act effectively, the court ordered into effect a reapportionment using the best parts of two proposed plans. The District Court recognized that its own plan was only provisional, and would not be acceptable as a permanent apportionment. The District Court then retained jurisdiction while deferring a hearing in the issuance of a final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively.

Upon review, the Supreme Court approved the actions of the District Court, holding that:

> "...as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

It also found that the "federal analogy" [see Wesberry v. Sanders, supra] was inapplicable, since there has never been a question of subordinate units of state government surrendering, as did the original 13 States, a portion of their sovereignty in order "to form a more perfect Union."

The court qualified its remarks by stating that "mathematical exactness" was not required, but that a state would have to make "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." The court also felt that a reasonable plan for periodic reapportionment is acceptable, and specifically approved the decennial reapportionment prescribed in forty-one states.

Finally, the court remarked:

> "...legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."

WMCA, INC. v. LOMENZO, 377 U.S. 633 (1964)

This action was similar in nature to that in Reynolds v. Sims, supra, and challenged the constitutional validity under the Fourteenth Amendment to the federal constitution of the apportionment of seats in the New York legislature. The District Court had initially found "want of justiciability," and dismissed the complaint. Baker v. Carr, supra, having been decided during the pendency of appeal from dismissal, the Supreme Court remanded the case for reconsideration by the District Court in the light of that opinion. The District Court subsequently dismissed the complaint on the merits, finding that the plaintiffs had not shown any invidious discrimination, that the New York Constitution's apportionment provisions were rational, that they were of historical origin and contained no improper geographical discrimination, and that the provisions could be amended by an electoral majority of the citizens of New York.

The Supreme Court, after a detailed examination of the New York scheme of apportionment, found that there was in fact an invidious discrimination against the voters in the more populous districts, as to both houses, and that there was no political remedy and remanded the case to the District Court to determine what relief was available, and when it should be made available to the plaintiffs. /16

LUCAS v. FORTY-FOURTH GENERAL ASSEMBLY OF COLORADO, 377 U.S. 713 (1964)

This case arose on appeal from a District Court decision upholding the validity of the apportionment of seats in the Colorado legislature pursuant to a constitutional amendment approved by the Colorado electorate in 1962.

The Supreme Court noted several features which rendered this case different from the other cases decided on the same date. First, at least one house of the Colorado legislature is at least arguably apportioned according to a population basis. Second, the scheme of apportionment question in the case is one which was adopted by a majority vote of the Colorado electorate at a recent date. Third, in Colorado there is an initiative to propose a constitutional amendment, which requires a percentage of the electorate to sign a petition without regard for the geographical distribution of the petitioners.

/16 For current status of legislative reapportionment in any state, see Appendix "C".

The court found the second and third features unpersuasive as arguments for the constitutionality of the scheme. It said:

> "Except as an interim remedial procedure justifying a court in staying its hand temporarily, we find no significance in the fact that a nonjudicial, political remedy may be available for the effectuation of asserted rights to equal representation in a state legislature. Courts sit to adjudicate controversies involving alleged denials of constitutional rights. 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 vote cannot be denied even by a vote of a majority of State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause."

The case was remanded to the District Court to determine whether the imminence of the 1964 primary and general elections required the use of one of the schemes attacked, or whether appellants' rights to cast adequately weighted votes could be effectuated in 1964. /17

MARYLAND COMMITTEE FOR FAIR REPRESENTATION v. TAWES, 377 U.S. 656 (1964)

This case arose under circumstances similar to Reynolds, supra. It adds to case law insofar as it describes the principle that the Supreme Court must of necessity consider the entire apportionment scheme of a legislature, and cannot be restricted, regardless of s ope of consideration in inferior courts, to examining the apportionment in one house only. The Supreme Court further makes it clear that while it highly approves of state court attempts to deal with apportionment problems, these courts must apply federal constitutional standards.

/17 For current status of legislative reapportionment in any state, see Appendix "C".

The court remanded the case to the Maryland Court of Appeals with instructions to ensure that election of members to the Maryland legislature in 1966 was conducted in accordance with a constitutional apportionment scheme, noting that there appeared to be adequate time for the legislature to reapportion itself. /18

DAVIS v. MANN, 377 U.S. 678 (1964)

This case arose in much the same way as Reynolds, supra. The District Court found for the plaintiffs, and declared that the challenged 1962 apportionment scheme violated the Equal Protection Clause and accordingly was void and of no effect. Defendants were enjoined from proceeding under the 1962 plan, but operation of the injunction was stayed until the general assembly could act or appeal could be taken to the Supreme Court. After a characteristic examination of the facts surrounding the particular plan of apportionment, the court found that it was violative of the federal constitution and that no adequate political remedy for the malapportionment existed. While noting that the situation in Virginia is different from that in Alabama, since the Virginia legislature has consistently reapportioned itself every ten years as required by the Virginia constitution, the court found that significant uncorrected malapportionment existed, and affirmed the decision of the District Court with the understanding that the District Court would provide plaintiffs with suitable equitable relief should the Virginia legislature itself fail to act to correct the constitutional defects before the 1965 elections. /18

ROMAN v. SINCOCK, 377 U.S. 695 (1964)

Again similar in nature to the suit in Reynolds, supra. Plaintiffs here asked the District Court for relief from malapportionment in the Delaware legislature. Relief sought included a declaration that the apportionment section of the Delaware constitution was unconstitutional, an injunction to prevent further elections from being held under it, and, alternatively, a reapportionment by the court or a direction that the November 1962 elections be held on an at-large basis.

The District Court refused to interfere with the November 1962 elections, and the legislature elected approved, in January 1963, a constitutional amendment to the legislative

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/18 For current status of legislative reapportionment in any state, see Appendix "C".